CORPORATE GOVERNANCE AND NOMINEE DIRECTORS – WHAT DOES IT MEAN?

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ABSTRACT

It is a trite law that Directors are under the fiduciary duties and to act in the best interest of the company. This fundamental principle has been embedded in s.132(1E) Malaysian Companies Act 1965 (CA 1965) which codifies the responsibility of a nominee Director. The nominee directorship status poses difficulty due to dual loyalty owed by the nominee Director to the company and nominator. This raises a dilemma to nominee Directors in discharging fiduciary duties. Nominee Directors are common in the Malaysian corporate landscape. Section 132(1E) statutorily stipulate that a Director who was appointed by virtue of his position as an employee of a company and a Director who was appointed by or as a representative of a shareholder, employer or debenture holder. Nominee Directors must act in the best interest of the company. Section 132(1E) states that the nominee Director 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, the nominee Director shall not subordinate his duty to act in the best interest of the company to his duty to his nominator. In resolving the conflict of interests and duties on nominee Directors Malaysian courts may adopt the UK strict approach. Commencing 2011 UK gradually adopted the attenuated duty approach. Malaysia with her concentrated ownership economy would adopt the attenuated duty approach. This is to ensure Malaysian corporate economy is dynamic and competitive, the approach on nominee directorships must be well established.

Keywords: *corporate governance, shareholders, nominee directors and directors' duties.*

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INTRODUCTION

The Malaysian Companies (Amendment) Act 2007 ("Amendment Act 2007") has made many substantial changes to the Companies Act 1965.[1] One of the amendments were on the duties of Directors. By virtue of s.132(1E) Amendment Act 2007 codifies the responsibility of a nominee Director. Section 132(1E) statutorily stipulate that a Director who was appointed by virtue of his position as an employee of a company and a director who was appointed by or as a representative of a shareholder, employer or debenture holder. Nominee directors must act in the best interest of the company. This provision further states that the nominee Director 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, the nominee Director shall not subordinate his duty to act in the best interest of the company to his duty to his nominator.[2]

It is a trite law that Directors are under the fiduciary duties and to act in the best interest of the company. This fundamental principle was embedded in s.132(1E) Companies Act 1965 (CA 1965). The nominee directorship status poses the difficulty to the nominee Director because of the dual loyalty owed by the nominee Director to the company and to his nominator. This raises dilemma to nominee Directors in discharging the fiduciary duties because nominee Directors are widely used in Malaysian corporate landscape.

WHO IS A NOMINEE DIRECTOR?

In practice, it is common for shareholders class, debenture holders or a major creditor to have authority in the company by way of either an express provision in the company's Articles or in a supplementary agreement such as a shareholders' agreement, to appoint or remove a Director. In a corporate group structure, it is common for the parent company to appoint nominee Directors for its subsidiary companies. Appointment of nominee Directors is also common in joint venture companies.

1 Samsar Kamar bin Abd Latif, (2008), The Recent Development In Company Law: The Company (Amendment) Act 2007Sweet & Maxwell Asia,p.1

2 Section 132(1E) Companies Act 1965

In the Malaysian corporate set-up, it is not uncommon for family-based enterprises and government corporatised bodies to have a legitimate interest in maintaining nominee Directors to oversee their interests. This expectation is legitimate and has commercial justification.[3] To reiterate the keynote address by the former Second Finance Minister and Entrepreneur Development Minister[4] at the Corporate Governance Conference for nominee Directors of Permodalan Nasional Berhad (PNB), "as a trusted premier investment organisation with the commitment to deliver outstanding long term performance and achievement, PNB[5] relies on its existing investments in the various investee companies which represent a cross section of the Malaysian economy to achieve this target. As such, I fully understand the purpose and objective of PNB in appointing its nominees to the Board of Directors and its investee companies. This is necessary given that PNB as a shareholder needs to undertake close and continuous monitoring of its investments. As such, the nominee Directors of PNB play a vital role. Since PNB has more than 300 companies in its stable and has appointed more than 170 nominee Directors to these companies, the implementation of good corporate governance practices at PNB level augurs well for the country. All nominee Directors of PNB should set an example in the eyes of the corporate world and the public to support Government efforts in enhancing principles of good corporate governance. I envisage that as a nominee Director of PNB, you would uphold the responsibilities and accountability expected of you as the representative of PNB on the Board of the investee companies. Undoubtedly, you are among the few who have been carefully selected and nominated by PNB to the Board of these companies with the paramount objective to protect the best interests of PNB, as a shareholder in the company and the unit holders at large. I understand that the nominee Directors of PNB are a pool of professionals for example engineers, architects, lawyers and entrepreneurs. Whilst your professional background is an added value in assisting you in your duties, good business ethics, sound knowledge in the field of management and proper business conduct are essential ingredients to ensure that the company is properly managed and is on the right path. The role you assume as the provider of

3 PhilipTN Koh, (2007), Reform Realism And The Board, Global Corporate Governance Forum, Issue 6, p.12

4 (1999) Keynote Address of YB. Dato' Mustapa Bin Mohamed Second Finance Minister and Entrepreneur Development Minister at the Corporate Governance Conference for Nominee Directors of PNB, August 20.

5 In March 1978, the National Equity Corporation (NEC) or Permodalan Nasional Berhad (PNB) was conceived as a pivotal instrument of the Government's New Economic Policy to promote share ownership in the corporate section among the Bumiputera and develop opportunities for suitable Bumiputera professionals to participate in the creation and management of wealth.

'the check and balance' in the investee company underscores the need for you to be well versed on what constitutes proper corporate governance".

Tricker[6] describes the nominee Director as a Director who has been nominated to the Board by a major shareholder or other contractual stakeholders, such as a significant lender, to represent their interests.

TYPES OF NOMINEE DIRECTORS

Nominee Directors can be categorized based on the way we view; (i) their involvement in the company to which Board they are nominated, or (ii) the level to which they are perceived as "representing" the nominator's interest.

In the first instance, (i) we categorise them based on their positions on the Board of the company to which they are nominated. In this sense, the nominee Director is either an executive or non-executive Director.

Acting as the executive nominee Director, he runs the business of the investee company. This may occur when the nominator takes over the investee company as it is often that officers of the nominator are seconded to take over the management of the investee company. In this sense, Auyeung[7] is of the view that the legal principles in place for nominee Directors largely mirror those governing Directors. Nominee Director who does not participate in the day-to-day running of the company as one who is regarded as non-executive, but not independent.[8]

In the second instance, (ii) the nominee Director is viewed from the perspective of how he is to represent the nominator. Lishman[9] stated that nominees are seen by the other Directors as representing their nominator and will be expected by the nominator or to report on the nominator's investment in the company.

6 B.Tricker, (2009), Corporate Governance – Principles, Policies, and Practices, Oxford University Press, p.53
7 S.Auyeung, (2004), One-Day Symposium on Accountability, Governance and Performance in Transition, Australia, p. 46, unpublished.
8 K.Anandarah. (2004), Basic Essentials of Corporate Governance, LexisNexis Singapore, p.44
9 M.Lishman, 2010, Nominee Directors: The need for board protocols, 28 Company and Securities Law Journal, p.130

Nominee Directors may be Found in the Following Business Structures

In some instances, a nominee Director may also hold another directorship such as an interlocking Director. An interlocking directorship exists where the same person is Director of two or more different companies. For example, A is Director of both X company and Y company. However, not all interlocking directorships will give rise to the nominee Director status, as a nominee Director status requires X company, for example, to appoint A to the Board of Y Company, or vice versa. In such a case, there would be an arrangement or understanding between X Company and Y Company for the appointment of the nominee Director.

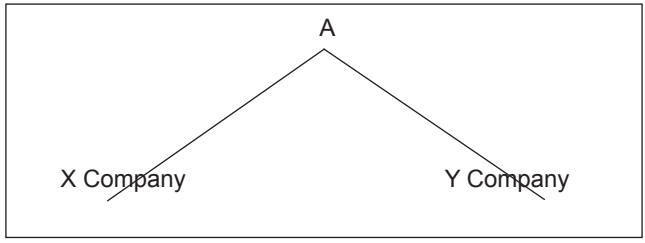

Figure 1: An Interlocking Directorship
(Source: An Interlocking directorship.[10])

Nominee Directors in Listed Public Companies, Listed Subsidiary and Associate

Companies

The nominator will often be a significant shareholder of the listed public companies or the listed companies are subsidiaries. The right of appointment may arise from mere agreement of the Board in recognition of that shareholding or it may be contractually based. In exceptional circumstances, it may be provided for in the articles of association of the company. The nominee Director will usually be a representative nominee Director although any additional nominee Director may well be an independent nominee Director to satisfy sensitivities. In the words, of one commentator[11] as a matter of commercial reality, Directors are appointed to the Board to represent a particular shareholder. For listed companies,

10 J Farrar, Corporate Governance In Australia and New Zealand, Oxford University Press, 2001, p.115

11 M.Lishman, (2010), Nominee Directors: The need for board protocols, 28 Companies and Securities Law Journal, p.130

this often occurs where the listed company is either a subsidiary or has a significant shareholder who seeks representatives on the company's Board and Directors are appointed to the Board to represent a particular shareholder.

Wholly Owned Subsidiaries and Partly Owned Subsidiaries

The Boards of such companies will mostly comprise of representative Directors but not in its entirety. Non-executive independent nominee Directors are often appointed to wholly own subsidiary Boards to provide an external perspective to the business of the company. In these companies, there will usually be representative nominee Directors, independent nominee Directors, Directors who are senior managers of the company and independent Directors representing the minorities.

Joint Venture Companies

A joint venture company is essentially the adoption of the corporate form, rather than an incorporated joint venture, a trust or partnership for the pursuit by a small number of parties (usually 2 or 3) of a common business enterprise. The company will normally be constrained by its Memorandum and Articles or shareholders' agreement to a single enterprise or purpose.

Appointment of Directors by each participating party will normally be the means by which party protects its own interests. As such, such appointees are representative Directors who act as spokespersons for and carry out their duties, solely in the interests of the nominator. The articles may expressly empower the participating parties to remove and replace their appointees on the Board.

Venture Capital Investments

In the venture capital process, the venture capitalists will often "wear two hats" – one as a Director, the other as a shareholder, and will owe fiduciary duties in both capacities. The venture capitalist may have interests of the venture capital fund represented through the appointment of a Director. In a small company, it is not unusual for the majority shareholder to have the power to appoint Directors.[12] However, in the venture capital setting, it is considered the norm. The terms of appointment for a Director may be set out in the shareholders' agreement[13] or may be conferred by the constitution, which may make provisions for outsiders to appoint Directors.[14]

12 Santos Ltd v Pettingell (19790N4) ACLR 110

13 Ford HAJ, Austin RP and Ramsay IM, Ford's Principles of Corporation Law (12th ed, 2005) p.6.330

14 Woodlands Ltd v Logan [1948] NZLR 230

The appointment of a nominee Director raises an inherent possibility of conflict with the recognized fiduciary and statutory duty of Directors to act in good faith in the interests of the company as a whole.[15] Conflict arises because the nominee Director will owe simultaneous duties to the portfolio firm and venture capitalist.

Government-Linked Companies (GLCs)

The nominee Directors of GLCs are often appointed to the Board of Directors of a company as the representative Director of the Government. The articles of association of the company may accord the right to the Government to appoint its representative. This is to protect public investment in the entity or to ensure adherence to some public policy which the entity is capable of affecting. The Malaysian Green Book, Setting the Guidelines for GLC Boards[16] provides that "there must be a balance in the Board between Independent Directors, representation from management and representation from major shareholders. However, significant shareholders should also be adequately represented – usually in proportion to the size of their investment – via nominee Directors."

In government-linked companies, for example, Malaysian Government-Linked Companies (GLC), the Government representative by way of her representative, that is the nominee Director, will hold the shareholdings termed as the 'Special Share'. As in the example of the Memorandum and Articles of Association of a local company, Malaysian Airline System Berhad, states that:

> *Article 5 (1) The Special Share may be held only by or transferred only to the Minister of Finance (Incorporated) or its successors or any Minister, representative or any person acting on behalf of the Government of Malaysia.*
>
> *Article 5(2) Subject to Article 2(2) of these Articles, the Special Shareholder shall have the right from time to time to appoint or nominate in accordance with Article 119 of these Articles, three (3) Government appointed Directors and to appoint one of them to be the Chairman in accordance with Article 144.*

15 Australian Corporations Act 2001 (Cth), s 181

16 Putrajaya Committee on Government Linked Companies High Performance, Enhancing Board Effectiveness, April 2006, p. 8

Article 119(1) The Special Shareholder shall have the right from time to time:

(a) To appoint any person; or
(b) To nominate any existing Director (with the consent of the Director concerned) to be a Government appointed Director so that there shall not be more than three (3) Government appointed Directors at any time comprising:
(i) The Chairman; and
(ii) Two representatives of the Government;

Other examples of Malaysian GLCs such as the telecommunications company, Telekom Malaysia Berhad (TMB), vide the provision of Article 2 of the company's Article of Association stipulates that the designation 'Special Shareholder' denotes the Minister of Finance, a body corporate established under the Minister of Finance (Incorporation) Act, 1957, its successor or any Minister, representative or any other person acting on behalf of the Government of Malaysia in the holding of the Special Share. The 'Special Shares' denote the one Special Rights Redeemable Preference Share of RM1.00 only.

By virtue of the following Articles 4,[17] 5,[18] 8(1) through (5),[19] 109[20] the Government representative or the nominee director of this company indicates that his powers are extensive. It is submitted that these powers are

17 TMB's Articles of Association, Article 4: Subject to Article 5 below, no person other than an Entitled Person shall be qualified to hold office as a Director, chief executive officer of the Company (by whatever name called), Secretary or Auditor of the Company.

18 Article 5: No person not being an Entitled Person may be appointed to hold office as a Director of the company without the prior written consent of the Special Shareholder.

19 Article 8 (1) The Special Share may only be held by or transferred to the Special Shareholder.
(2) The Special Shareholder shall have the right from time to time to appoint any Entitled Persons to be Directors, (hereinafter referred to as "Appointed Directors") so that there shall not be less than 2 nor more than 6 Appointed Directors at any time.
(3) Except as expressly provided for in these Articles, the Special Share does not confer any other rights to the Special Shareholder.
(4) The Special Shareholder shall be entitled to received notice of and to attend and speak at all general meetings or any other meeting of any class of shareholders of the Company, but the Special Share shall carry no right to vote nor any other rights at any such meeting.
(5) The Special Shareholder may, subject to the Act require the Company to redeem the Special Share at par at any time by serving written notice upon the Company and delivering the relevant share certificate. In a distribution of capital in a winding up of the Company, the Special Shareholder shall be entitled to repayment of capital to any other member. The Special Share shall confer no other right to participate in the capital or profits of the Company.

20 Article 109: The Special Shareholder may from time to time, appoint one or more Directors to be executive director(s) of the Company, for such period and upon such terms as he may think fit but if the appointment is for a fixed term the term shall not exceed 5 years and may from time to time (subject to the provision) remove or dismiss him or them from office and appoint another or others in his or their place or places. The executive director(s) may be conferred such other designation(s) as may be determined by the Special Shareholder.

conferred on to the nominee Directors as the controlling shareholder. Koh[21] submitted that, "in Malaysia, institutions such as Permodalan Nasional Bhd, Khazanah Nasional Bhd and the Employees Provident Fund have many such appointees who act as nominee Directors on Boards of corporations in which they hold substantial interests".

THE POSITION OF NOMINEE DIRECTORS IN MALAYSIA

The Malaysian Companies Act (CA), 1965, does not contain an explicit definition of the nominee Director. However, s.4(1) CA ,1965, provides a broad definition of Directors as including any person occupying the position of Director of a corporation by whatever name called. This includes a person in accordance with whose directions or instructions, the Director of a corporation are accustomed to act and an alternate or substitute Director.

There are nonetheless several provisions that refer to the concept of the nominee Director. The position of the nominee Director is implicitly recognized in s.128(1) CA 1965, where it is stated that a public company may, by ordinary resolution, remove a Director before the expiration of his period of office, not withstanding anything in its memorandum or articles or in any agreement between it and him. However, where any Director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders, the resolution to remove him shall not take effect until his successor has been appointed.

Effective 15 August, 2007, the Companies Act (Amendment) 2007, came into force and introduced the statutory provision on the duties and liabilities of company Directors. Inter alia, by virtue of s.132 (IE), provides the responsibilities of a nominee Director[22]:

> *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 shareholder, 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 duty to his nominator.*

21 Koh, P. 2008, Nominee Directors have to tread carefully, The Edge, p.1.
22 Companies Act (Amendment) 2007

This shows that despite the 'special' status of nominee Directors, s.132(1E) still treats the nominee Director's liability similar to that of other Directors.

At common law nominee Directors owe the same fiduciary duties to the company as any other Directors. It is an elementary principle of company law that the position of a company Director is fiduciary in character. The consequence the fiduciary relationship, Directors owe a duty to act in good faith for the benefit of the company. To illustrate the fiduciary duties of nominee Directors as in Re Syed Ahmad Alsagoff,[23] the court decided that a nominee Director has a fiduciary duty to his principal and as a "trustee" for his principal. He represents his principal's interests, but is not an agent for whom the principal is vicariously liable.[24]

The case of Industrial Concrete Products Bhd v Concrete Engineering Products Bhd[25] confirms the common law position of nominee Directors. Nominee Directors like any other Directors must act in the best interests and shall not subordinate his duty to act in the best interest of the company to his duty to his nominator.

United Kingdom

Similarly, in the UK, the courts did not draw any distinctions between a nominee Director and other Directors of a company. A nominee Director owes the same duties to the company and in particular, must act at all times bona fide in the interests of the company.[26] This can be seen in the following statements:

> *"Or take a nominee Director that is a Director of a company who is nominated by a large shareholder to represent his interests. There is nothing wrong in it. It is done every day. Nothing wrong, that is so long as the Director is free to exercise his best judgment in the interests of the company which he serves. But if he is put upon terms that he is bound to act in the affairs of the company in*

23 [1960] MLJ 147

24 Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] 3 NZLR 513

25 [2001] 2 MLJ 332; see also the case of Euco International Sdn Bhd v PF Chen [1984] 2 MLJ 61, the principal is liable to indemnify the nominee against liabilities entered into as nominee. This will be so if there is a resolution to that effect. In this case, the court held that a board resolution to indemnify guarantors of a subsidiary's debts was effective.

26 N.Sinclair, D.Vogel & R.Snowden, (2000), Company Directors: Law and Liability, Sweet & Maxwell, p.1/37:1.31

accordance with the directions of his patron, it is beyond doubt, unlawful. (Lord Denning in Boulting v ACTAT, [1963], 2 QB 606)."

Not only is the concept of a nominee Director permitted, UK cases also permit shareholders to enter into arrangements which safeguard the appointment of a particular nominee. In Bushell v Faith[27], a shareholder was able to retain the appointment of his particular Director by enforcing a regulation in the articles of the company which gave him weighted votes.

The United Kingdom Companies Act (CA) 2006, received Royal Assent on 8 November, 2006. Out of the 1,300 sections, in relation to directors' duties, the new Act codified the general fiduciary duties of Directors.[28] The general fiduciary duties are contained in ss.171 through 177. Ahern[29] considers the loyalty-based duty on Directors to act to promote the success of the company pursuant to s.172[30] CA 2006, can legitimately accommodate the divided loyalties of nominee Directors. Further, she states that having regard to the divided loyalty which being a nominee Director inexorably entails, given the Director's reliance on his nominator for his tenure, the duty which is of immediate relevance to the nominee Director is the duty to avoid external conflicts of interests as in s.175[31] CA 2006, is

27 [1970] AC 109

28 Rt.Hon Lady Justice Arden DBE, (2007) Companies Act 2006(UK): A new approach to directors' duties, 81 Australian Law Journal, p.162

29 D.Ahern, (2011), Nominee Directors' duty to promote the success of the company: Commercial pragmatism and legal orthodoxy, Law Quarterly Review, p.121

30 S.172 CA 2006, Duty to promote the success of the company

31 Section 175 CA 2006 – Duty to avoid conflicts of interests

(1) A director of a company must avoid a situation in which he has or can have a director or indirect interest that conflicts or possibly may conflict with the interests fo the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(3) This duty does not apply to a conflict of interests arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed –
If the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
If the matter has been authorized by the directors.

(5) Authorisation may be given by the directors –
(a) Where the company is a private company and nothing in the company's constitution invalidates such authorization, by the matter being proposed to and authorized by the directors; or
(b) Where the company is a public company and its constitution includes provision enabling the directors to authorize the matter, by the matter being proposed to and authorized by them in accordance with the constitution.

(6) The authorization is effectively only if-
(a) Any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
(b) The matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

expressed to cover both conflicts of interest and duty and conflicts of duties. As articulated by Lord Herschell in Bray v Ford[32],

> *"It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided ... allowed to put himself in a position where his interests and duty conflicts."*

Keay[33] is of the view that under the new legislation, s.173[34] CA 2006, a nominee Director might be in a more difficult position unless the constitution acknowledges the nominee's situation and that he is to act for the nominator. Certainly the most optimum situation for a nominee is to ensure that the company's constitution permits him to consider the interests of his nominator. This would seem, under s.173 CA 2006, to be permitted and thus, making life easier for a nominee. However, the Director must remember that a statutory duty is owed to promote the company success and consequently, there might be occasions where he is in the position of taking a view that is against his nominator if there is to be an escape from the clutches of s.172 CA 2006.[35]

The strict view as in the English case of Bennetts v Board of Fire Commissioners of New South Wales[36], Street, J, (as he then was) is that once Directors take their positions on the Board, they must act only in the interests of the company as a whole considering the interests of the members as a collective group in preference always to the wishes of their nominators. If this is the law, it imposes a standard which makes the position of nominee Directors impossible. It ignores the commercial reality of the appointment of the nominee Directors and the reality that in making decisions, they will often have regard to the interest and act upon the wishes of their nominators

32 [1896] A.C.44 HL at 51

33 A.Keay, (2009), Directors' Duties, Jordan Publishing Limited, p.169

34 Section 173 CA 2006, stipulates the Duty to exercise independent judgment

(1) A director of a company must exercise independent judgment;

(2) This duty is not infringed by his acting –

(a) In accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or

(b) In a way authorized by the company's constitution

35 S.172 CA 2006 – Duty to promote the success of the company

36 (1967) 87 W.N. (N.S.W) 307

Auyeung[37] has also considered the approaches in relation to the liability of nominee Directors. This second approach was given by Crutchfield as the pragmatic view. She suggested that a common denominator can be found in both approaches wherein there is a breach of fiduciary duty to the company not by reason of their nominee status but where there is an actual conflict of interests and the nominee responds by subordinating the interests of the company. Thus, the two approaches may essentially be a distinction without difference.

These approaches have also been considered by Ahern[38] but from a different perspective. Ahern applied three categorizations, namely, the absolutist approach, second, the corporate primacy approach and third, the attenuated duty approach. Ahern described the strict approach as the absolutist approach. The absolutist approach is a classical one, being fully in tune with the established legal principles concerning duties owed by Directors to the company. Under the absolutist approach, duty on Directors to act in the interests of the company is articulated without any acknowledgement of the possibility of accommodating the interests of the nominator.

CONCLUSION

It is submitted that under s.132(1E) Malaysian Companies (Amendment) Act 2007[39] and to quote Samsar Kamar[40], this provision, there are two types of nominee Directors, i.e. (i) a Director who was appointed by virtue of his position as an employee of a company, and (ii) a Director who was appointed by or as a representative of a shareholder, employer or debenture holder. These nominee Directors must act in the best interest of the company. Furthermore, a nominee Director must not subordinate his duty to act in the best interest of the company to his duty to his nominator in the event of any

37 Susanna Auyeung, 2004. "Nominee Directors: Sui Generis or Merely a Breed of Directors? One-Day Symposium on Accountability, Governance and Performance in Transition, Australia", p.34 (unpublished)

38 D.Ahern, (2011) Nominee Directors' duty to promote the success of the company: Commercial pragmatism and legal orthodoxy, Law Quarterly Review, 127 (Jan), 118-146, p.8

39 s.132(1E) Malaysian Companies (Amendment) Act 2007, 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 shareholder, 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 of his duty to his nominator.

40 Samsar Kamar , (2007),"The New Statutory Duties and Liabilities of Directors under the recent Companies (Amendment) Act 2007", 5MLJ, p.cxxii

conflict between the two. He further reiterated that the new s.132(1E) CA 1965 is based on the recommendation of the High Level Finance Committee on Corporate Governance (RCG) which states that there should be statutory clarification of the fact that a nominee Director's primary obligation is to act in the best interests of the company and that his duty to his principal is always subjected to his duty to act in the best interests of the company. In quoting LS Seng[41] viewed s 132(1E), "the phrase 'should not subordinate his duty' is worded in the negative. Therefore, as a final result, the company's best interest will prevail over the interests of the nominator."

41 Lee Swee Seng, (2008) Implications of some Recent Amendments to the Companies Act 1965; http:www. Amendments to CA1965