

UNIVERSITI TEKNOLOGI MARA

**BONA FIDE ELEMENTS RELATING TO
DIRECTORS' DUTIES**

**NUR SAFRISHA MOHD SAFAWAT HOSSAIN
(2004384185/LW772)**

**Dissertation submitted as partial fulfillment of the requirements for the
degree of Masters in Corporate Law**

Faculty of Law

11 October 2005

Acknowledgement

Assalammualaikum w.b.t.

Allhamdullillah that this dissertation has finally reached the end of its journey.

There are many parties who have directly and indirectly contributed to the success of this dissertation whom I would very much like to thank. Firstly, I would like to thank my supervisor, Prof. Dato' Dr. Hussin @ Mohamad Ab. Rahman who has given me his full commitment and determination through his guidance in ensuring the success of this dissertation. I would also like to thank the Dean of Law School, UITM, Prof. Madya Dr. Musrifah Sapardi for her endless support and care on the development of the program. Other than that, another important person who has given her time and effort in facilitating and coordinating the whole program, and who was always there to listen in time of despair, would be the coordinator of our program, Puan Norha Abu Hanifah. Last but not least, I would also like to thank my Company Law lecturer Prof. Madya ST Linggam who has very much helped me in my dissertation through his clear yet precise lectures.

On a more personal note, I would also like to thank my parents for their patience, endurance and support that they have given me either in terms of emotionally or financially. Completing this task is not an easy job and it requires a lot of understanding especially from the ones you love. I feel most fortunate for having my family to stand by me my whole journey and supporting me all the way.

Wassalam.

Candidate's Declaration

I declare that the work in this thesis was carried out in accordance with the regulations of Universiti Teknologi MARA. It is original and is the result of my own work, unless otherwise indicated or acknowledged as referenced work. This thesis has not been submitted to any other academic institution or non-academic institution for any other degree or qualification.

In the event that my thesis is found to violate the conditions mentioned above, I voluntarily waive the right of conferment of my degree and am subjected to the disciplinary rules of Universiti Teknologi MARA.

Candidate's Name : Nur Safrisha Mohd Safawat Hossain

Candidate's Student No. : 2004384185

Candidate's Signature :

Date :

Table of Content

1. Chapter 1 – Introduction/Background	1
1.1. Research Objective	4
1.2. Research Scope	5
1.3. Research Methodology and Techniques	5
1.4. Research’s Significant	6
1.5. Literature Review	6
2. Chapter 2 - Directors in the eye of the legislation	13
2.1. Defining the term “director”	14
2.1.1. Lord Denning LJ’s philosophy	15
2.2. Director being the corporate organ	17
2.2.1. The views of Viscount Haldane LC	19
2.3. The bona fide model towards corporate entity	21
2.3.1. Lord Greene’s Model	21
2.4. Legal theories affecting the fiduciary element	26
2.4.1. Fiction Theory	27
2.4.2. Realist Theory	28
2.4.3. In the light of Corporate Governance	31
2.5. Relationship between director and the company	34
3. Chapter 3 – Fiduciary instances relating to directors’ duties	36
3.1. Fiduciary obligations towards shareholders	36
3.1.1. Directors who are also shareholders	44
3.1.1.1. Judicial discourse of Latham CJ in Mills v Mills	44
3.2. Fiduciary obligations towards employees	48
3.2.1. The judicial framework of Bowen LJ	49
3.3. The shifting of fiduciary elements	56
3.3.1. Vice Chancellor Leo E. Strine Jr.’s approach	60
4. Chapter 4 – other factors affecting the fiduciary position relating to directors’ duties	65
4.1. Delegation of power	65
4.2. Appointment of Nominee Director	67
4.2.1. Jacob J’s proposition	68
4.2.2. Governing Director	69
4.2.3. Conflict of interest between the company and the appointers	70
4.3. The existence of Shadow Director	74
4.3.1.1. Millet J’s proposition	76
4.3.1.2. Moritt LJ’s guidelines	79
4.3.2. Implications of being a shadow director	82
5. Chapter 5 - Conclusions and Recommendations	86
6. Bibliography	i

Chapter 1

Introduction

1. Background.

Since late 1990's, many Commonwealth countries such as Malaysia, Australia and New Zealand has been actively conducting their Law Reforms especially in the area of Company Law¹. A common issue which most of these jurisdictions are heavily harping on is the area of directors' duties. This area has been evolving through time and still developing till to date. It seems to be an area of concern for many parties such as the regulators, corporations and professionals due to the fact that the law has come up with many tools which conferred such wide powers to the directors resulting them abusing those powers in mismanagement and breaching their duties. A very strong point was highlighted by Farwell LJ in *Gramophone & Typewriter Ltd v Stanley*² on the strength of the powers of directors conferred by the articles of the company and how even the body of shareholders as the owner of the company are only able to challenge those powers through two drastic actions that is, either by altering the articles or by refusing to reelect the director in the next general meeting.

The Malaysian Government, over the past few decades, after the merger boom in the 1980's, has been promoting local companies to be competitive not only in the local market, but to have the ability to be competitive enough in the international market. This is to strengthen the nation's economy by encouraging foreign investments into the local market and local companies penetrating into foreign markets. One of the steps taken by the Government is by the implementation of policies which creates a more conducive

¹ This is when each jurisdiction will form a committee which specializes or concentrate on the reforms of their Corporate Law in a more systematic manner. For example, in Australia is the **Corporate Law Economic Reform Program (CLERP)**, in UK its called the **Modern Company Law for a Competitive Economy**, a reform program by the UK Department of Trade and Industry, and in Malaysia it's the **Corporate Law Reform Committee (CLRC)**.

² [1908] 2 KB 113