International Journal of Engineering & Technology, 7 (3.25) (2018) 329-332

International Journal of Engineering & Technology

Website: www.sciencepubco.com/index.php/IJET

Research paper



Malaysian Companies Act 2016: Impact of the Rule of Law on Fiduciary Duties of Directors.

Usharani Balasingam[1*]

[1]University of Malaya
**Corresponding author E-mail: usha@um.edu.my*

Abstract

The business world is run by the use of legal vehicles including a private limited or public company driven by directors. The duties and responsibilities of directors and the board of directors who run the company to the shareholders in a solvent company is paramount to ensure business is done in the best interest of the company. It is necessary for businesses to be confident of the mechanism that exists in any country for the directors who are in positions of power to be held accountable so as not to abuse their trust. This has been regulated by statute and by rule of law (common law and equitable principles) to ensure accountability, fidelity and loyalty of the directors. However the revised Malaysian Companies Act 2016 has consequence and impact in this regard to the existing law by deliberating omitting existing reference to rule of law as a basis of liability. Hence this paper will in its method examine the provision of law both statute and common law of the old and current law to consider the impact on businesses and directors in Malaysia given the new Malaysian Companies Act 2016. There will be discussion on the effect of the provisions by reference to statute and case law. Findings of the changes and possible implications will be made in the paper.

Keywords: *Director, Fiduciary Duties and Remedies*

1. Introduction

In the world today, we have natural and artificial persons. The artificial persons are the statutorily enabled business vehicles that would enable the natural person, investors, society and nation to prosper and be economically driven and resilient in an ever increasing borderless and globalized economy. It offers legal benefits like limited liabilities of shareholders, capital, investment, perpetual existence (barring winding up), tax benefits and incentives when business are transacted in the vehicle of a company.

Hence there is much motivation to innovate, to ease and to empower the incorporation, administration and dissolution of companies formed under the Malaysian Companies Act 2016[1]. The companies are managed by a board of directors comprising of directors who are regulated by previous statutory fiduciary duties under common law and equity which were along other bases of causes of action were statutorily preserved by the explicit provision under the Companies Act 1965[2] to ensure that the designated protector (director) acts in good faith and proper purpose to further the interest of the company not only under the express provisions of the statute (written law) but also by the rule of law expressed and formulated through case decisions under unwritten law. The Companies Act 2016[1] has made some changes in this regard which this paper intends to explore and comment upon.

Fiduciary obligation it has been said by Lord Wedderburn[3] is imposed by "*private law but its function is public and its purpose social".*

2. Materials and Methods

The research proposes to examine the changes made by the Malaysian Companies Act 2016[1] to the statutory provisions in relation to fiduciary duties specifically. The method is legal doctrinal research that would involve description, analysis and review of legal literature including statute, cases, texts and journal articles. In this context, the questions to be discussed are

1. The origins and scope of fiduciary duties and the reception of common law and equity into Malaysia.
2. The reflection on the current and previous provision of the Malaysian Companies Act in relation to provision relating to the application of the rule of law (common law and equity) to preserve added duties and responsibilities on directors which includes fiduciary, contractual and tortious duties.
3. The differences and the possible implication arising therefrom.

3. Origins and Scope

In the case of Gartside v Isherwood[4] Lord Thurlow expressed the general principle which was applied by the Court of Chancery, that "*if a confidence is reposed, and that confidence is abused, a court of equity shall give relief.*"

Len Sealy[5] traced the origin of the law of fiduciary obligations as equity's treatment of relationship of trust and confidence. As the law of trusts became more detailed and defined, there was a difficulty in describing relationship that was trust-like, but not trust. These relationships were eventually described as fiduciary relationship to distinguish them from trust. The breach of fiduciary

Copyright © 2018 Authors. This is an open access article distributed under the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

duties attracted like remedies of a breach of trust. Lord Justice Fry in Re West of England & South Wales District Bank; ex parte Dale & Co[6]

"*What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust*."

3.1. Reception of English Equity and Commonlaw into Malaysian Legal System

Wu Min Aun[7] has commented that English common law and equity suitable to local circumstances form part of the laws in Malaysia. The reception of English common-law and equity is governed under Section 3 and 5 of the Civil Law Act 1956 respectively. The general reception of the same into West Malaysia is at 7 April 1956, whereas into Sabah and Sarawak (there is the added reception of statutes of general application) as at 1st December 1951 and 12th December 1949 respectively. The same is subject to the proviso of the absence of local law on the matter and where applied is applied suited to local conditions. The cutoff dates denotes that after the dates Malaysia is free to develop its own common law and apply as persuasive and not binding authorities of other especially commonwealth jurisdictions. Wu Min Aun[7] *authorities if in their view, it is desirable to do so in absence of local statutory provisions or judicial guidance*." The case of Jamil bin Harun v Yang Kamsiah & Anor[8] was cited in support.

The reception of English commercial law (common-law, equity and statute) is governed by Section 5 with the same provisos. However the cutoff dates for all states (except for Penang , Malacca, Sabah and Sarawak) is 7th April 1956 . The four stated states in event of a lacuna of law (which is rare) are open to a continuing reception of English commercial law which is subjected to local circumstances. The unique feature of equity is that its development of laws of equitable obligations has been the earmark of judicial conscience rather than statutory responses to novel, unpredictable and unconscionable situations.

It has been always the case that in equitable principles from which originated the concept of fiduciary it is distinctively flexible for good reason as stated by Gopal Sri Ram Judge of the Court of Appeal (as he then was) in Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latif[9],

"*As Dickson J (as he then was) stated in Pettkus v Becker [1980]117 DLR (3d) 257 at p 273 "the great advantage of ancient principles of equity is their flexibility : the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice."*

Thus far the Malaysian courts have accepted the feature and roots of equity in the founding of fiduciary duties of directors. In the Malaysian case of Pharmmalaysia Bhd (In Receivership) v Dinesh Kumar Jashbai Nagjibha Patel & 13 Ors[10] , the origin and fiduciary duties by Judge Abdul Malik Ishak in that,

"*Directors are in fiduciary relationship to their company. The law requires that directors must act in good faith and in the company's interests and they too must exercise their powers exclusively for the benefit of the company. These duties are aimed at protecting the company from the harm that may arise if directors are tempted to use their position for their own personal advantage.* ***Equity has developed the duties for directors to adhere to. It is called fiduciary duties.*** *So every company director now has a duty to: (i) act in a bona fide manner (ie acting honestly) in the interest of the company; (ii) exercise the company powers for a proper purpose; (iii) retain their discretion and not be bound in advance to act in a certain way; and (iv) avoid a situation of conflict between their duties to the company and their own interest."*

3.2 Common-Law Remedies and Equitable Remedies

It is to be recognized that the breach of duty and breach of fiduciary duty will entail harm or damage to the beneficiary (the company). Hence the civil remedies of the company against the wrongdoer should be preserved and not negated. It is humbly submitted the revision and omission in the new Companies Act 2016 (as will be seen later) cannot be taken as obliterating these remedies. It depends if the breach of a duty amount to a breach of fiduciary duty as not every duty will be a fiduciary duty. It may be a common law duty that is breached for which common-law damages would be the remedy. In this regard the case of Bristol and West Building Society v Mothew[11] as cited in The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohammed & Anor[12] has reference.

However when a fiduciary duty is breached the ensuing remedies are more extensive under the equitable remedies. The remedies as listed by Meager[13] are declarations, specific performance, injunctions, specific restitution, damages in equity, account, rectification, delivery up and cancellation of documents and receivers.

The statutory codification of some of the fiduciary duties owed by the director to the company within the Companies Act in the past and present is evident. However this will bring us to the next part the paper that deals with the question to what extent is the statutory preservation of common-law and equity principles (rule of law) maintained under the current structure and regime of the Malaysian Companies Act 2016. The resulting question that would follow after that would be the possible consequent impact of the changes.

4. Comparison between Current and Previous Malaysian Companies Act in Relation to Preservation of Rule of Law (Common-Law and Equity)

Aiman Nariman and Aishah Bidin[14] makes a distinction between common law duties and statutory duties when referring to the previous Companies Act. It is pointed out that although there is considerable overlap between the common-law duties and the statutory duties, there are important differences. Firstly, the duties may be owed by different people under the two different limbs and the person who enforce the duties, namely the company for common-law duties and the Registrar of Companies for statutory duties. The other crucial point is that there can be different remedies that result as a result of a breach of common-law duty and a statutory duty. There is also a need to recognize that the source of director duties may be found not only in statutory provisions and articles of association but also under common law causes of action like contract, tort and equity which was previously recognized under the old companies Act provisions under the broad term of the rule of law and also in the provision Section 131 (1B) Companies Act 1965 as set out below.

4.1. Previous Section 132 Companies Act 1965

Section 132 (1) requires the director to all "*times to exercise his powers for a proper purpose and in the best interest of the company."*

"(1A) A director of a company shall exercise reasonable care, skill and diligence with- (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and (b) any additional knowledge, skill and experience which the director in fact has. "

As far as the exercise of business judgment rule related to the question of whether the director has satisfied reasonable care and skill in the performance of the directors duties, there is statutory provision under Section 131 (1B) that provides that satisfaction of the business judgement rule discharges the director liability under statute, common law and equity. The previous provision under Section 131 (1B) *" A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if*

the director-…"

In this regard we find the statutory provision dealing with the other areas of duties of the director and thereby may be argued that the implicit recognition within the previous Companies Act of the other bases of causes of action upon which a director fiduciary duty may arise. Section 132(2) proceeds to codify the no conflict and no profit rule which is a feature of fiduciary duty somewhat within the statutory framework providing

"A director or officer of a company shall not, without the consent or ratification of a general meeting –(a) use the property of the company (b) use any information acquired by virtue of his position as a director or officer of the company; (c) use his position as such director or officer; (d) use any opportunity of the company which he became aware of in the performance of his functions as the director or officer of the company or (e) engage in a business which is in competition with the company, to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company."

Section 132(5) more importantly preserves the possible uncodified portions of fiduciary obligations which exist or may develop and the remedies alongside the statutory crafted obligations and penalties. The crucial Section 132 (5) reads "*This section is* ***in addition to and not in derogation*** *of any other written law or* ***rule of law to the duty or liability of director or officers of a company"***

Section 132 (3) provides that the officer in breach of the section "***would be liable to the company for any profit made by him or any damage suffered by the company as a result of the breach***"; and guilty of an offence against the Act. The penalty imposed is imprisonment for five years or RM30,000.

Director is read to include *"'the chief executive officer, the chief operating officer, the chief financial controller or any person primary responsible for the operations or financial management of a company, by whatever name called*' ". Officer "*includes a person who at any time has been an officer of the company."* The definition section extends the term officer to any director, secretary or employee of the company, an instrument appointed receiver and any liquidator appointed under a voluntary winding up.

4.2. The New Provisions under the Malaysian Companies Act 2016

There is no change in the definition of director or officer under the new Companies Act with respect to the relevant provision under discussion. The duties and responsibilities of the directors are governed now under Section 213. The changes include the requirement for the director to exercise his powers "***in accordance with is Act****".* The amendment provides a clarity in penal provision in that it does not **exceed** a term of five years and the increase of fine to not exceeding RM 3 million and "**or both**" to allow for a combination of sentences.

As for the provision in furtherance of the no-conflict and no-profit rule it is reproduced under new Section 218. The changes are the increase in the fine up to RM 3 million and clarity in jurisdiction to impose imprisonment up to five years and to combine the sentences.

However it is to be noted that there a change in that there is no saving of civil remedies against wrongdoer by the company for an account for profit or any damages suffered by the company (old provision Section 132 (3)) under the new Companies Act.

The other material change relates to Section 220 under the caption the effect of other rules of law on the duties of director.

"Section 214 to 219 shall be in addition to and not in derogation of ***any written law*** *relating to the duty or liability of director or officers of a company. "*

For the sake of contrast and emphasis this is contrasted with the old provision under Section 132 (5) (reproduced again) of the old Companies Act.

"This section is ***in addition to and not in derogation*** *of any other* ***written law*** *<u>or</u>* ***<u>rule of law to the duty or liability</u>*** *of director or officers of a company."*

There is evidently an intent that the rule of law that was previously preserved is now no longer expressly preserved (omitted) as a source of director duty and obligation and the resultant remedies under the new Act. It is also seen that where there is an explicit amendment to subject the powers to the director only in accordance with the Act and to exclude the rule of law (common law and equity) which was previously safeguarded to be expressly preserved. The intent one may argue is to regulate the duties of the director within the exclusive realm of written law under the Companies Act 2016. But then there is no written statutory provision within the framework of Companies Act 2016 that enables the company or an aggrieved shareholder to pursue an action against a director for any breach of the Companies Act 2016 or cause of action being founded upon the rule of common law or equity that is codified into the new Companies Act 2016.

On the other hand, Section 213 of the new Companies Act 2016, replicates the previous provision under 131 (1B) where compliance with the business judgement rule provision provides an answer to the discharge of care, skill and diligence of the director from not only the statutory obligation but also common law and equity remains unchanged. In this regard, we find within the new statutory provision arguably the recognition of the other bases of causes of action upon which a director duty may arise. This could be relied by the courts in furtherance of the view that the rule of law obligation imposed on directors whether arising under common law or equity though deleted under the new Companies Act 2016 is to be preserved as it still remains very much a body of law whereupon the directors maybe charged with added obligations and responsibilities where it does not contradict the new Act.

It is to be noted that even where there has been statutory provisions there has been recourse to common law to supplement some of the provisions under the Companies Act 1965. For example, Aishah Bidin[15] referring to the Companies Act 1965 stated that even though there are no statutory requirements for the content of a meeting notice. Table A article 45, provides "*that a meeting notice shall specify the time, date and place of the meeting and in the case of extraordinary general meeting, the general nature of the business to be transacted*." In addition there is she says a view that directors are imposed a common law duty to inform shareholders in a way that is understood by shareholders not well versed in business matters. Any notice to shareholders should contain sufficient information concerning the purpose of any proposed resolution for the shareholders to be able to make a reasonably informed judgment about whether to attend. It must also disclose any benefits that directors will obtain as a result of passing any resolution. In the current Companies Act 2016, Section 317 (1) has a similar provision as in Table 45. However, Section 317 (2) narrows this down to limit the application of common law wherein it reads "*notice of meeting of members may include text of any proposed resolution and other information as the directors deem fit*." Hence the wider obligation imposed by common law is limited by statute which confers on the directors the discretion on what to disclose. Hence in this instance is an example of where the statutory provision has modified the common law by express provision. Another example is responsibility of a nominee director under Section 217 which has been codified from a common law proposition[16].

The meaning, effect and direction of the changes would have impactful repercussion and the consequences which remain to be formulated and decided by the proper court of law in Malaysia.

5. Conclusion

It remains to be seen if the Companies Act 2016 will be revised in this regard to clarify that director's duty and liability exists concurrently outside the Companies Act 2016 within the realm of rule of law (common law and equity) that is developed by the courts that does not contradict the provisions of the statute. The deletion

of reference to this other bases of possible liabilities may otherwise be read to limit the director liability only to that which is provided under the statute. If this is not made clear, then it remains to be seen if the courts will construe the wording of the new Companies Act with more flexibility and treat the Act as non-exhaustive in terms of duties and liabilities of the director that is not contradictory to the statute. This is despite the express deletion of the provision of application of the rule of law (common law and equity) to construe the extent of director duties and liabilities and subjection of the director only to written law under the Companies Act 2016. Aside from common law and equitable causes of action there are also the wide ranging equitable remedies like tracing and account for profit available under that will be impacted by how the courts construe the amendment provisions. The court may very well take the view the deletion of the preservation of the rule of law as being applicable to the duties of the director has no impact and does not exclude the imposition of such duties under other bases of liability and equitable remedies by the courts. As the new Companies Act is in its infancy, this is a birthing question that awaits the resolution by the courts. However given the origins, the intrinsic and intricate legal relationship of the position of director under the equity and common-law and the resultant possible remedies, it is the envisaged and the expectant hope that the court will construe the deletion of the provision relating to preservation of rule of law under the previous Companies Act 1965 as not negating or obliterating the rule of law (common law and equity) that has developed alongside the Companies Act under which such duties has been imposed. The argument that it will likely strive to read the Companies Act 2016 as non-exhaustive may be supported by its preamble which refers the purpose of the Act as being on the registration, administrative and dissolution of companies and related matters aside from the other provision as mentioned in the paper that alludes to these other non-statutory causes of action.

Towards this end, it is pertinent to bring to mind the recognition of the role of the judiciary in advancing non statutory bases of liability more so now under the revised Companies Act 2016 as stated in Hodgkinson v Simms[17], *" the desire to protect and reinforce the integrity social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognised the importance of the instilling in our social institution and enterprise some recognition that not all relationships are characterised by a dynamic of mutual autonomy, and that the market place cannot always set the rules."*

Acknowledgement

University of Malaya UMRG Programme SBS (Equitable Society) RP035D-16SBS.

References

[1] Malaysian Companies Act 2016.
[2] Malaysian Companies Act 1965.
[3] Lord Wedderburn (1985), "Trust, Corporation and the Worker " 23 Osgoode Hall Law Journal: 203.
[4] Gartside v Isherwood 1 Bro CC 558 (England, 1788).
[5] Sealy LS (1962), *"Fiduciary Relationship"* Cambridge Law Journal: 69.
[6] Re West of England & South Wales District Bank ; exparte Dale & Co Vol 11 Chancery Division 772 (England ,1879).
[7] Wu Min Aun. (2005), *The Malaysian Legal System 3rd ed.* Selangor Malaysia: Pearson Malaysia Sdn Bhd.
[8] Jamil Harun v Yang Kamsiah & Anor Vol 1 Malayan Law Journal 127 (Malaysia ,1984).
[9] Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latif Shah & Ors Vol 2 Malayan Law Journal 265 (Malaysia, 1996).
[10] Pharmmalaysia Bhd (In Receivership) v Dinesh Kumar Jashbai Nagjibha Patel & 13 Ors Vol 7 Current Law Journal 465 (Malaysia , 2004).
[11] Bristol and West Building Society v Mothew I Chancery Court 1 (England , 1998).
[12] The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohammed & Anor Vol 6 Malayan Law Journal 497 (Malaysia, 1999) and Vol 5 Malayan Law Journal 469(Malaysia, 2008).
[13] Meagher, Gummow & Lehane's (2002), *Equity Doctrine & Remedies 4th Edition* , Australia : Butterworths Lexis –Nexis.
[14] Aiman Nariman Mohd Sulaiman et al (2005), *Commercial Applications of Company Law in Malaysia 2nd Ed* , Malaysia: CCH Asia a Wolters Kluwer Business.
[15] Aishah Bidin (2013), Shareholders Meeting in Cyberspace Legal Network Series (A): xxvii.
[16] Lai Zhen Pik (2017), Nominee Directors Dilemma: To whom do they owe loyalties to? A case of competing allegiance 1 Legal Network Series (A): xiv.
[17] Hodgkinson v Simms Vol 117 Dominion Law Reports (4th) p 199 , (Canada , 1994).