Directors Duties: The Foundation Of Good Corporate Governance (Part 1)

by

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This paper comes in two parts. The first opens with the concept of fiduciary and need for it even though s. 220 of the Companies Act 2016 has removed the expressed provision of ‘rule of law’ as a source of law to regulate directors’ duties. It covers the interlaced aspect of fiduciary within the shoes of the directors and the statutory aspects of directors’ duties. The second part returns to the fiduciary duties covering areas of trust and remedies.

Directors are fiduciaries of the company. With this comes a weight of responsibilities founded on trust to be discharged in an honourable manner. This in turn seeks to ensure that the businesses are inherently cultivated with values to ensure the business sustainability. This is in line with the realisation that no matter what structure or processes are in place for governance, the integrity and ethics of the individual directors, board of directors and key players in the check mechanisms are very crucial factors.

Directors As Fiduciaries

Fiducia is the root word of fiduciary which means trust and it requires a conduct that is at a higher level than is trodden by the crowd. It is the highest standard of duty implied by law and is aimed at preventing those holding position of trust and power from abusing their authority.

Cardozo J held that:

Many forms of conduct permissible in a workday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour.

Effect Of S. 220 Of The Companies Act 2016 On Rule Of Law As A Source Of Director Duties

The Companies Act 2016 has seemingly excluded the saving provisions that save and preserve common law and equity principles (rule of law) in addition to the statutory duties as codified. The repealed Companies Act 1965 under s. 132(5) reads:

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This section is in addition to and not in derogation of any written law or rule of law relating to the duty and liability of directors or officers of a company.

However, s. 220 of the new Companies Act 2016 under a header titled Effect of Other Rules of Law on the Duties of Directors reads, ‘Section 214 to 219 shall be in addition to and not in derogation of any other written law relating to the duty or liability of directors or officers of the company.’

The header may be argued to exclude rule of law as is evident in the new wording of s. 220 as above that intentionally omits the previously included rule of law and limits the duty and liability of directors and officers to the Act and written law. Whether it can be argued to preserve the rule of law is one of construction by the courts.

The wording in the section only mentions written law oblivious, it would seem, to common law and equitable principles that have co-existed alongside with statutorily imposed duties and shaped the same thus far.

The non-applicability of rule of law including common law and equitable principles seems unimaginable since directors’ duties are founded upon the concepts of trust and fiduciaries.

However, the revised provision under s. 220 of the Companies Act 2016 omits, from the previous Companies Act 1965, the sources of rule of law to regulate director duties. Under the Companies Act 2016, s. 220 only preserves the written law as seen above.

The courts will ultimately interpret and construe the application of s. 220 under the Companies Act 2016. Currently, the Companies Act 1965 is still in operation given that the cases before the court are governed under the previous Act. It envisaged that in the near future, s. 220 Companies Act 2016 will knock the judicial door for construction.

In the case of Superplas Technology Sdn Bhd v. See Chou Shon the High Court, in construing the repealed Companies Act 1965 (that had a reservation of source of law being rule of law) was faced with the argument that the statute negated the application of common law (and equitable) fiduciary duties. The court was quite clear about the reservation clause under the repealed Act preserving the same. It was also highlighted that the Malaysian courts have developed their common law fiduciary duties apart from the statute provisions. Collin Lawrence Sequerah J held:

[80] Although there is no doubt that s. 132 of the Act is a codification of the common law duties regarding fiduciaries, there is nothing that prohibits such a cause of action founded also upon the common law position. As the above authority shows, any breach of fiduciary duties as a director attracts the dual consequences of a penal sanction as well as accountability for secret profits and damages. The contention of the defendant therefore that s. 132 of the Act precludes recovery by way of civil action for damages, cannot be accepted ...
[91] There has been an abundance of local authority over the years that has recognised and applied English legal principles relating to the duty of directors as fiduciaries. This has now become part of Malaysian common law.

**UK Companies Act 2006**

It is perhaps noteworthy just to highlight the contrary stand under s. 170(3) and (4) of the UK Companies Act 2006 (C46) where the common law and equitable development and application to the extent it relates to general duties of directors, past and present, is preserved as quoted below:

Scope And Nature Of General Duties

(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

(4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

Section 178 – Civil consequences of breach of general duties

(1) The consequence of breach (or threatened breach) of sections 171 to 177 are the same as would apply if the corresponding common law rule or equitable principle applied.

(2) The duties in those sections with the exception of s. 174 (duty to exercise reasonable care skill and diligence) are accordingly enforceable in the same way as any other fiduciary duty owed to a company by its directors.

**Singapore Companies Act 2006**

The Singapore Companies Act 2006 (Cap 50), s. 157(4) which deals with the duty and liability of officers provides for and preserve the liabilities under the rule of law. It reads:

Section 157(4) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.9

It is also pertinent to note that the Singapore Companies Act 2006 in relation to a director's duty of disclosure of interest in transactions, property and offices reserves the source of rule of law obligations under s. 156(14) as seen below:

Section 156(14) Subject to subsection (4), this section shall be in addition to and not in derogation of the operation of any rule of law or any provision in the constitution restricting a director or chief executive officer
from having any interest in transactions with the company or from holding offices or possessing properties involving duties or interests in conflict with his duties or interests as a director or chief executive officer (as the case may be).

This was also the position under the Companies Act 1965 but omitted under Companies Act 2016. In contrast, we have s. 221(11) of the Companies Act 2016 which reads:

Except as provided in subsection (3), the section shall be in addition to and not in derogation of the operation of any provision in the constitution restricting a director from having any interest in contracts with the company or from holding offices or possessing properties involving duties or interest in conflict with his duties or interest as a director.

This is to be contrasted with the prior corresponding s. 131 under the repealed Companies Act 1965 that is markedly similar with the Singaporean position. The repealed provision read:

Section 131(8) Except as provided in subsection (3) this section shall be in addition to and not in derogation of the operation of any rule of law or any provision in the articles restricting a director from having any interest in contracts with the company or from holding offices or possessing properties involving duties or interests in conflict with his duties or interests as a director.

It remains to be seen how s. 221(11) of the Companies Act 2016 provision above will be construed by the Malaysian courts by reason of the amended above to remove rule of law as source of obligations. The intent of the Legislature will be determined. If it is read to limit liabilities of directors to only criminal penalties under sub-s. (12) under the provision of the s. 221 and written constitution only. The question arises as to the effect of development under the rules of law and contextual reading of the provisions and construction of the clauses. This is aside from references to other forms of liability like breaches of trust, negligence or voidable contracts as being part of the rule of law which is now seemingly removed under ss. 220 and 221 of the Companies Act 2016.

The courts are likely to find that the statutory provisions under the Companies Act 2016 do not exclude the rule of law interpretation of director and officer duties within the context of the Companies Act nor civil liabilities that exist independently. This again will in turn be tied to the court’s interpretation to be given to s. 220 of the Companies Act 2016.

Other References To “Rule Of Law” Within Companies Act 2016

Another point in favour of a wider reading including not excluding or negating civil liabilities under the rule of law notwithstanding the wording of s. 220 of the Companies Act 2016 is the fact that s. 214(1) of the Companies Act 2016 recognised the basis of liability under common law and equity so as to provide the statutory business judgment defence to such actions.
Section 214(1) A director who makes a business judgment is deemed to meet the requirements of the duty under s. 213(2) and the equivalent duties under the common law and equity if the director ...

Furthermore, across the Companies Act 2016, there are references, for example, s. 393(3) of the Companies Act 2016 as stated above where breach of trust and other basis of liability have been recognised. It is after all an Act and not a Code, though this is not an answer to intentional deletion under the Companies Act 2016 of a source of applicable law to directors.

**Preamble Of The Companies Act 2016**

The preamble of the Companies Act 2016 reads:

An Act to provide for the registration, administration and dissolution of companies and corporations and to provide for related matters.

This is to be contrasted with the repealed Companies Act 1965 wherein the scope is wider which read:

An Act relating to companies.

Additionally, it may be argued that the court may be guided by the preamble to constraint the purview of the Companies Act 2016 within the scope of registration, administration and dissolution of companies and related matters therein to find that it does not derogate from existing bases of rule of law and civil liabilities. Yet, this does not satisfactorily answer the need to delete or omit rule of law as a source of law.

This would, however, leave the development of the civil bases of liabilities including aspects of fiduciary duties which in turn influences the statutory provisions within the domain of the courts. This may extend to aspects of good faith of a fiduciary under ss. 213-215 of the Companies Act 2016.

Finally, the nailing point, if there is a need for one, is that there are reliefs or remedies that the courts may grant in the exercise of common law and equitable discretion for breach of fiduciary duty that covers, *inter alia*, common law or equitable damages, account for profit, rescission, tracing, injunction and specific performance. It would be illogical to read into s. 220 of the Companies Act 2016 an abolition of civil liabilities and remedies under the rule of law. It is absurd to argue that a director in breach of his statutory and fiduciary duty under s. 218 of the Companies Act 2016 is only to be accorded criminal punishment and there is no liability to account for the profits he has made as a result of the breach of s. 218 of the Companies Act 2016 to the companies.

Hence, it is puzzling why s. 220 of the Companies Act 2016 was amended so as to exclude a mere reference (without going into substantive law) to the rule of law as a source of duties and remedies.
Nonetheless, it is very likely that the courts will still proceed undaunted by the express changes made if the approach in the case of Pioneer Havens Sdn Bhd v. Ho Hup Construction Company Bhd\[10\] is taken to preserve, apply and develop concurrent rule of laws.

The prior provision of s. 132(1) requires a director to act honestly. The current s. 132(1) of the Act, requires a director to act in good faith in the best interest of the company. It is accepted that for all intents and purposes, the scope of the directors’ duties to act honestly under the old s. 132(1) and the new s. 132(1) are the same. Thus the old case laws relating to the duty to act honestly continues to be relevant. (See Cheam Tat Pang v. PP\[1996\] 1 SLR 541).

It has been always the case in equitable principles that originated the concept of fiduciary is distinctively flexible for good reason as stated in Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals.\[11\]

As Dickson J (as he then was) stated in Pettkus v. Becker\[12\] “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.”

Hence, it is argued that s. 220 of the Companies Act 2016, by providing for only written law to be applicable, has excluded the marvel of the flexibility and accommodation to the unforeseeable changing needs of the society. Hence, a literal, narrow and restrictive reading of the provision by the courts is not anticipated.

**Framework Overview Of Duties**

Aiman\[13\] classification of duties has two main classifications (a) care, skill and diligence; and (b) loyalty and good faith. The latter classification is correlated to the fiduciary nature that relates to aspects of (i) duty to act in good faith in the interests of the company; (ii) to act for a proper purpose; (iii) duty to retain discretion; and (iv) duty to avoid conflict of interest.

The common and equitable duties are imposed on directors as a class by rule of law whereas the statutory duties under the Companies Act 2016 are imposed on directors and sometimes officers or persons other than directors.

Under equitable remedies resulting from breach of fiduciary duty are equitable compensation for law or damage, setting aside of the transaction in breach (rescission) or recovery of secret profit, bribes or commissions made in breach, equitable tracing into property of company, constructive and resulting trust. The Companies Act 2016 reserves its own consequences for the breach of the statutory duties which are distinct and may include fine, imprisonment or disqualification.
As will be seen later, consent or waiver or ratification is possible for a breach of fiduciary duty that is done in good faith and is non fraudulent by the general meeting of shareholders.

In addition to common law and equitable duties, the Companies Act 2016 statutorily provides for remedies which also overlap with the common law equitable duties. An example is s. 213(1) of the Companies Act 2016 which overlaps with the equitable duty of a fiduciary.

The duty to act in good faith in the interest of the company and for a proper purpose finds its statutory manifestation under s. 213(1) of the Companies Act 2016 which reads:

A director of a company shall at all times exercise his powers in accordance with the Act, for a proper purpose and in good faith in the best interest of the company.

There are statutory provisions under Companies Act 2016 herein referred to that are meant to ensure loyalty and fidelity. This includes requirement to disclose certain interest which are provided under disclosure of interest in contracts, proposed contracts, property, offices etc (s. 221); general duty of disclosure (s. 219); register of directors shareholdings (s. 59); the conflict safeguards are reflected among others under loans to directors (s. 224); loans to persons connected to director (s. 225); substantial property transactions: transactions with directors; substantial shareholders or connected person (s. 228); interested director not to vote (s. 222); and duty not to misuse information or position or opportunity or to compete (s. 218).

The disclosure requirement under s. 221 of the Companies Act 2016 is triggered by the facts of the conflicts which come to the director’s knowledge in relation to interest in a contract or proposed contract. The effect of non-disclosure is that it makes the contract voidable at the option of the company. The Companies Act provides for a penalty for a term not exceeding five years or to a fine not more than RM3 million or both in default of compliance.

In such cases, even where the reservation of rule of law as a source of liability is now deleted under the new Companies Act 2016 for s. 221, the same is implicitly invoked arguably by the terms and phrases like voidable contract which necessitates reference to the same. Rule of law in this context covers a broader area inclusive of contract, tort and trust.

**Duty Of Directors**

The duty under s. 213(2) of the Companies Act 2016 to exercise care, skill and diligence is not springing from equitable fiduciary duties (loyalty and good faith basis); rather it is from a common law and a statutory imposed context wherein the applicable principles would be of tortious liability and resultant remedies being common law remedies.
This is to be differentiated from s. 213(1) which overlaps with fiduciary obligations. The assets of the company are entrusted to the directors as trustees to be employed for the company purposes and best interest.

Directors are so far as regards the employment of the funds of the company trustees … and answerable to their cestui qui trust for the due employment of the funds entrusted to them.\(^{15}\)

As explained below by Mummery LJ in *Towers v. Premier Waste Management Ltd*\(^{16}\) is the fiduciary duty in the management of the affairs of the company:

A director of a company is appointed to direct its affairs. In doing so, it is his duty to use his position in the company to promote its success and to protect its interest. In accordance with equitable principles the special relationship with the company generated fiduciary duties on the part of the director. His fiduciary commitments to the company took form of a duty of loyalty and a duty to avoid a conflict between his personal interest and his duty to the company.

In *Pharmmalaysia Bhd v. Dinesh Kumar Jashbhai Nagibha Patel & Ors*,\(^{17}\) Abdul Malik Ishak J recognised the equitable development of fiduciary duties in the following terms:

Equity has developed the duties for directors to adhere to. It is called fiduciary duties. So every company director has a duty to: (i) Act in a *bona fide* manner (ie, acting honestly) in the interest of the company (ii) Exercise the company’s 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 interests. \(\ldots\) The learned authors in the persons of Charlesworth and Cain on *Company law* (12th Ed) at p 371 in style wrote: The fiduciary duties of directors are (i) to exercise their powers for the purposes for which they were conferred and *bona fide* for the benefit of the company as a whole; (ii) not to put themselves in a position in which their duties to the company and their personal interest may conflict. \(\ldots\)

In *Magnifine Sdn Bhd v. Yap Mun Him*,\(^{18}\) Tan Sri Richard Malanjum (now CJ) held at pp. 423-424:

As a fiduciary the defendant was obliged to make a full and frank disclosure of not only the fact that he was being paid but also as to the amount. Indeed even with a full and frank disclosure the no-conflict rule and no-profit rule would not have excused or exempted him from his fiduciary duty to act *bona fide* in the interest of the plaintiff and for proper purposes. (See: *Neptune (Vehicle Washing Equipment) Ltd v. Fitzgerald (No. 2)* [1995] BCC 1000; *Bray v. Ford* [1896] AC 44).

\(\ldots\) It must be remembered that the no-conflict rule and no-profit rule are indeed very strict against a fiduciary. Even consent or knowledge of any of the directors or shareholders cannot be considered as that of a company-beneficiary especially if it is a victim of fraud or illegal activity to the detriment of its assets. (See: *Yap Sing Hock & Anor v. Public Prosecutor* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356; [1992] 2 MLJ 714; *Belmont Finance Corporation Ltd v. William Furniture* [1979] 1 All ER 118; *Attorney-General Reference (No. 2 of 1982)* [1984] 2 All ER 216).
I also find that the explanation by the defendant that the payments were for the benefit of the plaintiff remained just an assertion without any credible evidence adduced. In any event such noble intention, if there was any, would be irrelevant and would not have exempted him, being a fiduciary, from the rigours of the no-conflict principle. (See Regal (Hastings) Ltd v. Gulliver [1942] 1 All ER 378).

Also in Sinnah Timber Industries Sdn Bhd v. David Low See Kiat & Ors, Kamalanathan Ratnam J held:

In addition to the above stated statutory impositions (s. 132 Companies Act), a director is also in a position as a fiduciary of the company, being a person entrusted with the assets of the company and whose duty is to perform to the best interest of the company.

Hence, this is the further argument too that the omission of the rule of law by statutory deletion of reference to the same is suggested not to delete the body of law under fiduciary duty, contextual aspects of the limitations of waiver and consent of the company and the consequential remedies thereunder.

The finer point of the differences of duty of a director is that it is statutory, common law and in equity. Hence, perhaps this is best explained by the caution that not every duty that a fiduciary owes is necessarily a ‘fiduciary duty’. A common law breach of duty that is independent of breach of fiduciary duty will be subject to rules of causation and remoteness of damage unlike an equitable claim for compensation under a fiduciary duty-based which is based on restitution and subjected to equitable remedies that will be dealt with under part 2 of this paper.

In Bristol and West Building Society v. Mothew, Millet LJ commented that a trustee who acts loyally but incompetently is not in breach of his fiduciary duties although he may be in breach of a duty to exercise reasonable care.

The expression ‘fiduciary duty’ is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty. It is similarly inappropriate to apply the expression to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties … Although the remedy which equity makes available for breach of the equitable duty of care and skill is equitable compensation rather than damages, this is merely a product of history and in this context is … a distinction without a difference. Equitable compensation for breach of duty of care and skill resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damage should not be applied by analogy in such a case.
Concurrence Of Fiduciary And Non-fiduciary Duties

It is recognised that the duty of care to use proper skill and care is one under the realm of negligence and not fiduciary duty. There is no such thing as a fiduciary duty of care.

In the case of Henderson v. Merret Syndicates Ltd, it was said that:

*The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or to advise others.*

This is to be distinguished from the duty of skill, care and diligence under tort or contract or other heads of liability for which no fiduciary duty exists.

There could be an additional question as to whether the act or omission is also a breach of fiduciary duty. Does it contravene the duty of the fiduciary to act in good faith in the best interest of the principal for proper purpose whilst ensuring disclosure of all material information that prejudices the interest of the company including situations where the fiduciary is in conflict and in profit arising out by virtue of the fiduciary association with the principal.

For the purpose of this paper, the actors under study are directors and officers under the Companies Act 2016.

**Companies Act 2016**

**Director**

It is to be noted that the scope of duties and responsibilities of the director for the earmarked sections hereinafter mentioned under s. 210 of the Companies Act 2016 has been statutorily defined to extend also to include chief executive officer, chief financial officer, chief operating officer or any other person primarily responsible for the management of the company.

**Definition of Director**

The definitive sections for director is the same as previously and would include a person appointed to act as director (*de jure*), a *de facto* director a person who occupies the position of director even though there was no appointment or the appointment was defective or a shadow director is a person in accordance with whose directions or instructions the directors are accustomed to act and an alternate or substitute director; a person nominated by another director to attend meetings or act on his behalf.

**Responsibility Of Nominee Director**

It is to be noted that s. 217 of the Companies Act 2016 has codified the rule of law in common law and equity reflected in decided cases where the
principle is expounded that a nominee director must act in the best interest of the company and not subordinate the same to the interest of the nominator.

This is seen in the judgment of Lord Denning in *Scottish Cooperative Wholesale Society v. Meyer* 24 “It is plain that, in the circumstances, these three gentlemen could not do their duty by both companies and they did not do so. They put their duty to the society (nominator) above their duty to the company in this sense, at least they did nothing to defend the interests of the company against the conduct of the society. They probably thought as nominees of the society, their first duty was to the society. In this they were wrong.”

Likewise, in the case of *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits,* 25 the decision of the nominee director to dispose of the company’s core business when it is running profitably was held to be a breach of fiduciary duty as it was not in the best interest of the company but was to the benefit his nominator.

It is noteworthy that the law does not differentiate between the categories of directors when imposing the fiduciary duty. 26

**Officer**

The definition of the term officer under the interpretation section of Companies Act 2016 includes (a) any director, secretary or employee of the corporation, (b) a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument (c) any liquidator of a company appointed in a voluntary winding-up. It excludes expressly (i) any receiver who is also not a manager (ii) any receiver and manager appointed by the court or (iii) any liquidator appointed by the court or by its creditors.

It is noted that there is a statutory exemption to the excluded category from duties imposed on the officer under the Companies Act. The rationale seems to be that an appointee of the court is not an agent of any person but an officer of the court. Hence, the leave of court is required to sue or bring criminal proceedings against him. 27

Though this may be true in terms of procedure, the question remains that if it negates any fiduciary duty owed by the court appointee in any given state of circumstances or facts that may warrant the same as may be decided by the court on each special facts to the creditors of a company as a general body.

Notwithstanding the foregoing changes in Malaysia, the fact remains that s. 393(3) of the Companies Act 2016 does preserve a remedy against the receiver or receiver and manager by any creditor, contributory or liquidator for alleged “misfeasance, or breach of trust or breach of duty in relation to the company.” (emphasis added)
Elements Of Fiduciary Duty: An Overview

Duty To Act In Best Interest And Duty To Not To Conflict

The first duty of the fiduciary is to act in the best interest of the principal company. Where a fiduciary has a personal interest in the company's exercise of power, three considerations arises. The fiduciary must ensure proper disclosure is made to the company. To ensure no appearances of conflict or bias, the director should ensure that he does not vote on the matter, does not self-deal with the company without the company knowledge and consent and discharges the disclosure requirement to provide full and frank disclosure of material information to enable the company to make a decision. This duty to disclose this information to the company is an integral part of enabling the company to make decision on an informed basis.

The director in exercising his powers under the statute or articles in the management and running of the company needs to ensure that the powers are exercised properly and that he is subservient to the company's best interest in the exercise of the same.

Timing When Judged

In the case of *Thorby v. Goldberg* Kitto J held the time to make the assessment is the time of negotiation and not performance.

There are many kind of transactions in which the proper time for the exercise of the directors’ discretion is the time of the negotiation of a contract, and not the time at which the contract is to be performed. A sale is a familiar example ... If at the former time they are *bona fide* of opinion that it is in the interest of the company that the transaction should be entered and carried into effect , I see no reason in law why they should not bind themselves to so whatever under the transaction is to be done by the board.

Duty To Inform On Matters Adverse Or Detrimental To Company

However, there may be instances of where the fiduciary may not have a personal interest in the company exercise of power but has knowledge of matters detrimental to the company. There is a duty to inform the company of such detrimental interest.

This is decided in the case of *Sundai (M) Sdn Bhd v. Masaito Saito & Ors.* This concerned an action of Saito who was a director of Sundai Malaysia Sdn Bhd (Sundai). Sundai operates Japanese tuition centres. He was offered a position by a rival company Leading Education Centre Sdn Bhd (LEC) while he was a director and employee of Sundai. He subsequently resigned. Saito knew of the rival company plans of up a competing business *via* emails. It was discovered that confidential information like “student list” and “operations information” have been misappropriated. Saito was alleged to have also solicited employees of Sundai to join LEC. It was held that he breached his fiduciary duty that while he was a director he was involved in
improper acts against the interest of the company. This also included breach of his duty to bring to the attention of the company of the intent of the rival company. He knowingly assisted LEC to set up a competing rival school and procured breach of contract of the employees and used confidential information such as the students list and operation information of the company to her detriment while he was a director of the company.

The duty to disclose is imposed on the director even if it involves a confession of the director's misconduct. The case of British Midlands Tool v. Midland International Tooling Ltd v. Midland International Tooling Ltd\textsuperscript{32} involved its four directors who planned to resign and set up their own business. They took steps to set up a company but only one Donald Allen resigned from the company. The others directors tendered resignation which was effective at a future date. Before the resignation of the other three was effective, Allen set up a new company called Midland International Tooling Ltd. The new company started to solicit British Midlands Tool's customers and employees. BMT was wound up. BMT sued the three former directors for breach of fiduciary duty on account that they setting up a business to compete with BMT, induce release and causing the misuse of confidential information and soliciting BMT employees were breaches of their fiduciary duties.

The three directors were held liable as their conduct was 'a plain breach of their duties as director. Those duties required them to take active steps to thwart the process. Active steps should have included alerting their fellow directors to what was going on'.

This duty is imposed even if it involved a confession or exposed their own wrongdoing. Hence this strand of fiduciary equitable duty to protect and promote the interest of the company is a proactive duty imposed on directors.

**Disclosure And Informed Consent**

The question has arisen if a disclosure is necessary where the nature of the interest is known to other director's exempts the need to make a formal disclosure. This argument found favour in the case of Woolsworth v. Kelly\textsuperscript{33} but not so in Raja Nong Chik v. PP\textsuperscript{34} though it would appear as a mitigating factor.

However the Malaysian Court of Appeal case has been read in Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors\textsuperscript{35} to affirm the need for formal disclosure. It is to be noted that the argument that the previous s. 131(4) of the Companies Act 1965 which was read to dilute the requirement of a formal notice at the meeting of directors of company in the case of KFC Holdings (Malaysia) Bhd v. Yoong Nin Chor\textsuperscript{36} though on facts repealed s. 131(1) of the Companies Act 1965 was satisfied.
The provision under s. 131(4) of the Companies Act 1965 is no longer in s. 221 Companies Act 2016. Hence the rewording of the s. 221 furthers the point to the need for a formal notice at meeting to be minuted by the company secretary.  

It serves as a reminder to directors of their duties and to place paramount the company’s interest.  

It is brought to bear again the thought here that it would be difficult to sever rule of law in the interpretation and application related to s. 221 of the Companies Act 2016 disclosure requirements. For example, statutory requirement is to declare interest at a meeting of directors of the company. However, the rule of law meaning common law and equity has interpreted the same to read the requirement to mean not only disclosure but consent and additionally of a fully independent board of directors. It is to be noted that statutorily the word independent and consent is not stated in the statutory provisions. It is also relevant to note that indirect interest in contract has been interpreted to cover a situation where the director held interest in the contracting party as a trustee for shares which his wife is a beneficiary.  

The other point is the retention of the clause under s. 221(6) of the Companies Act 2016 that would seem to allow a wider base which includes and extends beyond mere statutory obligations which reads:  

Every director of a company who holds any office or possesses any property where duties or interest may be created in conflict with his duties or interest as director shall declare the fact and the nature, character and extent of the conflict at a meeting of the directors of the company.  

In this context, where such a situation may arise, reference can be made to the Court of Appeal case of Mohd Badli Abd Razak & Ors v. Ali Ismail where the director of a company sought to enforce a contract for distribution of profit agreement that he the plaintiff made with two other directors (first and second defendant) as a result of the company of which all three were directors of securing a timber logging and extraction contract. It was held that the directors were in breach of fiduciary duties to the company to whom the benefit of the profits for the contract executed by the company accrued. It was the benefit of the company and not the individual directors who sought to divert the profits to themselves without any requirement that it is conditional upon the consent or disclosure to the company. They were held to be in breach of their fiduciary duty to act in the best interest of the company. The contract for distribution of profits was held to be void and unenforceable. The case was not an action by the company for breach of fiduciary duty. However, it demonstrates manner in which secret profits may be made that may be outside the context envisaged under statute that requires regulation by rule of law should the circumstances involves nominees or persons connected to the director.
In the case in context of director duties, it was recognised that the disclosure requirements in the case will be caught under s. 218 of the Companies Act 2016 for consent by the general meeting of the company if not fraudulent, for the use of the director’s association with the company for personal benefit in conflict of the rule to act in company best interest.

Full And Frank Disclosure

The fiduciary would not be in breach of fiduciary duty if after full and frank disclosure of material information known to him, his principal agrees to his course of action. A “full and frank disclosure” of all the material information known to the fiduciary (including any information the fiduciary has deliberately refrained from acquiring) is usually required for an informed consent. Material facts would be facts that would affect or would reasonably affect the conduct of principal or his advisor in relation to the nature and elements of the proposed course of action. Whether full and frank disclosure has been satisfied will be a question of fact to be decided by the court. It will not be a defence to show that a full and frank disclosure would not have any effect on the principal. It does not avail the fiduciary to argue that he acted in good faith and that the benefit he obtained also benefited the principal.

In this regard, the disclosure requirements under s. 218 (where non fraudulent) Companies Act 2016 and s. 221 of the Companies Act 2016 will avail the fiduciary an argument that there is no breach of duty. In this regard, it may be regarded as compliance with the duty of a fiduciary as long as it corresponds with the duty to act for the principal best interest for a proper purpose with due disclosure and consent of the principal where there is any conflict.

Possible Dual Obligations; Disclosure To Board And To General Meeting Of Shareholders

This dual obligation can be illustrated in the case facts of Aberdeen Railway Co v. Blaikie Bros where Aberdeen Railway Co entered into a contract to purchase equipment from a partnership which conducted business under the name of Blaikie Bros. The chairman of the board of Aberdeen did not tell his other directors that he was the managing partner in the firm of Blaikie Bros.

It is obvious the conflict of interest that arises “his personal interest would lead him in an entirely opposite direction, would induce him to fix a price as high as possible. This is the very evil against which the rule in question is directed.”

The declaration interest in the proposed contract with the company may be covered under s. 221 of the Companies Act 2016 to the board of directors. However, the financial benefit to be acquired by the use of his position may require the disclosure to be made under s. 218 of the Companies Act 2016 to a general meeting of shareholders.
This is when the consent is obtained prior and not subsequent to the breach of the fiduciary duty. It becomes a defence when the breach has already occurred and for which ratification or waiver is required.

**Waiver Or Ratification**

This is a situation where the fiduciary acts first and then seeking a waiver by his principal of his liability for breach of fiduciary duty afterward. In such instances, the fiduciary is obliged to furnish such additional disclosure of the nature and extent of the benefits he has obtained as a result.

There is a provision under s. 218 of the Companies Act 2016 as to the need to obtain consent from the general meeting where the director uses by reason of his connection to the company, his position, the company property, information, opportunity or engages in business in competition with the company.

The consent or ratification is to be given by the general meeting of shareholders. Here again the limitation is that the act to be ratified should not fall within the context of a fraud upon the company.

**Scope Of Ratification Power**

The directors' breach of duty may in some circumstances be condoned by the general meeting. An effective consent to the breach or ratification after the breach will pre-empt a minority shareholder from bringing a derivative action against the directors.

However, it would seem that breach of duty of a fraudulent kind cannot be ratified in a general meeting and can be subject to a derivative action under the exception to the rule in *Foss v. Harbottle*.

In *Hurley & Anor v. BGH Nominees Pty Ltd & Ors*[^50], the premises where the company carried on business was purchased by a company formed by the director of the company. The shareholders argued that the purchase was in breach of fiduciary duty. The director contended that the plaintiff had no standing to bring the action. It was decided that the shareholders have a right to sue because they came under an exception to the *Foss v. Harbottle* rule as a fraudulent breach of the fiduciary duty cannot be condoned or ratified by the company.

In the case where the directors have acted dishonestly or without regard to the company’s interest, it would seem ratification is not possible if they have to use their votes to effect the same.

In the case of *Cooks and Deeks*[^52], the Privy Council held that the directors who had diverted to their own favour business that properly belonged to the company could not validly use their voting power as shareholders to ratify what they had done. Lord Buckmaster held that:

> directors holding a majority of votes would not be permitted to make a present to themselves. This would allow the majority to oppress the minority … .

[^49]: Amendment to previously given reference.
[^50]: Relevant case.
[^51]: Relevant rule.
[^52]: Relevant case.
But if it is a failure to act in good faith for the best interest of the company that does not involve dishonesty it may be ratified by the general meeting and does not come within the exception of the *Foss v. Harbottle* rule.

The directors in *Regal Hastings Ltd v. Gulliver* held that the directors who had made profit by virtue of their office would have not been liable to account for it if the company in general meeting had given their approval (antecedent or subsequent).

The difference is, there is no misappropriation of company property in Regal Hastings and the director had merely made incidental profit for which a duty to account arise. The material fact is that they had acted in good faith throughout.

Ratification by the general meeting has been possible also where directors who breach duties of care and skill and derived no profit from the same or retrospectively (not prospectively) ratify an act by the directors that is beyond the powers conferred by the articles.

**Duty To Act For Proper Purpose And In The Best Interest Of The Company**

Section 211 of the Companies Act 2016 provides that the business and affairs of the company shall be managed by or under direction of the board.

**Collective And Individual Duty**

This is a collective duty as a board of director’s duty to make decisions as a collective organ (unless delegated to an individual or committee of directors). However, it is an individual responsibility within the collective concept wherein each individual conduct of director is considered to ascertain if there is a breach of duty imposed.

This is manifested in the case of *Sime Darby & Ors v. Dato Seri Ahmad Zubair @ Ahmad Zubir Hj Murshid & Ors* where the first defendant the Group Chief Executive was sued for breach of fiduciary duties as well as negligence in discharge of duties and for unauthorised payments. The defendants sought to join in other directors on the argument that they sat on various committees who approved the transactions ie, for “collective responsibility of the whole board” as third parties against whom indemnity and contribution were sought. The application was dismissed. It was held that the plaintiff could decide who among the directors should be held responsible.

The duty to act in good faith in the best interest of the company and for a proper purpose finds it statutory manifestation for the director under s. 213 of the Companies Act 2016 which reads:

A director of a company shall at all times exercise his powers in accordance with the Act, for a proper purpose and in good faith in the best interest of the company.
The case of *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals* considered the duty of directors to act in good faith and for a proper purpose. It was held that if directors exercised their powers for some ulterior purpose or its exercise were to be carried out in an improper manner, even where it is substantially altruistic, such an exercise of powers could be set aside.

The scope of the duty to act *bona fide* in the best interests of the company is best propounded in the judgment of Kirby P in *Darvall v North Sydney Brick and Tile Co* (1989) 16 NSWLR 260 at pp 281-282, where His Lordship puts across in clear terms the exercise of the director's powers. His Lordship, *inter alia*, said that:

Honest behaviour on the part of directors is expected. However, it is not in itself enough to sustain their conduct if their conduct is otherwise determined to have been carried out for an improper purpose or collateral purpose: *Howard Smith Ltd v. Ampol Petroleum*.

Similarly, statements by directors about their subjective intentions, or beliefs, are not conclusive of their *bona fides* or for the purposes for which they acted as they did (*Advance Bank Australia Ltd v. FAI Insurance Ltd* at p 485). Even though the motives for exercising a fiduciary power are substantially altruistic, if those altruistic motives were actuated by an ulterior or impermissible purpose or were carried out in an improper manner, they will be set aside. This is so in order to ensure the integrity of the actions of the fiduciary and to require that the fiduciary’s decisions are made *bona fide* and for proper and relevant purposes.

Nevertheless, although not conclusive, the court can look at the deterred intentions, of directors in order to test their assertions (which will often be self-protective) against the assessment by the court of what, objectively, was in the best interest of the company at the relevant time ...

In the case of *Tengku Dato Ibrahim PetraTengku Indra Petra v. Petra Perdana Bhd* the court recognised the division of power between management of the company that is vested with the board of directors from the averred rights of the shareholders to dictate management of the company to the board of directors by resolution. Such an authority could not be done by a resolution. His Lordship Azahar Mohamed FCJ said that:

[110] The starting point is the important 1906 case of *Automatic Self-Cleansing Filter Syndicate Co v. Cuninghame* [1906] 2 Ch 34, CA, where the English Court of Appeal made the statement of principle that made it clear that the division of powers between the board of directors and the company in general meeting depended on the construction of the articles of association and that, where powers had been vested in the Board, the general meeting could not interfere with their exercise. The directors ceased to be mere agents of the company. In that case, directors of a company refused to carry out a sale agreement to sell the assets of the company resolved upon by the company in general meeting because in their opinion it was not in the best
interests of the company. The directors relied for support of their decision on the articles of association, which delegated to them all powers of management. The members argued that the articles were subject to the general rule that agents must obey the directions of their principals.

[111] The English Court of Appeal held that the resolution of the general meeting was a nullity and could be ignored; the articles constituted a contract between all the shareholders by which it was agreed that the directors alone should manage. It was further held that the shareholders could not compel the directors to sell the assets according to their wish.

**In Good Faith (Bona Fide)**

The scope of good faith has been extended to include to act honestly as it previously was under the pre-2007 amendments. The phrase includes the deliberate disregard of the knowledge or consciousness that what is being done is not in the best interest of the company.

In good faith means more than acting honestly. The case of *Blackwell v. Moray & Anor* (1991) the court held that a newly appointed director failed to exercised his duties in a *bona fide* manner when he voted on a resolution to release a debt owed by another director to the company. He was completely ignorant and had accepted blindly the views of a director who had just resigned before he voted on the matter. The court held that to act in a *bona fide* manner, he should have at least considered the relevant material. Hence, due diligence by the director is expected and required.

**Company**

The company as a separate legal entity is distinct from the shareholders, employees or creditors of the company. Yet during the process of decision making, the interest of shareholders and employees during periods of solvency may factor in to decide the best interest of the company where the performance of the company may be affected by these entities. Where a proposal affects the rights of different groups of shareholders as against the other, the directors must also exercise their powers in good faith fairly as between the different classes of shareholders.

It is a question of construction on the facts in any given case. As in the case of *Allen v. Gold Reef of West Africa Ltd* cited in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor and Other Appeal* where best interest of the company included shareholders interest in case of a takeover.

... In considering whether the actions of directors were *bona fide* in the best interests of the company as a whole, the court is not obliged to look at the company as in some way disembodied from its members. The phrase ‘*bona fide* for the benefit of a company as a whole’ is derived from Lord Lindley’s comments in *Allen v. Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at p 671. It tends, by overuse without fresh reflection to become a ‘cant expression’ (see Brennan J in *New South Wales Rugby League Ltd v. Wade*).
In the present as in other contexts, the best interest certainly included the interest of the shareholders as the corporators with a direct state in take-over offer.

The test is whether an intelligent and honest man in the position of the director of the company could in the whole of the existing circumstances have reasonably believed that the transaction was for the benefit of the company.67

The directors would usually consider whether the transaction benefits the company as a corporate commercial entity. The decision would invariably impinge on the interest of the stakeholders like shareholders, employees and creditors. The decision not to distribute profits as dividends but plough them back into the company would clearly prefer the company interest over that of shareholders or employees as individuals. As long as the decision is made with proper purpose in the best interest of the company, it cannot be challenged as a breach of fiduciary duty.68

A nominee director who acted in securing the interest of his nominator also does not act in the interest of the company. Hence, a director should act best in the interest of the company as distinct to a certain majority group of shareholders. Such was the case of Choo Chin Thye v. Concrete Engineering Products Bhd & Anor69 where it was held:

From the above I find that Choo has not acted bona fide in the interest of CEPCO and neither did he promote and advance CEPCO’s interest nor considered relevant facts before committing the acts as alleged. His entire action throughout this period as director was solely towards the benefit and interest of the group that nominated him to the board. Such interest not only conflicted with those of the CEPCO but was disastrous to CEPCO.

Hence, acting in good faith does not mean the absence of fraud but that the director should act to promote the interest of the company and not self or others to cause harm to the company.

Retaining Discretion

The duty to retain discretion is part of the duty under s. 213 of the Companies Act 2016 to act in the company best interest in good faith. The ability to make decision in the company best interest is conditional on their ability to decide freely and not be fettered. The duty to retain discretion means that the director cannot contract not to exercise the discretionary powers given to them.70

This also involves nominee directors (whose duty is now codified), as Winslow J stated in Raffles Hotel Ltd v. Raynor71

A director who is a nominee of someone else should be left free to exercise his best judgment in the interests of the company he serves and not in accordance with directions of his patron.
The case of *John Crowther Group PLC v. Carpets Inter* was a case where a parent company the defendant agreed to sell shares in its subsidiary Carpets (UK) Ltd company to the plaintiff. The sale under the listing rule of the subsidiary which was a listed company required the approval of the defendant shareholders. The agreement stated that the defendants will use its best endeavours to recommend the proposal to its shareholders. It also provided that the board agreed to propose the resolution of acceptance to its shareholders irrespective of any other offers that may be made. The plaintiff also secured from a shareholder of the defendant holding 41.3% that it would support the motion. After the defendant sent out a circular to recommend the acceptance of the plaintiff’s offer to its shareholder, a more attractive bid was made by a rival. The defendant directors then sent out a circular to its shareholders recommending that the plaintiff’s bid should not be accepted. Prior to the meeting, the plaintiff sued for interlocutory relief seeking to hold the defendant to the terms of undertaking. The court found that the directors had not acted improperly by recommending that the plaintiff’s bid be not accepted. The construction of the undertaking given by the director to use best endeavour must be read in line with the directors’ duties to act in the best interest of their company and to make full and honest disclosure to the shareholders before they vote on such a resolution. That not to disclose the rival bid would be a breach of fiduciary duty of the directors. The court also noted that the court will not pre-empt the decision of the shareholders. It is to be noted that ultimately the shareholders held the final say in the matter even under the undertaking given.

The duty to retain discretion is not dependent on the no-conflict or no-profit rule but on duty to act in good faith for the best interest of the company.

An agreement that fetters the discretion of the director may be valid as long as the proposed action is in the interest of the company.

In the case of *Thorby v. Golberg*, the defendants were the only shareholders as well as the directors of a company who owned a piece of land that they wanted to demolish the existing building and replace it modern multi-storey building and sell or let the spaces. With the purpose to bring in capital into the company, an agreement was entered into with the plaintiff. This agreement contained a covenant to cause a directors meeting in which a number of the defendant directors will resign and a number of the plaintiff group be appointed as directors. The defendant failed to challenge the validity of the agreement on the ground it fettered the director’s discretion as it failed to show that it was not in the best interest of the company.

**Best Interest And Proper Purpose**

The use of powers must be for a proper purpose. First is to determine who has the power as illustrated in the case of *Tengku Dato Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd* above. Then, if so, is the exercised by the
authorised party proper and for the best interest of the company as discussed previously. The mere fact that there is power does not equate to propriety as the latter is coloured with motives of the exercise of power.

If it is improper, then it is tainted and liable to be challenged as is illustrated by the case of *Majlis Amanah Rakyat (MARA) v. Dato Rahim & Ors.* It is related to the power to appoint additional directors. In the given facts, the appointment of additional directors by the majority board of directors who comprised the minority shareholder was found to be made in an attempt to frustrate the majority shareholders from appointing additional directors at a general meeting. It was held to be improper. It was also held to infringe the right to the shareholder to appoint directors in the given case.

Likewise the issuance of shares designed to dilute the shareholding of a majority shareholder is also an improper purpose as will be discussed shortly.

The exercise of powers for self-interest is a clear abuse of power. The case of *CIMB v. Jaring Communications Sdn Bhd* is where the director, Dato Norhisam exercised his power to cause the company to manifestly suffer losses on account of the many and various payments made under his authorisation in favour of Utusan Printcorp, Eye Consolidated, his two sisters, his driver, and to himself, totaling an aggregate sum of RM29,002,285.36, in the total absence of any form of benefit accruing to the company. The court held that there was a breach of s. 132 of the Companies Act 1965 (currently s. 221 of the Companies Act 2016) as well as breaches of other sections relating to loans to directors and person connected to directors as well as fiduciary duties of the director.

The fiduciary is to have the best interest of the principal and not self or other interest when pursuing the affairs of the principals which the fiduciary is authorised to act. The office of a fiduciary is founded on selflessness. Selfishness is absolutely prohibited. It is the highest standard known in law.

**Exercise Of Power: Dishonesty Or Ignorance Irrelevant**

It does not matter if the power was exercised honestly or considered to be in interest of the company or within the scope of powers when it is not or that the directors were ignorant of the constitution or the legal requirements of the law. It must be for proper purpose in good faith in the best interest of the company.

In the case of *Re Duomatic Ltd* a payment was made to an ex-director as compensation for loss of office without complying the UK statutory provision for disclosure to the shareholders. The court held the directors liable for the payment made as the powers were not exercised validly. This is so even though the directors were held to act honestly out of ignorance of the law.
Proper Purpose

The directors cannot exercise their powers for a collateral purpose that is purpose other than which the power is conferred for. In the case of *Howard Smith Ltd v. Ampol Petroleum*,79 shareholding in the company Millers Holding held by Ampol Petroleum who held 30% and Bulkships who held 25%. Ampol made an offer to buy Miller remaining shares at $2.27 and the offer was rejected. Howard then offered $2.50 for the shares of the company. But the buy-out was did not materialise as Ampol and Bulkships decided not to sell their shares. Both of them held 55% of the share of the company. The board of Miller then issued new shares to Howard Smith in effect diluting the shareholding of the Ampol and Bulkships. It was argued by the board in Miller that the shares were issued to raise capital. However, the Privy Council held that need for capital was not immediate and the primary purpose of the allotment was to reduce the holdings of Ampol Ltd and Bulkships Ltd. It was held that the directors improperly exercised their power for such a collateral purpose which they are not authorised. It may be the intent is to benefit the third party.

In deciding the question of proper purpose, the court has to examine the power and determine the purpose for which the power was granted and if the substantial purpose or reason for which it was exercised was within the power. The power includes power to issue shares,80 register a transfer of shares,81 power to call for meetings82 and power to use company funds.

In the case of *Re Lee, Behrens & Co Ltd*83 guidance is given on the use of company funds:

Whether they be made under an express or implied power, all such grants involve an expenditure of the company’s money, and that money can only be spent for purposes reasonably incidental to the carrying on of the company’s business, and the validity of such grants is to be tested, as is shown in all the authorities, by the answers to three pertinent questions; (1) Is the transaction reasonably incidental to the carrying on of the company business and (ii) is it done for the benefit and to promote the prosperity of the company? The fundamental principle is that the funds, assets, goodwill and property of the company must be used for “corporate purposes” and the general principle is that if directors in the exercise of their powers apply such resources of the company which result in no corresponding benefit to the company or to the detriment of creditors, it would constitute an abuse of powers.

A fiduciary empowered to invest in equities for profit and is swayed by moral considerations when making the investment is in breach of duty to act in the best interests of his principal.84
Directors Also A Shareholder

In a case where the director is also a shareholder, an interesting question arises whether he is to exercise his powers in the company interest. It would seem that where a director is performing or acting in pursuance to a fiduciary duty to the company, he should not be governed or conflicted by his self-interest as a shareholder.  

Test (Best Interest Of The Company)

The case of *Pioneer Haven* elucidated the test of how to determine if there was proper exercise of the repealed s. 132 of the Companies Act 1965 (currently s. 213 of the Companies Act 2016) when it considered and rejected a claim against the board of directors for breach of s. 132 of the Companies Act 1965 when entering a joint-venture transaction.

In the words of the learned Zainun Ali JCA (as she then was):

[232] What then, is the test whether there is breach of such duty? Or putting it in another way in order for the decision of the directors to be challenged, what is the test?

[233] The test is nicely condensed in Ford’s Principles of Corporations Law (para. 8.060), that there will be a breach of duty if the act or decision is shown to be one which no reasonable board could consider to be within the interest of the company.

[234] This test is adopted in *Charterbridge Corporation Ltd v. Lloyds Bank Ltd* [1970] Ch 62 at 74, in that, to challenge a decision of the directors, the test is whether: ... an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company.

[235] The above principle is often referred to as the “Charterbridge Principle”.

It is also pertinent to note the fact that the court considered that it is for the company and not the court to decide the best interest of the company as long as it is not motivated by an improper purpose.

[270] What the defendant directors did was to advance the interests of the company and if they had such power, and there was nothing improper in that entry, we fail to see any impropriety on their part.

[271] In our view, impropriety only arises where the entry is dictated by an improper purpose ...

[275] When D3 reminded the Board of Directors that as long as they were directors of Ho Hup they owed the company a duty to act in its best interest and that they cannot derogate from their duties even though some of them may be removed the next day, it was under those circumstances that they considered for themselves in good faith what was best for Ho Hup. Thus, in exercising their powers as directors, what they were making was a business judgment for Ho Hup to agree to Bukit Jalil agreeing to proceed with the proposal to jointly develop the Land with
Pioneer Haven but on condition that Bukit Jalil’s minimum entitlement from the project shall not be less than RM265 million as opposed to the initial lower amount of RM200 million.

[276] In view of it being a business judgment within the deeming provision of s. 132(1B) of the Act which they made at Ho Hup’s board meeting on 16 March 2010, the court should be slow to interfere with it. This deeming provision is a statutory recognition of the common law principle that courts are reluctant to pass judgment on the merits of business decision taken in good faith or to substitute such decisions with their own. It must also not be lost sight of that none of the said directors (D4 to D8) had any personal interest in the JDA. There was neither any allegation nor proof whatsoever that they had acted in collusion with the other defendants to act to the detriment of Ho Hup.

[277] This business judgment deeming provision finds support in Australian High Courts. The following authority supports this principle:

[278] In Harlowe’s Nominees Pte Ltd v. Woodside (Lakes Entrance) Oil Co NL [1968] 121 CLR at p. 493, the court said that:

Directors in whom are vested the right and duty of deciding where the company’s interest lie and how they are to be served may be concerned with a wide range of practical consideration and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review by the Courts.

The Federal Court decision in Tengku Dato’ Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal affirmed the decision in Pioneer Haven.

The test to determine whether there is any breach of director duties combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director. The classic formulation of the subjective element in the test is found in Re Smith & Fawcett Ltd (supra). The test is objective in the sense that the director’s assessment of the company’s best interest is subject to an objective review or examination by the Courts. This is the test set out in Charterbridge Corporation Ltd v. Lloyds Bank Ltd adopted by our Court of Appeal in Pioneer Haven Sdn Bhd v. Ho Hup Construction.

Likewise the provision of the statutory business judgment rule allows the director to cease to have excessive worry about being sued for breach of their duty. It is also regarded as a safe harbour for directors who act in compliance of the same without improper motives as they will unlikely to find a court to hold them in breach of their duties to the company.

The Federal Court in Tengku Dato’ Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd also held that:

The statutory business judgment rule as provided under section 132(1B) of the Act is as stated in Howard Smith Ltd v. Ampol Ltd (supra): the Courts do not undertake the exercise of assessing the merits of a commercial or business judgment made by directors. Courts will not interfere with business decisions as long as the directors acted bona fide.
Business Judgment Rule

The business judgment rule under s. 214 of the Companies Act 2016 (previously s. 132(1B) of the repealed Companies Act 1965) provides:

A director who makes a business judgment is deemed to meet the requirements of the duty under (sub-s. 213(2) Companies Act 2016) and the equivalent duties under the common law and in equity if the director

(i) Makes the business judgment in good faith for a proper purpose;
(ii) Does not have a material personal interest in the subject matter of the business judgment;
(iii) informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
(iv) Reasonably believes that the business judgment is in the best interests of the company.

In effect, it allows a compliant director to plead that they have discharged their duties under s. 213(1) of the Companies Act 2016 and also the equivalent duties under common law and equity. Hence, the exercise of decision made with proper purpose is presumed to be in the best interest of the company if it is made in line with the business judgment rule.

The fiduciary duty is also simultaneously discharged along with statutory, contractual and tortious duty of the director. The business and entrepreneurship function of a company vehicle involves making a proper business decision in the best interest of the company which in turn involves taking of risk to make profit. This cannot be buckled down by the shackles of fiduciary duties. Nor is the court the venue of appeal in business decisions finds favour in the Court of Appeal decision in Tan Joo Chai v. Eco Water Technologies (M) Sdn Bhd.89

The question that arises is then what would be the improper purpose that might disallow application of the safe harbour provided. This in part is related to also questions as good faith and what is the proper purpose for a specific action or decision, if the best interest of the company is safeguarded and the related links to the rule of disclosure to avoid the no-conflict and no-profit rule of a fiduciary is observed.

The proper purpose to issue shares includes to raise capital, to issue shares to employees under employees share scheme or to issue shares to enable development of the company’s asset which could be part of the company plan to expand its business.90

In this regard to highlight, s. 218 of the Companies Act 2016 that requires consent for the use of company property, position of director, information acquired, opportunity of company and duty not to compete would also
additionally offer perspectives on the improper use of power of director. Likewise s. 221 of the Companies Act 2016 on failure to disclose conflicts and profits for fiduciary related transactions is another source for consideration.

In the case of *Zaharen Hj Zakaria v. Redmax Sdn Bhd & Other Appeals* The Court of Appeal held that the director breached s. 132 of the Companies Act 1965 (equivalent to s. 213 of the Companies Act 2016) in the evidence of misuse of monies of the companies (property) to make unauthorised payment to third party companies upon fictitious transactions. The first defendant director was held liable not only to repay the RM15,371. It is also to be noted that an exemplary damage was awarded against the first defendant for the sum of RM500,000. The decision here has recourse to civil or other sources of rule of law that imposes duties upon the director.

Under the header of proper purpose and best interest of the company, the director may act also in breach of his duty as a fiduciary when he contravenes his obligation to act in good faith to secure the company best interest, to act to protect the company interest, not making disclosure of material facts including circumstances of no conflict and no profit imposed on a fiduciary that would attract equitable intervention.

For non-fiduciary breaches for example failure to exercise reasonable care and negligence under s. 213(2) of the Companies Act 2016 or any contractual breaches in the contract of service or the articles of association, the common law and statutory remedies would be the recourse of action.

**Mixed Purposes**

If there is more than one improper competing purpose underlying the exercise of a power, there will be a breach of duty if the improper purpose was causative to the exercise of the power without a need to examine which is the dominant purpose.

The second part of this paper continues further into areas of fiduciary duties, trust and remedies.

**Endnotes:**

1. Malaysian Code on Corporate Governance 2017 para 1.1 refer to ethical behaviour, accountability, transparency and sustainability as essential to corporate governance. *The Bursa Guide to Excellence* 3rd edn 2018 states in the preface that the culture of ethical conduct, transparency and sustainable value creation are the need for a robust corporate governance.


5. The Companies Act 2016 was gazetted on 15 September 2016 and enforced 31 January 2017 save for s. 214 and Division 8 Part 111. Division 8 Part 111 came into force on 1 March 2018 www.ssm.gov.my.


15. *Land Credit Co of Ireland v. Lord Fermoy* (1869) LR Eq 7 at 10.


18. [2005] 6 CLJ 413.


22. Yap Sing Hock & Anor v. PP [1991] 2 CLJ 1410; [1991] 4 CLJ (Rep) 257. However the Supreme Court [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356 in the case held that the definitive sections were only applicable in the context of company law and not for criminal breach of trust and wrongful gains under ss. 405 and 409 of the Penal Code.

23. Re A Company (Ex parte Copp) [1989] BCLC 13, where a bank debenture holder exerting pressure on the board of directors and Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180 where a parent company collectively controlled the action of the board of the subsidiary company.

30. (1964) 112 CLR 597.
31. [2013] 9 MLJ 729 HC.
34. [1971] 1 MLJ 190.
42. [2016] 7 CLJ 881.
46. Fur v. Tomkies (1936) 54 CLR 583, 592.
48. (1854) 1 Macq 461.
51. (1843) 2 Hare 461.
52. (1916) 1 AC 554.
53. (1942) 1 All ER 378.
55. Grant v. United Kingdom Switchback Rlys Co (1888) 450 Ch D 135.


64. (1991) 9 ACLC 924.


69. [2004] 1 LNS 618 CA.


71. [1964] 1 LNS 158.

72. (1990) BCLC 460.

73. (1964) 112 CLR 597 (High Court, Australia).


75. Majlis Amanah Rakyat (MARA) v. Dato' Abd Rahim Abd Halim & Ors [2018] 8 CLJ 738.

76. [2017] 4 CLJ 465.


78. [1969] 2 Ch 365.

79. [1974] 1 All ER 1126.


82. Re Homer District Consolidated Gold Mines, ex parte Smith (1888) 39 Ch D 546.
83. [1932] 2 Ch 46.
85. Mills v. Mills (1938) 60 CLR 150 at 163.
87. [2018] 2 CLJ 641.
88. Section 214 Reliance on information provided by others and 215 responsibility for actions of delegate has reference and application in the exercise of business judgments.
89. [2015] 3 CLJ 929 CA.
91. [2016] 7 CLJ 380.
92. Harris v. Digital Pulse Pty Ltd [2003] 56 ASWLR 298, 197 ALR 626 held that exemplary damages being a common law remedy was not available for an equitable wrong.
94. See Sime Darby & Ors v. Dato Seri Ahmad Zubair @ Ahmad Zubir Hj Mursid & Others [2012] 9 MLJ 464 where a claim for negligence against the directors were made (current s. 213(2) Companies Act 2016). The criminal sanction for breach of duties and responsibilities of directors is under s. 213(3) of the Companies Act. A criminal charge under the Penal Code is also possible as seen under the charges under ss. 408 and 409 Penal Code brought against Dato Seri Ahmad Zubair. See case Ahmad Zubair Hj Murshid v. PP [2014] 1 CLJ 697.