

# **What Keeps A Director Awake at Night?: Expectations for a 21<sup>st</sup> Century Contemporary Board**

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Philip TN Koh  
Senior Partner  
Mah-Kamariyah & Philip Koh

# The One Single Thought That keeps Director Awake:

- When and in what circumstances can I be held Personally Responsible and Liable for any acts or omissions?

# The Enlarged Powers Of the Companies Commission Malaysia: Pt 1

- S.38 B (Offences by Body Corporate) imposes personal liability and may be charged severally or jointly in the same proceedings with the corp.
- If Corp is found to be guilty S.38B(1)(b)deems the director / officer to be guilty unless he “proves that the offence was committed without his knowledge, consent or connivance

## **CCM Act: enlarged powers Pt 2**

- And that the director / officer had taken all reasonable precautions, and exercise due diligence to prevent the commission of the offence

## CCM Enlarged Powers : Pt 3

- S15: power of Compounding by levying fine
- S20C(1) Power to issue guidelines, Practice Notes, notices or circulars; S20C(2) addressee of the guidelines under duty to comply S 20 D
- S20D Power to publish information
- S20E Power to take action: direct, impose administrative penalty, reprimand.
- Written notice and right to be heard.

# CCM Enlarged Powers Pt 4

- PT IV A Investigation & Enforcement Powers
- S 27B (1) to require Information
- S27C (1) to Conduct Inspection: access to place, books, documents
- S 27 D Power to Investigate
- S27E/27F Search & Seizure
- S27J Surrender of Travel Documents

# Expectations for Boards & Senior Management?

- Who Expects?
- What are the Expectations?
- How will the Expectations be fulfilled?

# Who expects

- The Regulators: The Securities Commission; The Bursa Malaysia; The Companies Commission Malaysia
- The Law: the Courts
- The Stakeholders: Shareholders; Creditors
- The Public: In Investing public; The Stakeholders; the Media



# Who is included in the Expectations?

- S 210 for purposes of Subdivision 3 (Directors' Duties & Responsibilities) a “director“ includes CEO, CFO, COO or “other person primarily responsible for the management of the company.”
- An Approach by Austin J (ASIC v Vines (2005)) suggests that two components are involved: 1) meaning of “management“; 2) determining the degree of participation

# What are Expectations?

- The Core expectation :
- “the responsibilities of the board include setting the company’s strategic aim, the leadership to put them into effect, supervising the management of the business and reporting to the shareholders on their stewardship. The Board’s actions are subject to laws, regulations and the shareholders in general meeting.”  
(The Australian Report of the Committee on the Financial aspects of Corporate Governance, 1992, para 2.5)

# The Older expectations has been replaced by Heightened

- “Of necessity, as the complexities of commercial life have intensified the community has come to expect more than formerly from directors whose task is to govern the affairs of the companies to which large sums of money are committed by way of equity capital or loan...One of the striking features of the law concerning directors duties is the insistence that directors accept more and more responsibility for oversight of the corporate affairs at the same time as the affairs of the companies become more and more complex and diverse.” Rogers CJ in *AWA Ltd v Daniels t/s Deloitte Haskins & Sells* (1992) 7 ACSR 759 at 864-5

# The Higher Duty of Care: Conventional vs Contemporary

- See Now Section 213 (2) (a) (b) of Companies Act 2016
- “what constitute the proper performance of the duties of a director of a particular company is considered dependent:
  - a) Upon the actual knowledge and experience of the individual director;
  - b) the nature and extent of the corporation’s business;
  - c) on the distribution of responsibilities in the particular corporation.”

# Conventional v Contemporary

- “Conventional wisdom held that a director need not exhibit, in the performance of duties, a greater degree of care, skill and diligence than may be expected from a person of his or her knowledge or experience...more recent wisdom has suggested that it is the essence of the responsibilities of directors that they take reasonable steps to place themselves in a position to guide and monitor the management of the company...a director is obliged to obtain at least a general understanding of the business of the company and the effect of a changing economy may have on the business of the company. Directors should bring an informed and independent judgment to bear on various matters that come before the Board for decision.”

# What does the Heightened expectations in care & skill mean?

- Director to take reasonable steps to place themselves in a position to guide and monitor i) the management of the company; ii) the senior officers and management team
- If a director has no special experience or expertise that director is NOT relieved of the duty to pay attention to matters that fall outside of her expertise
- If there is a transaction where potential conflict between interest and duty special vigilance need to be exercised

# Heightened Fiduciaries Duties: proscriptive or prescriptive?

- To act in beneficiaries' best interest
- To act impartially, excluding from consideration matters that are irrelevant and proper consideration to matters which are relevant
- Reasonable due care of a reasonable prudent person managing business as if his own
- Honesty and good faith
- Informed view in exercise of discretion not irresponsibly, capriciously or wantonly; and
- Exercise of powers with due consideration for the purpose of which power is conferred and not ulterior purpose (the above duties for "trustees" apply to directors in their capacity as fiduciaries see Parker V Tucker (2010) 77ACSR 725

# **In Re HIH Insurance Ltd (in Liq) (2002) 41 ACSR 72 at 232-3**

- Director under an obligation not to promote his personal interest by making or pursuing a gain where there is a conflict or a real or substantial possibility of a conflict
- To assess real sensible possibility of conflict a reasonable person looking at the relevant facts and circumstances of a particular case
- A director may act with personal interest even though the director has not freed his mind of the personal interest provided that it is not the actuating motive rather than bona fide concern for company and fairness as between members
- In certain circumstances mere disclosure of conflict is insufficient (if a director is in a position of power and influence as that director may also be under a positive duty to take care of the company by preventing the transaction from taking place)
- What action beyond disclosure will depend on matters as to degree the director has been involved in the transaction, the gravity of outcomes



# Reliance on information provided by others: S.215 of Companies Act 2016

- As general law a director is entitled without verification on the judgment, information and advice of management. However reliance would be unreasonable where directors know, or by exercise of ordinary care should have known, any facts which will deny reliance on others
- Reliance must be in good faith and after making an independent assessment of the information & advice

# Reasonableness of reliance or delegation

- the function is such that it may be properly left to such officers
- the extent to which the director is put on inquiry, or given the facts of a case, should have been put on inquiry
- the relationship between the director and delegate, must be such that the director honestly holds the belief that the delegate is trustworthy, competent and someone whom reliance can be placed.  
Knowledge that the delegate is dishonest or incompetent will make the reliance unreasonable
- the risk involved and the nature of the transaction
- the extent of steps taken by the director of inquiries made or other circumstances engendering trust (see Santow J at HIH at page 372)

# **Delegate & Don't Abdicate: S.218**

- Directors remain responsible for the exercise of the power by the delegate
- There must be reasonable grounds at all times that delegate would exercise power in conformity of provisions of law & co. constitution
- Directors believed on reasonable grounds, in good faith and after making a proper inquiry, that delegate was responsible & competent

# Prohibition vs improper use of property, information or position

- S.218 encapsulates what is known as “Corporate Opportunity” doctrine
- It prohibits a director or “officer“ unless with consent or ratification of a general meeting from abuse of position or misuse of corp. property or information or engage in a business in competition with the company

# Examples

- Failure to ensure the making of loans only in accordance with its' authorized practices
- The company to having a system of controls and audit to avoid defalcations or commission of breaches of law
- If transaction has conflict or potential of real conflict in a context requiring special vigilance, calling for scrupulous concern on part of officers to ensure that proper approvals are procured and whilst the primary responsibility is placed on that director proposing the transaction this does Not excuse other directors or officers who become aware of the transaction.

# Additional Expectations

- To become familiar with the fundamentals of the business
- To keep informed of company's activities
- To monitor generally the company's affairs
- To maintain familiarity with the financial status of the company by review of the financial statements and board papers and to make further enquiries where appropriate
- To have a reasonably informed opinion of company's financial capacity (see *ASC v Rich* [2009] NSWSC 1229 at 7203)

THANK YOU