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REFORM OF THE LAW RELATING TO DIRECTORS' DUTIES IN MALAYSIA

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ABSTRACT

The Malaysian legislature recently passed the Companies (Amendment) Act 2007 which introduced significant and far-reaching changes for Malaysian companies. In particular, important changes were made to the law relating to directors' statutory and common law duties. Among the changes are the codification of certain common law principles relating to directors' duties and the introduction of new concepts such as the Business Judgement Rule. There is also an attempt to provide statutory clarification as to the role and function of the board of directors in a company. The central theme of these amendments appears to be the implementation of a strong and effective corporate governance regime in Malaysia. Needless to say, these reforms are consistent with the objective of the Malaysian corporate law reform programme to modernise the present legislative framework and to facilitate an effective and competitive business environment in Malaysia. This paper examines some of the provisions in the Companies (Amendment) Act 2007 which relate to directors' statutory and common law duties and considers their implications on the corporate law regime in Malaysia.

1.0 Introduction

Malaysian legislation relating to companies has always been vibrant and progressive. Since 1965 the Companies Act 1965 (hereafter referred to as the principal Act) has been amended no less than seventeen times.[1] The year 2007 witnessed the enactment of another Amendment Act, the Companies (Amendment) Act 2007 (Act A1299) (hereafter referred to as "Act A1299"). Act A1299, which came into effect on 15 August 2007, is a major milestone in the history of company law legislation in Malaysia. It creates amendments, substitutions and new provisions which will have a significant and wide reaching effect, principally on directors. The central theme of Act A1299 appears to be the implementation of a strong and effective corporate governance regime. Its contents mirror to a great extent the recommendations of the High Level Finance Committee Report on Corporate Governance which was published in 1999, soon after the calamitous financial storm that swept across Asia in the period 1997-1998.

In this paper, the writer aims to examine some of the changes brought about to directors' statutory and common law duties in Malaysia by Act A1299. It must be mentioned that Act A1299 also deals with matters other than directors' duties and that those matters are not dealt with in this paper.

The relevant provisions affecting directors' duties are discussed, in parts II- XVIII below.

2.0 Section 132 of the Companies Act 1965 - Directors' Fiduciary Duties and Duties of Care and Skill

Before Act A1299, section 132(1) of the principal Act contained a feeble and inadequate attempt to state in statutory form, directors' fiduciary duties and their duties of care and skill. The said provision reads:

(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

The words "honestly" and "diligence" were never adequately determined by case law in Malaysia. In practice Malaysian courts have shown little enthusiasm to utilise this provision[2] as a guide to decide on matters relating to directors fiduciary duties and duties relating to care and skill. Instead most cases[3] have shown their readiness to seek the aid of the rich English case law on the subject. In this context, it may be noted that the courts were entitled to use such cases by virtue of s 132(5). This is because s 132(5) reads, "This section is in addition to and not in derogation of any other written law or *rule of law*[4] relating to the duty or liability of the directors or officers of the company".

The High Level Finance Committee Report on Corporate Governance recognised the area of directors' fiduciary duties as one which was "crucially important".[5] One of its recommendations was that legislation should be enacted to "set out clearly the obligations of directors in their dealings with the company in conflict situations and the ways in which such conflicts may be managed without detriment to the company". Its principal recommendation in this area was that the common law fiduciary duty to avoid conflicts of interest should be codified into statutory form.

The recommendations of the Committee have, to some extent, been implemented with the enactment of new provisions substituting the existing provisions in ss 132(1) and 132(2).

A. Contents of the Substituted Section 132(1)

The contents of s 132(1) have been substituted to read as follows:

> (1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in
> the best interest of the company.

It is well established at common law and equity that directors must act in good faith in what they consider is in the best interest of the company. Added to this is the closely associated rule that directors must exercise their powers for a proper purpose. It is submitted that the new contents of s 132(1) will add nothing new to the existing common law and equity on the subject as it is well established by case law, that directors are fiduciaries and that the powers conferred on them must be exercised bona fide in the interest of the company and not for "some private advantage or for any purpose foreign to the power".[6] It may also be noted that the new s 132(1) is restricted to the exercise of powers and makes no specific reference to *acts* of directors. It is submitted that a more comprehensive effect could have been achieved by the legislature if the words "act, and" had been inserted between the word "times" and the word "exercise" in the new s 132(1).

A point to be noted is that neither the new s 132(1) nor any other amendment made by Act A1299 deals with another closely linked duty to the exercise of the powers of directors, namely that directors must always exercise independent judgment and that they must not fetter their discretion. Thus, where it is alleged in Malaysia that directors have in fact fettered their discretion, resort must be made to equity and common law. At common law the rule regarding this duty of directors to exercise independent judgment has been somewhat modified by *Fulham Football Club Ltd* v *Cabra Estates plc*,[7] which, following the Australian case of *Thorby* v *Goldberg*,[8] held that directors may enter into an agreement which in fact provides that they will act in a particular way in future, if at the time of the agreement, they bona fide consider that it is in the interest of the company to so fetter their discretion. Whether a similar approach will be adopted by the Malaysian courts remains to be seen.

B. Section 132(2) – Prohibitions against Use of Company's Property, Etc.

Before Act A1299, the original s 132(2) provided that an officer (which by the definition in s 4 of the principal Act includes a director) or an agent of a company or an officer of the Stock Exchange shall not make an improper use of *any information* acquired by virtue of his position to gain directly or indirectly an advantage for himself or for any other person or cause detriment to the company. The provision made no reference to an improper use of a company's property by a director or officer of the company. Also there was no specific reference to the expropriation of any opportunity of the company which a director or officer became aware of. But, it is submitted that this omission did not exclude the expropriation or diversion of corporate opportunity from its ambit as such misdeeds almost invariably arose from the misuse of *information* acquired by virtue of a director's or officer's position. Also, before Act A1299, the principal Act did not deal with the thorny issue of whether any breach of fiduciary duty could be ratified by the members in a general meeting, or with the question whether directors could engage in business which is in competition with the company.

Act A1299 amends s 132(2) by replacing the existing subsection with the following:

Prohibition against improper use of the company's property, position, corporate opportunity or competing with the company

(2) A director or officer of a company shall not, *without the consent or ratification of a general meeting*[9]
   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 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.

The wording of s 132(2) in the form enacted raises a number of significant questions and these are dealt with below. At the outset, it may be noted that the five transgressions listed in s 132(2) (a) to (e) are only prohibited without the consent or ratification of a general meeting and if they are made to gain directly or indirectly a benefit for the director or any other person or cause detriment to the company.

C. Significance of the Words "Shall Not Without the Consent or Ratification of a General Meeting"

The words "shall not without the consent or ratification of a general meeting" suggest that the prohibitions listed in s 132(2) may not be wrongdoings if they are consented to or ratified by the general meeting. At common law, a valid consent or ratification of the general meeting regarding a wrongful conduct of a director, may amount to a decision not to sue him in respect of that wrongful conduct. Thus an effective consent or ratification of a wrongdoing may adversely affect a future suit against a director by the company, or a derivative action by members, regarding that wrongdoing. A crucial question, therefore, is whether there are any limitations placed on the general meeting when it purports to ratify or give its consent to the prohibitions in the new s 132(2). Unfortunately, the section is silent on this point.

At common law, the general meeting may to some extent release directors from their fiduciary obligations[10] but there are limits to the exercise of the power.[11] It is difficult to state the limitations placed on the general meeting at common law when the general meeting purports to consent to or ratify a wrongdoing by directors.[12] But the legal position regarding a consent or ratification obtained by the use of the votes of wrongdoers or those under their influence is fairly clear in cases which can be classified as "fraud on the company" or a "fraud on the minority".[13] Such ratification will not release the wrongdoers from liability. Although the real meaning of the aforesaid expressions has never been settled, it is clear that they include a wrongful act which amounts to an expropriation of the company's property[14] or the company's opportunity[15] or where the expropriation involves members' property.[16]

Reverting to items (a), (b), (c) and (d) of s 132(2), the use by a director for gain of the property of the company, or information acquired by virtue of his position or a corporate opportunity which the company could have utilised for its profit may amount to a fraud on the minority or a fraud on the company and may give grounds for a suit by the company or a derivative suit by members. The reason for allowing the general meeting to consent to or ratify the transgressions mentioned above is not clear. In providing for ratification or consent, it is possible that the legislature intended that such ratification or consent is to be given by independent shareholders not involved directly or indirectly in the wrongdoing but there is no clue as to whether such or other restraints are placed on the general meeting.[17] It is submitted that, as a measure of protection for the company and its minority members, the legislature should have made it clear that a consent or ratification referred to in s 132(2) would be ineffective unless it was achieved without the votes of wrongdoers or of those who were under their influence or who had a personal interest in condoning the wrong.[18] It may also be mentioned that as s 132 (2) does not specify the type of resolution required for a consent or ratification, an ordinary resolution (which may not be difficult to obtain) may be sufficient.

D. Link between s 132(2) and the New Statutory Derivative Action Created by Act A1299

At this point, reference must be made to the new ss 181A to 181E inserted into the principal Act by Act A1299 and which create a statutory derivative action for the benefit of the members and the other complainants listed in s 181A(4). Under s 181A (1), this statutory action is only possible with the leave of the court. s 181B(4) provides that the court in deciding whether or not leave shall be granted shall take into account whether the complainant is acting in good faith and whether it appears prima facie to be in the best interest of the company that the application be granted. More importantly, where there is a ratification of a director's wrongdoing its effect is dealt with in s 181D which reads:

> If members of a company, ratify or approve the conduct, the subject matter of the action
> a) the ratification or approval does not prevent any person from bringing, intervening in or defending proceedings with the leave of court;
> b) the application for leave or action brought or intervened in shall not be stayed or dismissed by reason only of the ratification or approval; and
> c) the Court may take into account the ratification or approval in determining what order to make.

Reverting once more to s 132(2), the ratification referred to in it will not prevent a *member* from bringing a statutory derivative action with the leave of the court under the new provisions. However, under s 181D(c), the court may take into account the ratification in determining what order it would make. The factors that the court will take into account are not clear. A possibility is that the court may not recognise a ratification of an act which at common law amounts to a fraud on the minority or a fraud on the company. Another possibility is that the court may not give effect to ratification unless it was achieved by the votes of independent members with no direct or indirect link to the alleged wrongdoers.[19]

> It must also be noted that the common law derivative action appears to be preserved by the new s 181A (3) which states:
>
> The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.

The difficulties of the common law derivative action have made it an unattractive remedy[20] for members. It is hoped that the courts will interpret the new provisions liberally free of the hurdles encountered by plaintiffs at common law. It must also be mentioned that the introduction of the new statutory derivative action will not affect a member's right to present a petition under s 181(1) where he alleges that a ratification of the prohibitions in s 132(2) amount to one of the grounds mentioned in s 181(1), namely that they amount to oppression, disregard of interests, unfair discrimination or prejudice.

E. Director Engaging In Competing Business

Reference must once more be made to s 132(2) (e) which provides that a director shall not, "engage in business which is in competition with the company". At common law it was never entirely clear whether a director could compete with his company. The cases usually

relied on to state that he could, actually involved competing directorships.[21] The effect of these cases was that directors of a company were, subject to the articles of association, allowed to be members of a rival board provided they did not disclose confidential information of the first company to the second.

After the enactment of s 132(2) (e), a director may not, without the consent or ratification of a general meeting, engage in a business enterprise which is in competition with the business of his company. The degree and scope of his engagement for the purpose of this prohibition is unclear. Secondly, Act A1299 offers no clue in relation to the question whether directors do "engage in business which is in competition with the company" when they accept directorships in a rival company. It is unlikely that the prohibition in s 132(2) (e) includes competing directorships, but the possibility of it being construed otherwise by the court cannot be ruled out.

The effect of the new provision is that a general meeting may consent to or ratify a business activity of the directors which is in competition with the company. Where directors do engage in a competing business activity there is a possibility that they can cause serious harm to the company and its members. As in the case of a consent or ratification of the prohibitions stated in s 132(2) (a) to (d) there is no indication in the section whether there are limits which are applicable where a general meeting gives its consent or makes a ratification of a breach of the said prohibitions. The comments and observations made earlier regarding ratification of the prohibition in s 132(2) (a) to (d) in part II sub-part C of this paper are also relevant in this case.

F. Voting By an Interested Director

Another associated question not dealt by with by Act A1299 is whether the affected director may vote when a proposed resolution to ratify any of the prohibitions listed in sub-sections (a) – (e) of s 132(2) is tabled before the general meeting. The traditional rule is that votes of shareholders are proprietary rights and the member is free to vote as he likes, even though he has an interest in the matter voted on.[22] The rule should not apply to a shareholder-director in respect of the prohibitions mentioned above as it is possible for some of them to be cases of fraud on the company or fraud on the minority. This is clearly illustrated in *Cook* v *Deeks*.[23] A further pertinent issue which Act A1299 does not address, is whether a director may vote if there is no fraud on the minority or fraud on the company. The writer is of the opinion that Act A1299 should have made it clear that an interested person (which will include the affected director) should not under any circumstances, whether or not there is a fraud on the company or a fraud on the minority, be allowed to vote on a resolution to ratify a breach of s 132(2) (a)-(e). It is important that a resolution to ratify a wrongdoing should be passed by disinterested members free of any influence, direct or indirect, of the wrongdoers.

Finally it must be mentioned that the expression 'director' has, for the purpose of s 132, been extended by the new s 132 (6) to include "the chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operations or financial management of a company, by whatever name called". Thus the net has been spread much wider in order to catch other functionaries involved in senior management of a company.

3.0 Section 132 (1A) of the Companies Act 1965– Directors' Duties of Care, Skill and Diligence

The common law took an indulgent attitude to this subject and the law was never developed with clarity or precision, or to deal with the increasing professionalism of directors. The traditional starting point of any discussion of the common law has always been Romer J's historic, but much criticized, three propositions in *Re City Equitable Fire Insurance Company*.[24] The first of these relates to the degree of skill which a director must display in the discharge of his duties. On this Romer J said,

> A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.[25]

This slack subjective standard has been disparaged by commentators[26] and judges[27] as to be of little value. Under the test, a director with little or no skill or little or no experience stood a better chance of escaping liability.[28] It did not encourage directors to acquire skills or experience.

In recent years, there has been a visible departure in English case law from the lenient standard of Romer J's first proposition.[29] *Re D'Jan of London Ltd*[30] indicated a new approach to a director's standard of care. In that case, Hoffman J accepted the standard stated in s 214(4) of the Insolvency Act 1986 of England. His Lordship was of the view that the standard required by this section correctly stated the common law duty owed by a director to his company. This was unusual in that a statutory standard which was enacted for wrongful trading was applied in a common law case of director's alleged negligence.[31] In Hoffman J's words,[32]

> In my view, the duty of care owed by a director at common law is accurately stated in s 214 (4) of the Insolvency Act 1986. It is the conduct of
>
> 'a reasonably diligent person having both – (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and (b) the general knowledge, skill and experience that director has.'[33]

This new development has been praised by the Law Commission in England as "a remarkable example of the modernisation of the law by the judges".[34] The Companies Act 2006 of England now provides a new section 174 modelled on this dual or twofold objective/subjective standard.

In Malaysia, there was a limited statutory recognition of directors' duty to show diligence in the original s 132(1), which provided that a director shall "use reasonable diligence in the discharge of the duties of his office". This statutory provision was never developed by the Malaysian courts. On the other hand, it appears to be generally assumed that the propositions of Romer J applied.[35] In 1999, the High Level Finance Committee Report on

Corporate Governance recognised the importance of the subject and recommended that s 132(1) should be amended to incorporate the duties of skill and care of directors but that the section "should not[36] be amended to clarify that the standard of care imposed is with reference to the particular circumstances of the director".[37]

Act A1299 now amends the principal Act by inserting immediately after s 132(1), the following:

(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.

The statement in s 132(1A) reflects the dual or twofold standard which has been advocated in England. The first part of the standard is an objective standard which today becomes the minimum benchmark for directors. If the director does not meet this standard, the second subjective test need not be considered. Where a director does meet the first objective standard, he may still be liable if he fails to meet the subjective standard in the second part, which is based on any additional knowledge, skill and experience which the director in fact has.

This new statutory statement of the standard of care of directors is most welcome. Although the courts in Malaysia may ultimately by judicial law-making arrive at a somewhat similar position, the evolution process may be slow[38] and may take many years.

4.0 Section 132 (1E) of the Companies Act 1965 – Nominee Directors

Common examples of nominee directors are directors who are nominated by a majority shareholder or a debenture holder. A nominee director may be put in an extremely difficult position when his duty to his company and his obligations to his nominator are in conflict. English common law has taken a strict stand over this matter and this is reflected in the House of Lords' case of *Scottish Cooperative Wholesale Society Ltd v Meyer*[39] and decision of the Privy Council in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd.*[40] Under English common law the duties of a nominee director are no different from that of an ordinary director. A nominee director's first duty is to his company and he must not allow this duty to be compromised by taking into account the interests of his nominator.

The difficulty involved in asking nominee directors to put aside the interests of their nominator was recognised in other common law jurisdictions. For instance, Jacobs J in the Australian case of *Re Broadcasting Station 2 GB Pty Ltd*,[41] was of the opinion that a nominee director may take into account his nominators' interest if he honestly believed that the nominator's interest corresponded with the interest of the company.[42] In the New Zealand case of *Berlei Hestia (N.Z) Ltd v Fernybough*[43] Mahon J said,[44]

> The stage has already been reached according to some commentators where nominee directors will be absolved from suggested breach of duty to the company merely because they act in furtherance of the interests of

> their appointers, provided their conduct accords with a bona fide belief that the interests of the corporate entity are likewise being advanced.

In *Oversea Chinese Banking Corp Ltd and another* v *Justlogin Pte Ltd* [45] Chao Hick Tin JA in the Court of Appeal of Singapore after referring to the strict rule that the duty of the nominee director is no different from that of an ordinary director said,

> But that is not to say that a nominee director must act against the interest of his appointor. A nominee director may take into account the interest of his appointor if such interest does not conflict with the interest of the company; see *Kumagai Gumi Co Ltd* v *Zenecon Pte Ltd* [1995] 2 SLR 297 at 315 [58]. The court will only interfere if it is of the view that no reasonable director would consider the action taken to be in the interest of the company.

Another Australian case, *Levin v Clark,*[46] illustrates that the terms or special circumstances under which a company accepted a nominee director may be construed as a waiver by the company of the strict requirements imposed by the common law upon a nominee director. Few would hesitate to commend the practical, sensible and realistic approach in these cases.

In addition, some common law jurisdictions have created special statutory exceptions[47] to the strict common law rule. For example, statute may, subject to certain conditions being met, permit a director of a wholly owned subsidiary to act in the interests of its holding company.

There is a dearth of Malaysian case law[48] on this subject but the legal position may now be considered to be reasonably clear following the enactment of Act A1299 which adds a new subsection (1E) to s 132. The new provision reads:

> (1E) A director, who was appointed by virtue of his position as an employee of a company, or who was appointed by or as a representative of a shareholder, employer or debenture holder, shall act in the best interest of the company and in the event of any conflict between his duty to act in the best interest of the company and his duty to his nominator, he shall not subordinate his duty to act in the best interest of the company to his duty to his nominator.

It is noted that s 132(1E) lists the categories of nominee directors who come under the section's ambit. The list is wide enough to cover the usual kind of nominee director. The duty imposed by the new provision is similar to the duty under the common law. Whether the section will be interpreted liberally or strictly by the courts remains to be seen. A point to note is that the new provision makes no exception. The strict rule seemingly applies even in the case of the director of a wholly owned subsidiary. However, a possible, but limited, escape route is the wording of the section, which is that a nominee director "shall not *subordinate*[49] his duty to act in the best interest of the company to his duty to his nominator". Thus it is arguable that he may, as was stated in the Australian and New Zealand case law mentioned above, act in the interest of his nominator provided that his act

also advances the interest of the company or does not conflict with his duty to the company.

5.0 Sections 132(1C) and 132(1D) of the Companies Act 1965 - Reliance on Information Provided by Others

It is unavoidable that in exercising their powers, or in carrying out their functions, directors have to rely on information provided by others. Both the High Level Finance Committee Report on Corporate Governance[50] and the Corporate Law Reform Committee[51] recognized the importance of allowing directors to rely on others in order to obtain information. The High Level Finance Committee Report pointed out that if directors are unable to rely on others to obtain information, they would be forced to make detailed and exhaustive inquiries into every matter and as a result delay the decision-making process.[52]
Act A1299 inserts a new subsection (1C) that provides that a director may rely on information, professional or expert advice, opinions, reports or statements including financial statements or other financial data prepared, presented or made by the person mentioned in the subsection. The persons are, (i) an officer of the company whom the director believes on reasonable grounds to be reliable and competent in respect of the matters concerned, (ii) any other person retained by the company in connection with matters involving skills or expertise, where the directors believe on reasonable grounds that the matters concerned are within the persons' professional or expert competence, (iii) another director concerning matters within that directors' authority or (iv) any committee of the board (on which the delegating director did not serve) concerning matters within that committee's authority.

It is clear from an ensuing new subsection (1D) that blind reliance, reliance without inquiry or reliance without independently weighing the relevant information will not protect the director. This new provision creates two requirements that must be fulfilled if reliance is deemed to have been made on reasonable grounds. First, the reliance must be made in good faith. Secondly, the reliance must have been made after making an independent assessment of the information, advice, opinion, report, statement or financial data having regard to the directors' knowledge of the company and the complexity of its structure and operation.

These new developments are fairly reliable indicators on when directors can rely on information provided by others.

6.0 Sections 132 (1F) and 132 (1G) of the Companies Act 1965 - Directors' Rights and Responsibilities In Respect of Delegation of Their Powers

Except in the case of small companies, delegation by the board of some of its management functions is inevitable. The third proposition of Romer J in *Re City Equitable Fire Insurance*[53] dealt with directors' powers of delegation. His Lordship said,

> In respect of all duties that, having regard to the exigencies of business and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

In England, it is now accepted that Romer J's statement does not protect the directors when they had placed unqualified or blind reliance on the person to whom they had delegated their task. Also, delegation, even though made in good faith, does not release them from supervising the discharge of the function they had delegated. A director cannot delegate and abdicate all responsibility for the delegatee's acts and omissions[54]. In Malaysia, the High Level Finance Committee Report on Corporate Governance[55] recommended that the directors' power to delegate and the rule that they may rely on the information provided by others be put in statutory form. These recommendations are now implemented in Act A1299. Act A1299 amends the parent Act by inserting a new subsection (1F) to s 132 which reads:

> (1F) Except as is otherwise provided by this Act, the memorandum or articles of association of the company or any resolution of the board of directors or shareholders of the company, the directors may delegate any power of the board of directors to any committee to the board of directors, director, officer, employee, expert or any other person and where the directors have delegated any power, the directors are responsible for the exercise of such power by the delegatee as if such power had been exercised by the directors themselves.

At first sight, that part of s 132(1F) which provides that "the directors are responsible for the exercise of such power by the delegatee as if such power had been exercised by the directors themselves," may appear to be overly rigorous in that it may appear to make directors liable even though they had taken the necessary precautions to prevent a wrongdoing by the delegatee. But this is not so, for an ensuing new subsection (1G) provides that directors are not responsible under subsection (1F) if they believed, on reasonable grounds, at all the times that the delegatee would use the power delegated in conformity with the duties of the director under the principal Act and the company's constitution. An additional requirement is that the directors believed on reasonable grounds and in good faith (and after making proper enquiries if the circumstances warranted the need for one) that the delegatee was reliable and competent to exercise the power delegated.

Neither s 132(1F) nor the ensuing subsection (1G) (discussed below) expressly say that the power to delegate is subject to reasonable supervision or monitoring by the directors. It is submitted that despite this omission, directors cannot escape liability for the proper exercise of any of their functions by merely delegating their power in good faith to a committee or one of the persons mentioned in the section. Malaysian courts are likely to hold that directors are bound to monitor or supervise the exercise of the functions delegated unless the circumstances indicate that supervision may be reasonably excused.

Considered overall, the new subsections, (1F) and (1G) are useful additions to the statutory law dealing with directors' duties. Whilst recognising in statutory form that the directors can delegate their powers the new subsections impose requirements which attempt to ensure that the exercise of the power of delegation is responsible, honest and informed. These new provisions will serve to promote effective corporate governance.

7.0 Section 132 (1B) - Business Judgment Rule

The board of a company involved in a commercial enterprise cannot totally avoid making business judgments that involve risk taking. Most business opportunities available to a company, come inevitably with the attendant risk that the opportunity, if exploited, may go wrong and cause loss to the company. No one will deny that it is proper to protect the directors over a business judgment that has gone wrong if they had exercised their judgment with responsibility, honesty and in the best interest of the company.

The High Level Finance Committee Report on Corporate Governance[56] noted the existence of a business judgment rule to protect directors in the United States[57] and Australia[58] and recommended the enactment of a statutory provision on the subject.[59]

Act A1299 now incorporates a business judgment rule modelled on s 180 (2) of the Australian Corporations Act 2001 by inserting a new subsection (1B) in s 132. The new provision reads as follows:

(1B) A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A)[60] and the equivalent duties under the common law and in equity if the director

(a) makes the business judgment in good faith for a proper purpose;
(b) does not have a material personal interest in the subject matter of the business judgment;
(c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
(d) reasonably believes that the business judgment is in the best interest of the company.

At the outset, reference must be made to the definition of "business judgment" in a new provision in s 132(6). This provides that business judgment means "any decision on whether or not to take action in respect of a matter relevant to the business of the company". This was probably enacted to cover both acts and omissions in relation to a business decision. The writer would submit that the wording of the definition is not comprehensive. The wording creates some doubt as to whether the definition covers all decisions in relation to the business activity of the company or only covers decisions as to whether to take or not to take action in respect of a matter. It is suggested that a better alternative would be one with the word "includes" before the words "any decision" or a definition without the words "whether or not to take action" so that it would cover every decision in relation to the business of the company.

It may be noted that a director only enjoys the protection of the business judgment rule if he does not have a "material" personal interest in the subject-matter of the business judgment but there is ambiguity as to when an interest will be "material".

The enactment of the business judgment rule as part of the principal Act is a welcome development. Courts have traditionally demonstrated a reluctance to assess or judge the wisdom of business and management decisions by directors.[61] The new provision will

enable both the board and the court to determine when a business judgment will protect directors from a suit if their business judgment has gone wrong and caused loss to the company.

As indicated above, the common law courts have shown disinclination to question directors' business judgments and management decisions and this is reflected in the new statutory provisions. At this stage it is not clear how far the courts will go in using the rule to protect directors. A pertinent question which may confront the court in the future is whether, despite the business judgment rule, courts may still examine directors' business judgments where they have made a grave error in their decision making process thus raising doubts as to their good faith.[62] It is to be noted that if the director satisfies the requirements of subsection 1B, he is deemed "to meet the requirements of the duty under subsection 1A and the equivalent duties under the common law and in equity". The duty under s 132(1A) was discussed earlier in part II of this paper.

8.0 Section 131 of the Companies Act 1965 – Disclosure of Directors' Interests In Contracts

Section 131(1) of the principal Act imposes a duty on every director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to disclose his interest at a meeting of the directors of the company. The disclosure must be made as soon as practicable after the relevant facts have come to his knowledge. Failure to comply with s 131(1) is a criminal offence with a penalty of imprisonment for seven years or a fine of one hundred and fifty thousand ringgit or both.

A. Addition Of A New Subsection To Deal With The Interest Of A Spouse Or Child Of A Director

Section 131 is amended by the addition of a new subsection (7A) which reads:

> For the purpose of this section, an interest of the spouse of a director of a company (not being herself or himself a director of the company) and an interest of a child, including adopted child or stepchild, of a director of the company (not being himself or herself a director of the company) in the shares or debenture of the company, shall be treated as an interest in the contract and proposed contract.

The categories of family members specified in the new provision appear to be exhaustive and one may question the need for restricting the list to these limited persons.

Further, the interpretation of this section is bound to cause difficulties. It is to be noted that the interest of the family members referred to in the new sub-section is the interest in the shares or debentures of "the company", and the phrase, "the company" appears to refer to the *company of the director concerned*, and not to the *other contracting party* where the other party is a company. The need for such disclosure is not clear as one would have thought that the interest of the spouse or child in the other contracting party is the relevant interest for the purpose of s 131(1). The Explanatory Statement of the Bill for Act A1299 states that the intention of the amendment is "to provide that the interest of a spouse and a child including adopted child and step-child is included in the *interests that a director must disclose*[63] under section 131". It is respectfully submitted that the wording of the

amendment does not reflect this explanation. This is because the interest which a director *must disclose* to prevent contravention of s 131(1) is not his interest in his own company but his interest in respect of the other contracting party. Again, the degree or level of interest in the shares or debentures is not specified. On a strict interpretation of the new provision, disclosure may be necessary even if the interest is minimal. This difficulty of determining the level or extent of interest for the purpose of disclosure has been a feature of s 131 from the date of its inception. It is submitted that even the addition of the word "material" before the word "interest" would not have totally removed the difficulty for this would simply raise the enquiry as to what level or degree of holding would be deemed to be material. This, it is submitted, is the problem faced with the construction of another component of s 131, namely, s 131(2). This section exempts a director from disclosure where his interest consists only of being a member or creditor of the other contracting party, where the other party is a corporation, "if the interest of the director may properly be regarded as not being a material interest". The word "material" is not defined in s 131 or in s 4, the definition section of the principal Act.[64]

The writer would have preferred greater clarity in the drafting of s 131 for a breach of the section is a criminal offence carrying severe penalties.

B. Addition of a New Subsection to Provide for a Civil Remedy

Before s 131 was amended by Act A1299 the said section did not contain any provision which dealt directly[65] with the civil consequences which followed its breach. Act A1299 now adds a new subsection (7B) to s 131. This subsection makes a contract entered into in contravention of s 131 voidable at the instance of the company. The new subsection creates a happy situation for the company which may elect to adopt a favourable contract even though it is tainted by a transgression of s 131. The same new section puts a restraint on the company's right to rescind the contract by creating an exception which applies where the tainted contract is "in favour of any person dealing with the company for valuable consideration and without any actual notice of the contravention". Thus it appears that an outsider who satisfies the requirements mentioned in the exception may enforce a contract which infringes s 131 even if the terms do not favour the company.

It is noted that subsection (7B) uses the expression "actual notice". This, it is submitted, is beneficial to an outsider involved in a contract to which s 131 applies because it appears to shut out constructive notice of the fact that s 131 is being breached. One may argue that the words, 'actual notice' may even protect an outsider who is put on inquiry that s 131 is being contravened, and that this is not desirable. The writer would have preferred the use of the expression "in good faith and without notice", so as to make good faith an essential element of subsection (7B).

Subsection (7B) does not state that *restitutio in integrum* is a requirement before the company may avoid the contract. It was not necessary for it to say so because when a party opts to rescind a voidable contract, s 65 of the Contracts Act of Malaysia 1950 will apply. Under s 65 the party rescinding a voidable contract, shall, if he has received any benefit thereunder from the other party, restore the benefit to the party from whom it was received

Finally, it is submitted that the word "debenture" in the expression "shares and debenture" in the new provision appears to be an inadvertent error. It should be "debentures" as the persons mentioned in the section may have an interest in more than one debenture.

9.0 Section 131A of the Companies Act 1965 – Voting and Participation at A Board Meeting of A Director Who Is Interested In A Contract Or A Proposed Contract

Act A1299 addresses two important questions which were not dealt with in the principal Act. The first was whether a director interested in a contract within the meaning of s 131 could participate in the relevant discussion at a board meeting. The second was whether such director may vote on a board resolution pertaining to the contract. Probably it was thought that these matters could be properly left to the articles of association. In this context, article 81 of Table A of the Fourth Schedule to the principal Act 1965 does provide that such a director shall not vote at the relevant board meeting and if he does vote, his vote shall not be counted. Article 81 does not say that a director may not participate in the discussion at the board meeting. However, Table A is not (and never was) of universal application and companies are (and were) free to exclude or modify article 81.

A. Addition of a New Section to Bar an Interested Director from Voting and Participating at Board Meetings

Act A1299 now alters the legal position by creating a new section 131A which provides that in the situation mentioned above, the director concerned "shall be counted only to make the quorum at the board meeting but shall not participate in any discussion while the contract or proposed contract is being considered at the board meeting and shall not vote on the contract or proposed contract". The new section allows the interested director to be present at the board meeting although he cannot participate in the discussion or vote on a resolution adopting the contract. In the opinion of the writer, the preferred position would have been to exclude his presence at the time of the relevant debate and voting on the proposed resolution, as a director may be able to influence the board by his mere presence.

Section 131A (2) provides for four exceptions where the prohibitions in s 131A (1) do not apply. They are: (i) in the case of a private company which is not a subsidiary to a public company; (ii) in the case of a private company which is a wholly owned subsidiary of a public company in respect of its contract or proposed contract with the said holding company or with another wholly-owned subsidiary of the same holding company.; (iii) in respect of any contract or proposed contract of indemnity against any loss which any director may suffer by reason of becoming or being a surety for a company; and (iv) in the case of a contract or proposed contract by a public company or a private company which is a subsidiary of a public company with another company in which the interest of the director concerned consists solely of :

a) in him being a director of that company and the holder of shares not more than that required as his share qualification, or
b) in him having an interest in not more than five per centum of that company's paid up capital.

The writer wishes to point out that even where the exceptions enumerated in s 131A(2) apply, a company should not assume that it may allow a director to participate or vote at a

board meeting in relation to a contract in which he is interested. This is because the relevant company will still be subject to restrictions, if any, in its memorandum and articles of association. Thus, for example, where a private company which is not a subsidiary of a public company has adopted article 81 of Table A, a director shall not vote though he may participate, at a board meeting in respect of a contract or proposed contract in which he is interested.

It is also to be noted that Act A1299 makes no amendment to article 81 of Table A. Therefore a company to which the exceptions stated above do not apply must be wary of the fact that if it adopts article 81 of Table A, part of the article will conflict with section 131A because while the said article forbids voting, it does not expressly forbid participation in the discussion.

B. Civil and Criminal Sanctions for a Breach of Section 131A

Section 131A (3) provides civil consequences for a breach of s 131A (1). These civil consequences are substantially similar to the position in the new s 131(7B) for a breach of s 131(1) discussed above. It provides the same protection for a person dealing with the company for a valuable consideration and without any "actual notice" of the contravention of s 131A (1). The comments made earlier regarding actual notice in relation to section 131(7B) in part VII above, regarding s 131(7B) also apply to section s 131A (3).

Finally, it may be mentioned that under s 131A (4), a director who knowingly contravenes s 131A shall be guilty of a criminal offence the penalty for is imprisonment for five years or a fine of one hundred and fifty thousand ringgit or both.

10.0 Section 131B of the Companies Act 1965 - Functions and Powers of the Board

Section 131B is another new provision inserted into the principal Act by Act A1299. Subsection (1) of the section provides that "the business and affairs of a company must be managed by, or under the direction of, the board of directors". The purpose of this provision appears to give statutory recognition and statutory force to the commonly accepted rule that the board's primary function is to manage or oversee the conduct of the company's undertaking. Similar legislation to codify this primary function of the board to manage, supervise, direct and assume responsibility for the operation of the company's affairs and business has been enacted in some common law jurisdictions.[66] The new provision implements the recommendation in the High Level Finance Committee Report on Corporate Governance that the board's duty to oversee the conduct of the company's business and its "power" to manage the company should be given statutory force.[67] The writer would readily agree with the Committee's view that a statutory reiteration in the form enacted in s 131B (1) would bring advantages in that; it is a clear statement to the board as to its responsibilities and a clear direction to the courts of the collective functions and duties of the board.

In large companies the board will inevitably have to delegate some of its management functions to others. In such cases it cannot abdicate its duty to supervise the discharge of the functions delegated. That the board need not factually manage the company, and if it does not do so, that it has a duty to direct and supervise, is reflected in the words "be managed by *or*[68] under the direction of the board of directors". The board must, at the least,

ensure that the company's business and affairs are conducted under its direction and supervision.

A. New Statutory Provision Recognizing the Board's Powers of Management and Supervision

The High Level Finance Committee's recommendation that the board's power to manage the company be given statutory force is implemented in a new section 131B (2) which provide as follows:-

> The board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the memorandum or articles of association of the company.

The articles of association of a company will almost always give powers of supervision and management to the board and the usefulness of this section may be questioned. However it may serve as a reminder to directors and outsiders that the powers of management are still subject to any modification, exception or limitation contained in the Act or in the memorandum or articles of association of the company.

B. Relationship of the New S 131B (2) To Table A Article 73 on Management Powers of the Board

The subject of the board's power of management under the new s 131B has a link to article 73 of Table A and some remarks on the said article may be pertinent. This article, which is commonly adopted by many companies, provides that "the business of the company shall be managed by the directors who…may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting…".

Reverting once more to the statutory power expressed in s 131B (2), it was noted that the powers conferred on the board are subject to modification, exception and limitation in the memorandum and articles. Thus, the said documents may reserve some management powers for the general meeting to exercise, even though they are management powers that the board may exercise. More importantly, it is clear that the new provision does not prohibit a specific power in the memorandum or articles which purports to allow the general meeting to interfere in the management of a company by the passing of a resolution, whether ordinary or special. This matter is particularly relevant where there is a conflict between the board and the company in general meeting over the division of powers between these two organs. In this context, there is strong authority that where the articles give powers of management to the board, the general meeting cannot interfere with the exercise of those powers.[69] Therefore, in the event of a conflict between the board and the general meeting, the relevant article dealing with the exercise of management powers, for example, Table A article 73, has to be carefully construed to determine the division of management powers between the two organs. Articles materially similar to article 73 were construed in a number of English and Malaysian cases as not permitting interference by the

general meeting in matters of management.[70] But a debate as to whether articles in the form of article 73 can be construed in this way began a hundred years ago and still continues.[71] This is because the wording of article 73 and its ancestors is both ambiguous and inelegant.[72] One aspect of the debate which has arisen is whether the words towards the end of article 73, which read "and to such regulations… as may be prescribed by the company in general meeting…", can be construed as empowering the general meeting to interfere in management by an ordinary resolution. But the weight of authority against such a construction appears overwhelming.[73] In England, the equivalent to article 73, namely, article 70 of the 1985 version of Table A makes the management powers given to the board subject "to any directions given by special resolution". The English article 70 may have removed the alleged ambiguity[74] in its predecessor and is a precedent which Malaysia may adopt. However article 70 may be criticised as strengthening the grip of the board on management as the majority required to pass a special resolution may often be a difficult task for members to achieve.

It is regrettable that Act A1299 makes no amendment to Table A article 73 to free it from its controversies. If the article is adopted by a company, its board could, on the basis of current authority, ignore the directions of the company in general meeting over management matters which are not specifically reserved for the benefit of the general meeting by the Act or by the company's constitution. Whether the present position should continue or whether Table A should be amended to give greater powers to the general meeting is also a debatable question in Malaysia.

This subject can be concluded by a final comment. Although the board may appear to enjoy near absolute powers where a company adopts a regulation similar to article 73, recalcitrant directors may be warned that they run the risk of a possible removal from their office by an exasperated general meeting, and this could be achieved in the case of a public company by an ordinary resolution.[75]

11.0 Conclusion

Malaysia has always shown eagerness towards raising the standard and efficiency of the country's corporate laws and corporate governance. The various amendments to the principal Act, the establishment of the High Level Finance Committee in 1999, the Companies Commission in 2001 and the Corporate Law Reform Committee in 2003 indicate Malaysia's enthusiasm to achieve these noble and desirable purposes.

Act A1299 is yet another evidence of Malaysia's commitment to strengthen its corporate laws and corporate governance. This paper has attempted to examine some of the major effects of Act A1299 on directors' duties in Malaysia. Overall, the writer is of the view that the new legislation is a commendable attempt to strengthen the corporate laws of Malaysia. The changes made by Act A1299 will help to invigorate the existing legislation and enhance responsible management and good governance.

Note: This article forms part of an article co-authored by this writer and ST Lingam, entitled "The Effects of the Companies (Amendment) Act 2007 On Directors' Duties: Some Observations".

REFERENCES

[1] By Act 23/1966, Act A21, Act A50, Act A616, Act A657, Act A720, Act A791, Act A816, Act A836, Act A845, Act A949, Act A1007, Act A1022, Act A1043, Act A1081, Act A1108, Act A1118.
[2] Some of the cases where s 132 (1) was referred to are*: Yeng Hing Enterprise Sdn Bhd* v *Datuk Dr Ong Poh Kah* [1988] 2 MLJ 60; *Simmah Timber Industries Sdn Bhd* v *David Low See Keat* [1999] 5 MLJ 421 and *Industrial Concrete Products* v *Concrete Engineering ProductsBhd* [2001] 2 MLJ 332.
[3] See for instance, *PJTV Denson (M) Sdn Bhd & Ors* v *Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 and *Ng Pak Cheong* v *Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64.
[4] My emphasis.
[5] See Ch 6 paras 2.2.25-2.2.31 of the Report. See also Consultative Document 5, CLRC at para 4.28.
[6] Dixon J in *Mills* v *Mills* (1938) 60 CLR 150.
[7] [1994] 1 BCLC 363.
[8] [1964] 112 CLR 597.
[9] My emphasis.
[10] See *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.
[11] See *Cook* v *Deeks* [1916] 1 AC 554.
[12] This arises because of the difficulty in reconciling some of the common law decisions and judicial dicta on the subject. It is difficult to summarise these decisions. Some appreciation of the difficulties will be evident from the decisions in *Regal (Hastings) Ltd* v *Gulliver* (see n 10, *supra* at p 150 of the judgment), *Cook* v *Deeks*, (*ibid* at p 564 of the judgment), *Smith & Others* v *Croft* (No 3) [1987] BCLC 355 at p 404 and *Prudential Assurance Co Ltd* v *Newman Industries Ltd* (No 2) [1981] Ch 257 at p 307. See in particular the statement of Vinelott J in *Prudential* that "there is no obvious limit to the power of the majority to authorize or ratify an act or transaction whatever its character provided that the majority does not have an interest which conflicts with the company".
[13] Some of the cases where the doctrine of fraud on the minority was applied were instances where the victim was the company itself. This paper uses the expressions "fraud on the company" and "fraud on the minority" to distinguish the position of the company from that of its minority shareholders. .
[14] *Menier* v *Hoopers Telegraph Works* [1874] LR 9 Ch App 350.
[15] The classic case is *Cook* v *Deeks, supra* n 25.
[16] *Brown* v *British Abrasive Wheel Ltd* [1919] 1 Ch 290.
[17]In this context see the recommendations of the Company Law Review Steering Group in England entitled, Modern Company Law For a Competitive Economy; Completing the Structure (URN00/1335) (London: DTI 2000) para 5.85.
[18] In this context see s 175 of the Companies Act 2006 of England which, *inter alia*, deals with (a) the duty of a director to avoid a conflict of interest, (b) when a breach of such duty may arise, and (c) the machinery for obtaining "authorization" of a breach of such duty. See also ss 176, 180, 181 of the English Act which are relevant to the present discussion.
[19] See sub-part C above.
[20] The derivative action in Malaysia is dealt with in detail in Loh Siew Cheang, *Corporate Powers Accountability* (Kuala Lumpur: Lexis Nexis Butterworths, 2nd ed., 2002), Ch 35.

[21] *London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165; *Bell v Lever Brothers Ltd* [1931] All ER Rep 1; *Shanghai Hall Ltd v Chong Mun Foo* [1967] 1 MLJ 254.
[22] *North-West Transportation* v *Beatty* (1887) 12 App. Cas 589 (P.C.) and *Burland* v *Earle* [1902] AC 83 (P.C.) are the leading cases.
[23] *Supra* n 11.
[24] [1925] Ch 407
[25] *Ibid* at p 428. Romer J's second proposition dealt with diligence. His Lordship said ,

> A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings and at meetings of any committee of the board upon which he happens to be placed. He is not, however bound to attend all such meetings, though he ought to attend whenever in the circumstances he is reasonably able to do so.

Romer J's third proposition is dealt with in part VI.
[26] See for instance the High Level Finance Committee Report on Corporate Governance Ch. 6 paras 2.2.51-2.2.65 and the Cooney Committee Report in 1989 in Australia.
[27] See for instance *Daniels* v *Anderson* [1995] 16 ACSR 607
[28] *Re Brazilian Rubber Plantations & Estates Ltd* [1911] 1 Ch 425 is a striking example of where ignorance benefited the director.
[29] See *Norman v Theodore Goddard* [1991] BCLC 1028, *Re Barings Plc No. 5* [2000] 1 BCLC 523 and *Re D'Jan of London Ltd* [1994] 1 BCLC 561.
[30] *Ibid*.
[31] See Farrar, JH & Hannigan, BM, *Farrar's Company Law* (London: Butterworths, 4th ed, 1998) at p 395.
[32] *Supra* n 30 at p 563.
[33] See also his Lordship's preference for the adoption of a similar standard in *Norman v Theodore Goddard* [1991] BCLC 1028.
[34] *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties*, Law Commission Consultation Paper No. 153 (London: Stationery Office, 1998), para 13.19, quoted in Mayson, French & Ryan, *Company Law* (Oxford: OUP, 22nd ed., 2005-2006) at p 518.
[35] For example in *Abdul Mohd Khalid v Dato Haji Mustapha Kamal* [2003] 5 CLJ 85, although the reference in this case to *Re City* was obiter.
[36] The Committee's emphasis.
[37] See Ch 6 para 2.2.65 of the Report.
[38] *Ibid*.
[39] [1959] AC 324.
[40] [1991]1 AC 187.
[41] [1964-1965] NSWR 1648.
[42] *Ibid* at p 1663.
[43] [1980] NZLR 150.
[44] *Ibid* at p 165-166.
[45] [2004] 2 SLR 675.
[46] [1962] NSWR 686.
[47] See Consultative Document 5, CLRC paras 4.33- 4.36 and s 187 of the Corporations Act 2001 of Australia.

[48] See *Industrial Concrete Products Bhd* v *Concrete Engineering Products Bhd* [2001] 2 AMR 2151*;* [2001] 2 MLJ 332 where a director had acted in the interest of his nominator and against the interest of the company.
[49] My emphasis.
[50] See Ch 6 para 3.1.3 of the Report.
[51] See Consultative Document 5, CLRC, paras 3.10 – 3.16.
[52] *Supra* n 51.
[53] [1925] Ch 407 at p 428 *et seq*.
[54] Mayson, French and Ryan, *Company Law* (Oxford: OUP, 22nd ed., 2005-2006) at pp 519-520 contains an illustrative account of the leading cases on the subject.
[55] See Ch 6 paras 2.1.12 and 3.1.1 - 3.1.4 of the Report.
[56] See Ch 6 para 3.2 of the Report.
[57] In the USA the so-called 'safe harbour' principle was developed by judicial doctrine.
[58] In Australia the business judgment rule was created by statute. See s 180(2) of the Australian Corporations Act 2001
[59] See also Consultative Document 5 CLRC, para 3.21
[60] Subsection (1A) of s 132 deals with a director's duty of care, skill and diligence.
[61] See *Dovey* v *Cory* [1901] AC 477 at p 488. An emphatic statement is that of the Privy Council in *Howard Smith Ltd* v *Ampol Ltd* [1974] AC 821 at p 832 as follows: "There is no appeal on merits from management decisions to courts of law; nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."
[62] For a critical and analytical discussion of the business judgment rule see Rosenberg, David , "Galactic Stupidity and the Business Judgment Rule (2006) Bepress Legal Series, Paper 1067 (http://law.bepress.com/expresso/eps/1067).
[63] My emphasis.
[64] Curiously, another new section, s 131A (which deals with voting and participation at a board meeting in respect of a contract caught under s 131) attempts indirectly to deal with the issue of a material interest of a director. See part IX, sub-part A.
[65] This was not actually a defect because s 131(8) provides that s 131 "shall be in addition to and not in derogation of the operation of any rule of law" and thus brings in the application of the common law. At common law, contracts which violated the duty mentioned in s 131 were voidable at the option of the company. See *Aberdeen Railway Company* v *Blaikie Brothers* 1 MACQ 461, *Hely-Hutchinson* v *Brayhead Limited* [1968] 1QB 549 and *Guinness* v *Saunders* [1990] 2 AC 663.
[66] An example is s 128 of the New Zealand Companies Act 1993.
[67] See Ch 6 para 2.1.13 of the Report. See also Consultative Document 5, "On Clarifying and Reformulating the Directors' Role and Duties" by the Corporate Law Reform Committee for the Companies Commission of Malaysia (hereafter referred to as "Consultative Document 5, CLRC"), at paras 2.1-2.7.
[68] My emphasis.
[69] See n. 70.
[70] *Automatic Self-Cleansing Filter Syndicate Co Ltd* v *Cuninghame* [1906] 2 Ch 34 (C.A)*; Quin & Axtens Ltd* v *Salmon* [1909] AC 442 (H.L); *John Shaw & Sons (Salford) Ltd* v *Shaw* [1935] 2 KB 113 (C.A); *Breckland Group Holdings Ltd* v *London & Suffolk*

Properties Ltd [1989] BCLC 100; *Dato Mah Kok & Ors v See Keng Leong & Ors* (1990) 1 MSCLC 90, 357; *Pilot Cargo* v *Adinas Tours and Travel Sdn. Bhd.* [2002] 2 AMR 1732.

[71] See Neville J in *Marshall's Valve Gear Co Ltd* v *Manning Wardle & Co Ltd* [1909] 1 Ch 267, and Lim Teong Qwee JC in *Credit Development Pte Ltd* v *IMO Pte Ltd* [1993] 2 SLR 370. See also Sealy, L S, *Cases and Materials in Company Law* (London: Butterworths, 7th ed, 2001) at p 205; Loh Siew Cheang, *Corporate Powers Accountability* (Kuala Lumpur: Lexis Nexis Butterworths, 2nd ed., 2002) at pp 146 – 155; Mayson French and Ryan, *Company Law* (Oxford: OUP, 22nd ed., 2005-2006), at pp 506– 509, for illuminating summaries.

[72] See *Gower's Principles of Modern Company Law* (London: Stevens & Sons, 4th ed, 1979) at p 145.

[73] See n 70, *supra*. In this context, Professor Gower's view of the possible meaning of the controversial words were as follows: "Possibly "regulations", when it first appears, means the existing articles and, when used in the final phrase, means any new articles adopted by special resolution." *Ibid*, p 145 in his n 46.

[74] In this context, see Mayson French and Ryan, *supra* n 70, pp 507-508.

[75] See s 128 of the principal Act for the procedure required.