SOME THOUGHTS ON…NOMINEE DIRECTORS

INTRODUCTION

This piece will consider in brief the concept of the nominee director and, by consequence, the concept of a shadow director. I have been working in the international private wealth sector since my days as a trainee solicitor in Jersey in the late 90s. Use of the phrase "nominee director" has been, and continues to be, commonplace.

It is worth noting that, to a certain degree, all directors are "nominees" – i.e. chosen – usually by one or more members of the company. However, in many cases, the term "nominee" director does not merely refer to a director of a member's choosing, but one who will also act as directed and do what they are told. Indeed, in many cases, there are agreements to such effect[1]. Are such agreements effective[2]?

Furthermore, such nominee directors are often corporate directors. The corporate nominee director acts through its own directors who, as they do not exercise any form of director-like role, are more than likely themselves nominee directors of the corporate nominee director!

In the competitive world of the professional trust and corporate service provider ("TCSP"), there is an inevitable desire to keep the "client[3]" happy. There is a fine line -but a clear one- between a director

[1] I would be interested in any attempts to enforce such an agreement. [The director would most likely resign!].
[2] See comment from Lord Denning in *Boulting v Association of Cinematograph* below.
[3] For fiduciaries, such as directors or trustees there can be dangers in referring to a specific individual as such.

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following directions from the "client" (and even agreeing so to do) on the one hand and, after due process, a director coming to a decision with which the "client" is happy, on the other.

This is a balance which the vast majority of the global corporate services industry manages well. Perhaps more of an issue is the use of family members, friends, employees and others as directors who "do what they are told".

The offshore investment fund industry post -*Weavering*[4] looked at governance. There has been some focus on the qualifications of, and independence of, directors vis-à-vis the investment manager and the other service providers (such as law firm or administrator). Increased regulation in this area in a number of jurisdictions[5] has also assisted.

I have generally been of the view that the phrase "nominee director" is an oxymoron - you are either a director or you are not[6]. A fiduciary powerholder is not able to fetter the exercise of their powers by agreeing, for example, to only exercise such power on the instruction of another. Less confusing terms would be "nominated" director, "third party" director or "independent" director and these are used in the industry.

However, on more complete analysis, to dismiss nominee directors is an oversimplification. The notion of a nominee director does appear within the international private wealth arena so it should be addressed.

This piece mainly discusses the situation where the nominee director is a passive agent of their principal. Their principal is often the beneficial owner of the company which does lead into a brief discussion of the *Duomatic*[7] principle below.

Leaving aside for now advertisements by various corporate service providers across the globe[8] offering "nominee directors" as a solution to all kinds of issues[9], the concept of a passive nominee director appears in a number of situations and cases. For example:

(i) The term is used formally in Singapore statute[10] from 31 March 2017 and before that in Singapore case law. This is discussed below.

(ii) Whilst much of the criticism of certain financial centres and their uses is without basis, it is true that there have been misuses of corporate structures - of which nominee directors

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[4] *Skandinaviska Enskilda Banken AB v Conway & Anor [2019] UKPC 36 and* other earlier decisions.
[5] See for example: The Directors Registration and Licensing Regulation Act (2021) of the Cayman Islands.
[6] By way of example the legal guide of Carey Olsen, a leading offshore law firm states: "*Please note that BVI law does not recognise the concept of "nominee director*."
[7] Re Duomatic [1969] 2 CH 365
[8] Often in Hong Kong, Singapore and the UK.
[9] Such as confidentiality, privacy, avoiding tax(!). With due respect, the accuracy of some of the marketing material leaves a lot to be desired.
[10] There may be other such jurisdictions.

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have been a part. For example (but note that there have been many enhancements to AML/CFT regulation since 2011);

a. stories from the ICIJ[11] leaks in 2012[12]; and
b. the "Puppet Masters" report for the World Bank[13] in 2011.

(iii) The FATF[14] discusses the use of and risk of nominee directors:

a. In its paper on Transparency and Beneficial Ownership (October 2014)[15]
   i. For example at para 36: "*The Interpretive Note to Recommendation 24 also requires countries to take measures to prevent the misuse of nominee shares and nominee directors, for example by applying one or more of the following mechanisms: a) requiring nominee shareholders and directors to disclose the identity of their nominator to the company and to any relevant registry, and for this information to be included in the relevant register, and/or b) requiring nominee shareholders and directors to be licensed, for their nominee status to be recorded in company registries, for the nominees to maintain information identifying their nominator, and make this information available to the competent authorities upon request*."
b. In its paper on Concealment of Beneficial Ownership (July 2018)[16] (50 references!)
   i. For example at para 5: "*Nominee directors and shareholders, particularly informal nominees (or "straw men"), are a key vulnerability, and were identified in a large majority of case studies assessed for this report. The role of the nominee, in many cases, is to protect or conceal the identity of the beneficial owner and controller of a company or asset. A nominee can help overcome jurisdictional controls on company ownership and circumvent directorship bans imposed by courts and government authorities. While the appointment of nominees is lawful in most countries****, the ongoing merits of this practice are questionable*** *in the context of the significant money laundering and terrorist financing vulnerabilities associated with their use." [EMPHASIS ADDED]*
   ii. And para 84: *"A nominee director is a director appointed to the board of a company to represent the interests of his/her appointer on that board. Legally, nominees are responsible for the operation of the company, and accept the legal obligations associated with company directorship or ownership in the country in*

[11] International Consortium of Investigative Journalists
[12] Revealed: Worldwide web of sham directors (smh.com.au) or https://panamapapers.sueddeutsche.de/articles/5718f882a1bb8d3c3495bcc7/
[13] https://openknowledge.worldbank.org/bitstream/handle/10986/2363/9780821388945.pdf?sequence=6&isAllowed=y by Emile van der Does de Willebois, Emily M. Halter, Robert A. Harrison, Ji Won Park and J.C. Sharman
[14] Financial Action Task Force
[15] http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf
[16] https://www.fatf-gafi.org/media/fatf/documents/reports/fatf-egmont-concealment-beneficial-ownership.pdf

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which the company is incorporated. ***However, in some cases a nominee may hold the position of director or shareholder in name only on behalf of someone else.*** *These arrangements may be controlled by a trust arrangement or civil contract between the nominee and actual director or shareholder."[EMPHASIS ADDED]*

c. in its paper on TCSPs[17] (June 2019)
   i. At p51 "*A nominee director is a person who has been appointed to the Board of Directors of the legal person who represents the interests and* ***acts in accordance with instructions issued by another person****, usually the beneficial owner."* (EMPHASIS ADDED)
   ii. At p53 "*Company law in a number of countries does not recognise the status of a nominee director because in law it is the directors of the company who are liable for its activities and the directors have a duty to act in the best interest of the company."*

(iv) A recent OECD[18] paper[19] also highlights the misuse of nominee directors:
   a. "*Use of nominee directorships can therefore be viewed as a risk indicator for criminal activity and professional enablers*".

(v) The concept of a passive nominee director is mentioned in recent cases with which readers in the private wealth sector may be familiar[20]:
   a. The "*Pugachev*"[21] case:
      i. "*I agree those individuals took their instructions from Mr Pugachev at all times. As directors of those companies, they were his [Mr Pugachev's] nominees. But I do not accept that those individuals are to be found as the directing mind or will of those trustee companies for all the relevant purposes*." (at 426) [i.e. It was held that other directors held more sway than the nominee directors].
   b. The "*DBS* case[22]" which has been discussed in great detail in respect of trustee duties:
      i. "*DBS Corporate provided services including the provision of a Nominee Director for Wise Lords…"* (para 13)
      ii. "*And for the reasons there considered, we find it hard to see how approval of those transactions can be said to involve gross negligence on the trustees' or nominee director's part*." (para 87).

[17] www.fatf-gafi.org/media/fatf/documents/reports/RBA-Trust-Company-Service-Providers.pdf (fatf-gafi.org)
[18] Organisation for Economic Co-operation and Development.
[19] Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes (oecd.org)
[20] There are no doubt others.
[21] [2017] EWHC 2426 (Ch)
[22] 2019 HKCFA 45

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c. The Cayman Islands decision of *In the Matter of the Ta-Ming Wang Trust*[23] in respect of "*Hastings-Bass*[24]":
   i. "*The directors of the company [owned by the trustee as part of the trust fund] were officers of CIBC's subsidiaries and effectively CIBC's nominees*." (at 542)
   ii. "*Although the directors of the second defendant were effectively CIBC's nominees, there was a legal obligation on company directors to act independently on behalf of their company. Moreover,* ***the decisions of directors who were mere nominees could not be set aside under the Hastings-Bass principle, which required that the decision in question be attributable to the fiduciary decision maker and to no-one else***." (at 542)
   iii. "*Indeed it would be a contradiction in terms to hold that the decisions of directors who are mere "nominees" and acting merely on the directions of their principal, can be set aside on Hastings-Bass principles which require that the decision in question is that of the fiduciary decision-maker and of no-one else*." (at 552).

BACKGROUND AND CONTEXT

There is much written on director's duties and in the interests of space it is not proposed to discuss this in great detail. I do however wish to flag some relevant background sources and cases which readers may choose to turn to – noting of course the concentration on common law jurisdictions.

First, there is detailed discussion on nominee directors by The Australian Government Takeovers Panel report on "Nominee Directors and Alternate Directors" in 1989[25]. [This report is referred to in the Law Commission of England and Wales 1998 paper on Directors Duties.].

Second there is an excellent publication entitled "Corporate Governance and the Duties of Company Directors" ed. Ian M Ramsay[26] which contains a chapter entitled "The Role of Nominee Directors and the Liability of their Appointors"[27] and another entitled "Shadow Director and Other Third Party Liability for Corporate Activity"[28].

Both documents set out the main issues:

(I) There is no set definition of nominee director. In their Report, the Takeover Panel used the following definition:
   a. "*The term 'nominee director' will be used to refer to persons who, independently of the method of their appointment, but in relation to their office, are expected to act in accordance with some understanding or arrangement which creates an obligation or*

[23] 2010 (1) CILR 541
[24] Per Re Hastings-Bass [1975] Ch 25 as adapted.
[25] https://www.takeovers.gov.au/content/Resources/cslrc/cslrc_report_no_8.aspx
[26] https://law.unimelb.edu.au/__data/assets/pdf_file/0004/1721173/7-Ian-Ramsay-1997.pdf
[27] Justice E W Thomas.
[28] Robyn Carroll.

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mutual expectation of loyalty to some person or persons other than the company as a whole."

(II) Directors owe duties to the company and in certain cases to other stakeholders such as creditors and potentially employees. If they owe duties to their appointors, these duties to the company are undermined. This is the main objection to nominee directors.

Recent consideration of the general position is to be found in the Privy Council decision in *Central Bank of Ecuador and ors v Conticorp SA and ors*[29].

In this case a Bahamian director had been appointed for a nominal fee and was told that a number of individuals were authorised "to give full instructions". The judge at first instance examined the director's duties and this was quoted by Lord Mance at para 25:

"He assimilated them to those accepted in England: in short, a director must act bona fide in the best interests of the company; he must positively apply his mind to the question what the company's interests are; ***he must exercise independent judgment and not fetter his discretion; and a nominee director is in no different position****. In the last connection, he cited Lord Denning's statement in Boulting v Association of Cinematograph et al [1963] 2 QB 606, 626-627, that there is nothing wrong with a director being nominated by a shareholder to represent his interests:*

"… so long as the director is left free to exercise his best judgment in the interests of the company which he serves. ***But if he is put upon terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful*** *…." [EMPHASIS ADDED]*

He also cited Ungoed-Thomas J's conclusion in Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555, 1577-1578 that a director "who acts without exercising any discretion, at the direction of a stranger to the company [is] fixed with the stranger's knowledge of the nature of the transaction."

PARTIAL RELAXATION OF THE RULE IN RESPECT OF SHAREHOLDERS

In terms of "nominated" directors rather than strict "nominee" directors, the British Virgin Islands ("BVI"), for example, has allowed narrow circumstances where a director can act other than in the best interests of the company (but must be so permitted by the Memorandum and Articles of Association).

Section 120(4) of the BVI Business Companies Act 2004 ("BCA") states:

"A director of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint

[29] [2015] UKPC 11

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venture, ***if expressly permitted to do so by the memorandum or articles of the company, act in a manner which he believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company****."* There are similar provisions for directors of subsidiaries acting in the interests of a parent.

This is not the situation in point and the director is not a "straw man" of said shareholder.

CONTROL EQUATED WITH BENEFICIAL OWNERSHIP

Another relevant trend which effects the risk and dangers of using nominee directors is the increased focus by governments, regulators and tax authorities on beneficial ownership.

In many jurisdictions, registers of directors of companies are public documents and, even if are not public, are produced for due diligence purposes. However, for obvious reasons, many have sought to control companies from behind the scenes and stay out of the company books.

In addition, in many countries, registers of members are public and the use of "nominee shareholders" is common. A nominee shareholder relationship is based on property rights and does not lead to the same issues as with a nominee director.

In literal terms, controlling a company does not make a person the owner. However, for many years, anti-avoidance provisions and regulatory provisions have equated control with beneficial ownership. In that regard, many "beneficial ownership" registers are named, as in Hong Kong, the "Significant Controllers" Register, or in Singapore, the "Registrable Controllers" Register. The direction of travel is for these registers to also be public[30]. This may remove the use of nominee directors where the nominator needs to be disclosed in a public register – assuming of course that the registers are properly maintained!

There are strong arguments why beneficial ownership should remain private and that is for another time. There are also good grounds for registers of directors to be public. However, if the named directors are not truly in control then the disclosure issue remains.

Most significant control registers will require registration of a person with significant control:
Per Singapore and Hong Kong a controller who has significant control over a company includes[31] a person who:

- holds the right to appoint or remove directors who hold a majority of the voting rights at directors' meetings;
- exercises or has the right to exercise significant influence or control over the company.

[30] https://www.linkedin.com/pulse/after-you-richard-grasby-tep

[31] There are also qualifications by virtue of holding equity.

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In this regard, this would catch the principal of a sole nominee director. It would not catch a nominee director relationship in respect of one director out of a board of directors (unless it could be shown that the other directors also followed the same lead).

SINGAPORE

Singapore is an interesting case study in respect of this issue. Since 2004, Singapore has required a Singapore resident natural person to be one of the directors of a Singapore company. There are sound reasons to have a natural person in the jurisdiction of the company as a director. New Zealand also decided on a similar requirement[32] to beef up its compliance regime.[33]

This arrangement resulted in an informal practice whereby the Singapore director is regarded as a "nominee director". This can be found in promotional materials of Singapore TCSPs. However, the position of the nominee director is certainly not as passive as many suggest. They still are required to comply with certain director duties.

Of note is the 2016 High Court of Singapore decision in *Prima Bulkship*[34]. In this case, the defendants were appointed as two "local directors". They received a "*Nominee Director Indemnity Agreement" in which "Both the Principal and Nominee Director acknowledge and agree that the Services are provided in a purely nominee capacity and the Nominee Director will not act in any executive capacity to undertake any commercial decisions or assume any commercial responsibility*." (at 7).

The Nominee Directors had granted powers of attorney ("POA") to certain individuals in respect of shipping transactions. The Liquidators sued the two local directors for breaching their duties. The High Court held, on the terms of the POAs that the local directors had not completely subordinated their discretions:

"*The Defendant Directors have merely agreed not to participate in the commercial decisions of the Companies. This does not, in and of itself, amount to an impermissible fetter of the Defendant Directors' discretion."* (at para 47)

And at para 49:

"*First, it is important to emphasise the role of the Defendant Directors in the Companies. They were appointed merely to fulfil the statutory requirement that the Companies appoint a local resident director. As mentioned above at [45], this is a practice that is prevalent. Such directors often do not have the relevant skills and/or expertise in the subject matter the company's business pertained to. Their main role is to ensure that the company complies with its statutory obligations and are rarely expected to participate in the commercial decisions of the company. These decisions and the management of the*

[32] With a concession for Australians!

[33] https://www.mbie.govt.nz/assets/be173d0c00/misuse-of-nz-companies-and-limited-partnerships.pdf

[34] Prima Bulkship Pte Ltd (in creditors' voluntary liquidation) and Star Bulkship Pte Ltd (in creditors' voluntary liquidation) v Lim Say Wan and Beh Thiam Hock [2016] SGHC 283.

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company are typically left to other more qualified persons (usually the parties who incorporated the company and intend to do business through the company). While this does not mean that the Defendant Directors are relieved of their duties of care, skill and diligence, it does impact the extent to which they are expected to be informed of the Companies' affairs."

In addition, the case of *Abdul Ghani bin Tahir v Public Prosecutor*[35] warrants attention. In this case the nominee director was imprisoned for money laundering offences. This should be of concern to local directors in any jurisdiction who fail to act with anything other than full diligence.

"*The Appellant, as a nominee director of [company] with the background of a chartered accountant and experience as a director of 20 companies and a provider of corporate secretarial services was held to a higher standard of care and diligence than that of a reasonable director in his position*." [at 26]

Furthermore, the court highlighted "*the Appellant's egregious breach of director's duties by placing himself as a 'mere dummy director', who had no intention of fulfilling his duties as a director*." [at 29]

"*The duties of a non-executive director are not dependent on the terms of his employment contract. The duties of a director (even a non-executive director) are imposed by the common law and statute and cannot be contracted away by any form of employment contract.* ***It is antithetical for a person to agree to be a director on the condition that he will not exercise any form of supervision or control over the affairs of the company.*** *Whilst I can accept that a non-executive director is not obliged to keep constant tabs on his company, I cannot accept that he can completely relinquish even the duty of having some minimal level of supervision over the company's affairs. Therefore, although the limited functions of the Appellant's office are relevant to the question of neglect, it remains to be assessed whether the surrounding facts and circumstances ought to have made him aware of the predicate offences and whether there were steps he could have taken – even in his limited role – to ensure that [company] was not engaging in any criminal acts in contravention of the CDSA*." [at 65]

The Appellant tried to argue along the lines of *Prime Bulkship* but was not successful:

"*In such a case, it might very well be that local resident directors should not be held liable for breach of their duties of diligence in connection with commercial decisions made by the company; this is because it is not the role and purpose of non-executive local resident directors to make such decisions given that these legitimate business decisions are usually spearheaded by the executive directors.* ***In stark contrast, however, a local resident director, cannot simply be a "dummy director" who approves, ignores, or is nonchalant as to whether the company is engaging in any illegal activities. If it were otherwise, it would make an utter mockery out of the statutory requirement to have a local resident director because all a foreign company needs to do to circumvent any external supervision is to employ a dummy resident director and pay him enough money to keep his mouth sealed in order for the corporate shield of the company to be used for nefarious or illegal purposes.***"[at 89]

[35] [2017] SGHC 125

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Equally of note, Singapore is the main jurisdiction I have found which has adopted a "Register of Nominee Directors[36]" in addition to a "Register of Registrable Controllers"[37]. This appears to have been full adoption of the FATF paper in 2014[38] -in particular, para 15 of the Interpretative Note to Recommendation 24.[39]

Most Singapore companies are required to keep a non-public register of Nominee Directors and their nominators. Nominee Directors must inform the company. Nominee Director has a definition:

"*A director is a nominee if the director is accustomed or under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of any other person. The obligation to act in accordance with the directions, instructions or wishes of any other person may arise from legal obligations (e.g. contract; trust) or informal arrangements."*

This would catch a wide range of nominee directors. The guidance states that "*For example, a person appointed as a director of a company for the purpose of compliance with the requirement that every company registered in Singapore must have at least one director who is ordinarily a resident in Singapore would generally fall within the definition of a director who is a nominee*."

Thus, it does seem possible – at least in Singapore - to have directors who have agreed to act as directed by other persons. What is clear from the cases above is that the nominee director cannot be free from obligation so the agreement to act as directed cannot be applied absolutely.

SHADOW DIRECTORS

We turn now to the other side of the nominee director arrangement. What about the principal? Many jurisdictions recognise the concept of shadow directors. There are definitions in company statutes.

For example: Hong Kong: "*shadow director* in relation to a body corporate, means a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act[40]".

Thus, a person who controls a single director (A) is not a shadow director unless the board consisted of A alone or, on the facts, A controls the majority.

"Accustomed to act" suggests more than once and over a period of time[41].

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[36] https://www.acra.gov.sg/docs/default-source/default-document-library/compliance/register-of-controllers/acra-guidance-on-register-of-nominee-directors-for-companies-(v1-4).pdf
[37] https://www.acra.gov.sg/docs/default-source/default-document-library/compliance/register-of-controllers/acra-guidance-on-register-of-controllers-for-companies-(v1-5).pdf
[38] See note 15 above.
[39] https://cfatf-gafic.org/index.php/documents/fatf-40r/390-fatf-recommendation-24-transparency-and-beneficial-ownership-of-legal-persons
[40] Companies Ordinance (Cap.622)
[41] See Bowmer (note 42 below): at para 24

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Since there are many companies with a sole nominee director acting on behalf of a single principal, there are doubtless many shadow directors of such companies – all of whom should be recorded on the appropriate register.

The liability of directors is extended to shadow directors in a number of situations in the Hong Kong Ordinance.

For a detailed examination of shadow directors see for example:

"*Obligations in the Shade: The Application of Fiduciary Directors' Duties to Shadow Directors*"[42] in which Colin R. Moore debates the scope and application of directors' duties to shadow directors; and

"*Shadow Directors*" by Michael Bowmer of New Square[43] who states: "*What duties shadow directors owe and in particular whether they owe fiduciary duties is not clear*".

By way of illustration, S170(5) of the English Companies Act states: "*The general duties apply to a shadow director of a company where and to the extent that they are capable of so applying*."

In the BVI, "shadow director" is defined in the Insolvency Act[44] but not in the BCA. The BCA contains provisions relating to directors' duties:

For example s120(1) :"*Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company".*

And s 121 "*A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company*"

In the BCA, director includes any person "occupying or acting in the position of director by whatever name called". This is potentially wide enough to catch shadow directors.

The English cases are far from definitive in respect of the duties of shadow directors. To quote in detail from Matthew Brown of Conyers "*Shadow Directors in the BVI: Who Are They, What Duties Do They Owe and What Are Their Risks?*"[45]

"*In summary, unlike the position with ordinary or de facto directors, the most that can be said in respect of shadow directors is that they may owe a duty of good faith (or loyalty to the company) when giving*

[42] Colin R Moore, Kent Law School, University of Kent. https://kar.kent.ac.uk/43802/7/Colin%20R%20Moore%2C%20%3D0027Obligations%20in%20the%20Shade%20-%20The%20Application%20of%20Fiduciary%20Directors%E2%80%99%20Duties%20to%20Shadow%20Directors%3D0027%20%28Accepted%20Version%29.pdf

[43] https://www.4newsquare.com/wp-content/uploads/2019/09/Shadow-Directors-by-Michael-Bowmer.pdf

[44] Similar to the Hong Kong definition.

[45] https://www.conyers.com/publications/view/shadow-directors-in-the-bvi-who-are-they-what-duties-do-they-owe-and-what-are-their-risks/

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directions or instructions to the board, and will almost certainly owe fiduciary duties if they voluntarily assume responsibility for a particular company asset. Aside from that, it appears that the Court will have to determine on a case by case basis whether the relevant individual expressly or impliedly undertook or assumed a position of trust and confidence or whether there was a legitimate expectation that he would not use his position in a way adverse to the interests of the company. The extent of the particular duty will also depend on the particular facts. The position, it is fair to say, is fluid." AND

"*Given the prevalence of nominee directorships (and shareholders) in the BVI, it is very likely that there are a substantial number of individuals (particularly beneficial owners) who fall within the definition of a "shadow director". As a result, they may, unbeknownst to them, owe fiduciary duties to those companies. Therefore, given the risks if those duties are found to have been breached, it is important that those individuals (at the very least) take legal advice before: (1) voluntarily assuming responsibility for any company assets; and/or (2) providing directions or instructions to the board of a BVI company that is insolvent or is likely to become insolvent*."

Mr Bowmer's paper also contains an interesting discussion about Directors and Officers Insurance[46].

"*Accordingly: (a) A shadow director may well be entitled to the benefit of any D&O insurance; but (b) Such cover will be of no practical utility where the shadow director's liability arose as a consequence of any deliberate or dishonest breach of duty on her/his part."*

DUOMATIC

The issue of a single nominee director following instructions also was of some relevance in the recent Privy Council decision of *Ciban Management Corporation*[47] . The fact that the directions to the nominee director are from the ultimate beneficial owner ("UBO") is of significance. In some respects, the nominee director relationship has been given some oxygen by the Privy Council – although the facts are unusual and detailed.[48]

The case involves the classic combination of a BVI company, bearer shares, a corporate nominee director provided by the registered agent and powers of attorney. Here the UBO refused to sign the agreement with the director because (i) he didn't wish his name to appear on the documents and (ii) (so he claimed but this was rejected) it contained an indemnity. The company took instructions from an associate of the UBO, some of which turned out to be unauthorised by the UBO resulting in a loss to the company. The corporate director and registered agent were sued. Of relevance to this article is the position of the director.

[46] Para 61

[47] Ciban Management Corporation (Appellant) v Citco (BVI) Ltd and another (Respondents) (British Virgin Islands) [2020] UKPC 21

[48] The CA stated that "*the case at bar is very fact sensitive and extends beyond the traditional evaluation of the duties of directors and/or registered agents*."

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Both appeals were dismissed so that the First Instance decision[49] of Bannister J is of most relevance in particular paras 60-65.

- The nominee director was subject to all BVI legislation and bound to comply with it and to act honestly and in good faith. "*But to attribute to [Director] the sort of duties which affect directors charged with responsibility for the overall management of the affairs of a company whose members expect the board to bring to the table their own skill and to manage its affairs by applying those skills independently of day to day intervention and participation on the part of the members is unrealistic.*"
- *"In determining the nature and extent of the duties of a director of a BVI registered company it will always be necessary to pay the most particular attention, not only to its corporate documents, but to the whole circumstances. The circumstances, in the present case, include the fact that the sole beneficial owner…wished the executive organ of the company not to act otherwise on his instructions. ….Provided [the] instructions did not involve dishonesty or illegality [director] could act upon them without more*."
- The Director's role "was execution only" and its responsibilities were limited to ensuring the company's acts were "valid and lawful".
- Interestingly Bannister J stated: "***Indeed, if this sort of relaxation on the part of ultimate beneficial owners of the duties which would otherwise be owed by directors to the companies which they own were not permissible, the provision by fiduciary service providers of companies like [company] and directors like [director] for the purposes for which they are provided, at the rates at which they are provided, would have to stop***.*"[EMPHASIS ADDED}*

In terms of Duomatic, the principle is that anything the members (or beneficial owners) of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it. In *Ciban* therefore the informal consent by the UBO of the means by which instructions were given to the director and the giving of such instructions were binding on the company. The UBO could not claim against the director for so complying. In the BVI Court of Appeal counsel for the director stated that "*a director might be cautious about slavishly following the directions of a sole owner of a company but only insofar as the instructions might be ultra vires, illegal or if the company might be at risk of insolvency*."

It is also worth noting the penultimate paragraph of the Privy Council:

"*There are two final general observations. First,* ***it would be incorrect to interpret this decision, or anything said by the Board or the lower courts, as suggesting that the law in the BVI imposes a lower standard of care on directors than is applicable under English law****. Secondly, the Board is conscious that the kind of arrangements put in place by [UBO] - by which he chose to hide from public view his position as ultimate beneficial owner - may not be uncommon. In this case, it has not been necessary for the Board to consider the propriety of that course of action but it may be required to do so in other circumstances. A central message of the decision in this case is that the ultimate beneficial owner who chooses such arrangements takes the risk of being betrayed by an agent who is being used to convey*

[49] 27 November 2012

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instructions to the director. Although there may be claims by the ultimate beneficial owner against the agent, the ultimate beneficial owner, on facts comparable to this case, cannot throw the risk taken onto the director by instigating an action by the company against the director for breach of the director's duty of care. The courts will treat the ultimate beneficial owner … as having been hoist by his own petard."[EMPHASIS ADDED]

This is likely to address some commentary on the earlier decisions. See for example Mark J. Forté and Tameka Davis of Conyers[50]:

".. there appears to be no reason in principle why professional directors who agree to act as directors of a company with full knowledge of their obligations under the Act, for a fee, are to be held to a different standard. Although in reality the directors in that case were merely the "nominee" of the UBO they were still directors under the Act. The Learned Judge appeared to have been swayed by the fact that this was a one man company and it was that "one man" that sought to sue the very directors he previously advised should not act otherwise on his instructions. No third parties interest was being affected, no harm done. However, it would be an unwelcomed development if the Judge's conclusion in that case were to be read as justification for some lesser standard of care for professional directors or those merely acting as nominees. …The saving grace in all this, is that even if the professional directors are not held accountable to the typical statutory obligations at the very least there is a strong case for saying that those duties should be attributed to UBO's who, while apparently not so, purport to act with a degree of control and in manner inimical to that of a director." In which regard, see the discussion on shadow directors above.

POTENTIAL RISKS

What are the potential risks where a nominee director[51] situation is in place? There are potential risks/concerns for the nominee director, any shadow director, the company and other related parties. Here are some that come to mind:

1. Nominee directors remain liable as directors. This should be a particular concern where there are solvency issues for the company and note the custodial sentence imposed in Singapore. Counter that with the position where directions are coming from the UBO of the company and are lawful.

2. Will conflicts of interest be properly addressed? How will the conflicts of the "principal" be disclosed? See the statement of the judge in *Selangor United Rubber* above. Will directors need to confirm they are not nominees?!

3. As a matter of good practice should regulated entities be acting as or providing nominee directors with promises to act as instructed?

[50] https://www.conyers.com/wp-content/uploads/2019/09/2013_BVI_Professional_Directors_Duties_in_BVI_Companies.pdf

[51] In the sense of a conduit for the directions of another

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   a. For example: see Guernsey FSC[52] rules setting out that a licensed fiduciary must act with integrity and "*when acting as a director, take all reasonable measures to obtain information sufficient to make a decision regarding the company*."[53]
   b. Note the statement of Lord Denning in the *Boulting* case above.
   c. Note the direction of travel from the FATF.

4. Should regulated persons be acting as nominee directors with promises to act as instructed?
   a. For example: the STEP Code of Conduct[54] states that "*A Member should not permit his or her independence, objectivity or integrity to be compromised*."
   b. Note the statement of Lord Denning in the *Boulting* case above.
   c. Note the direction of travel from the FATF.

5. If family members/ friends are used as nominee directors, could carefully crafted governance arrangements be put at risk?

6. Breach of representations/ warranties / terms of agreements
   a. For example, there may be statements given by the company or by the *de jure* directors as to who controls the company.
   b. Perhaps we will see due diligence requirements extending to production of the significant controller register and / or representations from the directors that they are not "accustomed to acting on the instructions of others".

7. Breach of confidentiality
   a. If nominee directors are sharing information with others (particularly non-shareholders/ beneficial owners), is this permitted?
   b. Note s158 of the Companies Act in Singapore allows a director, with the board's authorisation, to disclose certain information to "*a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's powers and duties".*

8. Breach of connected persons / competition / anti-trust / anti-round tripping rules
   a. This would be where the persons "in control" were not made aware to third parties.

9. Tax residence / CFC[55] rules
   a. Many jurisdictions look to where the ultimate decisions are taken in respect of corporate tax residence and CFC-type rules.

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[52] The Fiduciary Rules and Guidance 2020.pdf (gfsc.gg)
[53] Above at 3.2.2(1)(g)
[54] https://www.step.org/system/files/media/files/2020-03/STEP_Code_of_Professional_Conduct_April_07_2017.pdf at para 4
[55] Controlled Foreign Corporation.

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10. Economic substance[56]
    a. Using the Cayman Islands and BVI as an example[57], in respect of "relevant activities" other than holding business, there is a requirement that the relevant activity is "*directed and managed*" in [Cayman/ BVI].
    b. Per BVI, "*strategic decisions for the relevant activity are required to be taken in the BVI*."
    c. If the directors in Cayman/ BVI are "nominee" directors, is this test satisfied? (And is the certification given correct?).

11. Compliance issues
    a. Note the views of the FATF above.[58] The burden on registered agents and companies is increasing and to the extent local directors are used they will be held more accountable[59].
    b. As discussed above "significant controllers" or equivalent will, in the main, be caught by registers of beneficial ownership but other persons may not be.
    c. Will the company/ registered agent be aware of all such arrangements? Note recent fines in the Cayman Islands[60] where beneficial ownership information was not up to date.
    d. If a director is prepared to act at the direction of another, how can they be certain that their "principal" is not themselves a nominee for an unknown third party?
    e. Banks and financial institutions have (quite rightly) been clamping down on the "nominee director plus power of attorney to a third party" in respect of a company's bank and other accounts. For companies with digital assets not held via a custodian there is even less need for formalities! Note also the Prime Bulkship case where the Director had duties outside the power of attorney.

12. FATCA/ CRS classifications
    a. For example, under CRS in Hong Kong, where no natural person exercises control through ownership interests, the controlling person(s) will be the natural person(s) who exercise control "through other means".

13. Significant issues for regulated entities / fiduciary companies
    a. The *de jure* directors will often be approved by a regulator and consent may also be needed for any changes. There would be a requirement that the directors controlled the entity.

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[56] The author has written extensively on this topic.
[57] See Cayman Guidance p 26 and BVI Rules p 24-25.
[58] See footnotes 15-17. These views are likely to be implemented by local regulators.
[59] This is perhaps one reason why a local director is required.
[60] https://www.mfs.ky/news/registrar-of-companies-enforces-caymans-beneficial-ownership-regime/

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b. Prospectuses/ offering documentation in respect of share offerings will set out the names of the directors and this information will be relied upon by investors.
c. If the company holds fiduciary powers - a private trust company for example – could its actions be challenged if it were acting via nominee directors?

14. Do shadow directors owe fiduciary duties? If so, what are these duties? What if they are in breach?

15. Availability of "*Hastings-Bass*" relief?
    a. In the *Ta-Ming Wang Trust* case above, the relief was denied to the nominees.
    b. Cayman has now introduced a mechanism by statute for the court to set aside the "mistaken exercise of a **fiduciary** power."[61]
    c. There's an interesting discussion on Hastings-Bass for directors by Barrett J from the Supreme Court of NSW[62] - particularly in respect of boards of directors acting by majority.
    d. What about shadow directors?

16. Issues for trustees
    a. Where company shares are held on the terms of a purpose/STAR trust, the purposes are often stated to include a requirement to ensure that the directors are certain named persons or are appointed from within a potential pool. If the trustee (and/or enforcer) became aware that the directors are nominee directors, could this be an issue?
    b. Similarly, in a VISTA trust, the terms may incorporate "office of director rules[63]" setting out that certain persons be the directors (and that the management of the company is left to the directors). If others are acting behind the scenes, is this a concern?
    c. Potential unavailability of "*Hastings-Bass*" relief in respect of actions by nominee directors.
    d. *Anti-Bartlett* clause issues?
        i. These clauses have been examined in depth particularly post-*DBS*. All such clauses are not the same[64]. Depending on the clause in question, if a trustee has actual knowledge that the directors are nominees, could this warrant further enquiry?
        ii. What are the risks if the directors are nominees for the trustee? (particularly if the directors are employees of the trustee where actual knowledge can be imputed and the *Anti-Bartlett* clause is not as wide as it could be?)

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[61] S64A Trusts Act (2021)
[62] See https://nswca.judcom.nsw.gov.au/wp-content/uploads/2017/04/barrett_2006.02.23.pdf
[63] S7(2) Virgin Islands Special Trusts Act: "*The office of director rules may, in particular…require the trustee to ensure that a particular person holds or retains office as director*."
[64] See for example "Disputes over trusts that hold corporate structures"- Andrew Child and Jonathan Hilliard QC. Trusts & Trustees Vol 22 No 9 1015-1023;

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e. As an aside, there should also be concerns if it were thought that another supposedly fiduciary powerholder (enforcer, protector etc) is acting as nominee.
f. Of course, the concept of reserved powers and investment directions does necessitate that directors of underlying companies are often required to carry out certain actions but this is different from a "nominee" director.

To conclude therefore, nominee directors definitely do exist but whether they should be used at all is open to debate.

For further information please contact:

Richard Grasby

RDG Fiduciary Services Limited[65], Hong Kong

E: rdg@rdgfiduciary.com

T: 852 6596 7517

www.rdgfiduciary.com

https://www.linkedin.com/in/richard-grasby

https://twitter.com/GrasbyRD

Wechat: grazza73

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