

LHAG Insights

Corporate & Commercial Disputes



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Directors' Interest — To Disclose or Not to Disclose?

A director may hold more than one directorship in companies. There may be instances where these directors may cause their companies to enter into agreements or transactions in which they may have interest.

The Malaysian Companies Act 2016 imposes a duty on a director to disclose his interest to the board of directors. The provisions are, among others:

- Section 219 of the Companies Act 2016, which imposes a general duty on directors to make disclosure of, among others, particulars relating to the shares, debentures, participatory interest, rights, options and contracts to the company.¹
- Section 221 of the Companies Act 2016, which imposes a duty on a director to disclose his interest to the board of directors (whether directly or indirectly) in a contract or proposed contract as soon as practicable after it comes to the director's knowledge.²

Section 317 of the Capital Markets and Services Act 2007 also imposes the duty of disclosure on the chief executive and director.³ Unless exempted by the Securities Commission, this section requires the chief executive and director of a listed company who have interest in the securities to notify the company in writing of their interest and the extent of their interest in the securities.⁴

¹ Companies Act 2016, s 219

² Companies Act 2016, s 221

³ Capital Markets and Services Act 2007, s 317

⁴ Capital Markets and Services Bills 2007, Explanatory Statement to cl 317

The purpose of “disclosure” serves to ensure that:

- the board of directors takes note if there is a conflict of interest and/or potential conflict of interest;⁵
- the board of directors is aware of its member’s interest in the matter being discussed during the board meeting and that the decision arrived at is not influenced by views given by the interested director;⁶
- the decision made by the board of directors is in the interest of the company;⁷
- there is transparency in the dealings by the management of the company and moral integrity of those helming the administration of the company;⁸ and
- shareholders are fully informed of the actual position of the company.⁹

A director may wonder what kind of interest requires disclosure and what are the consequences if one does not comply with the obligation. The law requires a director to disclose his interest:

- if the company enters into an agreement or transaction with another company in which he has interest;
- if the company enters into an agreement or transaction where the interest is held by certain family members of his such as his spouse, children, etc.¹⁰ Section 221(9) states:

“for the purposes of this section, an interest in the shares or debenture of a company (a) of the spouse of a director who is not a director of the company; or (b) of a child, including adopted child or stepchild, of a director of a company who is not a director of the company, shall be treated as an interest in the contract and proposed contract”.¹¹

Based on reported decisions, the courts have held directors breached their duties when they did not make full disclosure to the company:

- The High Court¹² held the first defendant was in breach of his fiduciary duties when he did not make full disclosure of his intention to acquire a vehicle sold by the plaintiff company to another entity. Such failure to disclose is in breach of s 131(1) of the Companies Act 1965¹³ and the plaintiff company’s memorandum and articles of association.

⁵ Arjunan, K, *Modern Company Law in Malaysia* (2nd ed, Wolters Kluwer 2018)

⁶ Ibid.

⁷ Ibid.

⁸ *Delta-Pelita Sebakong Sdn Bhd v Wong Hou Lianq & 2 Ors* [2020] 1 LNS 475 (CA)

⁹ *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2012] 1 LNS 250 (CA)

¹⁰ This list outlined is by no means exhaustive. There could be other types of relationships that could give rise to a conflict of interest.

¹¹ Companies Act 2016, s 221(9)

¹² *Syarikat Ying Mui Sdn Bhd v Hoh Kiang Po & Anor* [2013] 1 LNS 417 (HC)

¹³ Akin to s 221 of Companies Act 2016

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- The Court of Appeal,¹⁴ among others, held the defendant as a managing director must make full disclosure of all material facts to the board. Disclosure requirements are not confined to the nature of the director's interest. They extend to disclosure of its extent, including the source and scale of the profit made from his position, so as to ensure that the shareholders are fully informed of the actual position. Failure to do so amounts to a breach of s 131 of the Companies Act 1965.¹⁵
- The High Court¹⁶ held the defendants were in breach of their fiduciary and statutory duties as directors of the plaintiff company as they did not disclose their interest in two other entities to the plaintiff company and failed to procure the plaintiff company's express consent.

As the law imposes on directors a duty to disclose, it is an offence if they do not do so. A director may be fined a sum not exceeding RM3 million or imprisonment for a term not exceeding five years, or both.¹⁷

Conclusion

Therefore, it is clear that a director must ensure the nature and extent of his interest is disclosed to the board of directors once he is aware that there might be a conflict of interest or potential conflict. In the event there is a change in the nature and extent of the interest, the director should make a new disclosure to allow the board to decide whether to pursue the transaction. Further, he should also refrain from participating in the discussion or abstain from voting at the board of directors' meeting on matters in which he has an interest.

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¹⁴ *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2012] 1 LNS 250 (CA)

¹⁵ Akin to s 221 of Companies Act 2016

¹⁶ *Systemex (Malaysia) Sdn Bhd v Sia Kee Chow & Ors* [2013] 8 CLJ 120 (HC)

¹⁷ Companies Act 2016, s 221(12)