



**A COMPARATIVE STUDY OF THE DUTIES OF  
NOMINEE DIRECTORS AND THE LIABILITIES OF  
THEIR NOMINATORS: RECONCILING THE LAW  
WITH COMMERCIAL REALITY**

**BY**

**YANG CHIK BINTI ADAM**

**A thesis submitted in fulfilment of the requirement for the  
degree of Doctor of Philosophy in Law**

**Ahmad Ibrahim Kulliyyah of Laws  
International Islamic University Malaysia**

**DECEMBER 2013**

## ABSTRACT

A nominee director is one who is appointed to the board of directors of a company to represent the interests of a particular person or group of shareholders or class of shareholders. Nominee directors are common in the corporate landscape. Section 4, Malaysian Companies Act (CA) 1965 defines 'director' as including "any person occupying the position of director by whatever name called ...". Under CA 1965 there is no specific definition on nominee director. By virtue of the Malaysian Companies Amendment Act 2007, s.132 (1E) clarifies statutorily the responsibility of nominee director, '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 ...". The nominee directorship is an issue peculiar by reason of their dual loyalty. This dual loyalty creates the difficulty such as the extent to which the nominee director may act in the interest of the nominator and disclose information to his or her nominator or the degree of involvement of the nominee director in the running of the company. This provision is silent on the liability of the nominator. It is recommended that s.132(1E) CA 1965 be reviewed so as to balance accountability and efficiency arguments. The research adopted the doctrinal analysis of data from both primary and secondary sources of law from Australia, United Kingdom and Malaysia. Semi-structured interviews were conducted with the relevant informants from the corporate industry. In reviewing s.132(1E) CA 1965 the research revealed, inter alia, that s.187 Australian Corporations Act 2001 may be adopted because little modifications are required but it would only be applicable in a wholly-owned subsidiary. The result of the interviews indicated that there is some uncertainty as to who nominee directors are despite commonly found. The informants indicated that s.132(1E) CA 1965 is clear. In the event of conflict of interests the company's interests prevail over the nominator. The informants were also uncertain on the issue of whether to hold the nominator liable for the acts of the nominee director. The extra legal solutions based on the Islamic law framework vide the Directors' Islamic Code of Ethics reveals a moral code of behaviour has the potential to be advanced to modern corporations.

## خلاصة البحث

المدير المرشح هو الشخص الذى تم تعيينه لدى الهيئة الإدارية لشركة ما . وهو يمثل مصالح لشخص مخصوص أو لجماعة من المساهمين أو طبقة من المساهمين . المديرين المرشحون أمر شائع في تنظيم الشركة . البند 4 من قانون الشركات في ماليزيا (CA) لسنة 1965 يعرف المدير بأى شخص يشغل منصب المدير ولو بأى لقب . وبمقتضى قانون الشركات في ماليزيا المعدل لسنة 2007 البند 132 (IE) يوضح قانونيا مسئوليات المدير المرشح وهو المدير الذى تم تعيينه بمقتضى وضعه كموظف للشركة أو كممثل للمساهمين أو كصاحب الشركة أو كحامل السند لأسهم الشركة... وطبيعة وظيفة المدير المرشح أصبحت قضية ذات عنصر متميز لأجل ثنائية الولاء. وأن ثنائية الولاء قد نتجت منها صعوبة على سبيل المثال مدى حق تصرف المدير المرشحة لأجل مصالح المرشح وكشف المعلومات للتي أو للذى يرشحه أو مدى درجة توغل المدير المرشح في إدارة الشركة. وهذا البند لم يذكر عن المسئولية القانونية للمرشح . لأجل ذلك يقترح إعادة النظر للبند 132 (IE) لقانون الشركات في ماليزيا لسنة 1965 للتعاادل بين المسئولية وفاعلية النقاش . والبحث سوف يتخذ التحليل الوثائقي للحقائق والوقائع من المراجع الرئيسية والثانوية من القوانين لأستراليا وإنجلترا وماليزيا . وكذلك سوف تجري أيضا المقابلات "نصف التركيب" مع مقدم المعلومات في مجال الصناعة التجارية . وبإعادة النظر لبند 132 (IE) CA 1965 قد كشف البحث - ضمن أمور أخرى - أن بند 187 لقانون الشركات لأستراليا للسنة 2001 يمكن أن يتبنى لأنه يحتاج إلى تعديلات يسيرة ولكنه قابل للتطبيق لشركة فرعية ذات ملكية كلية فقط . ونتيجة المقابلات تثبت أيضا أن هناك بعض الشكوك حول إلى من يسند إليه وظيفة المديرين المرشحين مع تواجدهم الشائع. ومقدموا المعلومات يشيرون إلى أن بند 132 (IE) CA لسنة 1965 واضح تمام الوضوح . في حالة التناقض بين المصالح فمصالح الشركة تغلب على مصالح المدير المرشح . ومقدم المعلومات يشككون أيضا في قضية هل المرشح مسئول عن حركات المدير المرشح . والحلول القانونية الإضافية التي تستند إلى الشريعة الإسلامية بالرجوع إلى مجموعة آداب المديرين تكشف عن القاعدة الأخلاقية للسلوك صالحة لوضع الشركات المعاصرة في المقدمة .

## **APPROVAL PAGE**

The thesis of Yang Chik Binti Adam has been examined and is approved by the following:

---

Aiman Nariman Bt Mohd. Sulaiman  
Supervisor

---

Mushera Bibi Bt Ambaras Khan  
Internal Examiner

---

Aishah Bidin  
External Examiner

---

Abdul Wahab Abdul Rahman  
Chairman

## DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any degree at IIUM or other institutions

Yang Chik Binti Adam

Signature .....

Date .....

**INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA**  
**DECLARATION OF COPYRIGHT AND AFFIRMATION OF**  
**FAIR USE OF UNPUBLISHED RESEARCH**

Copyright © 2013 by Yang Chik Binti Adam. All right reserved

**A COMPARATIVE STUDY OF THE DUTIES OF NOMINEE**  
**DIRECTORS AND THE LIABILITIES OF THEIR**  
**NOMINATORS: RECONCILING THE LAW WITH**  
**COMMERCIAL REALITY**

No part of this unpublished research may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying recording or otherwise without prior written permission of the copyright holder except as provided below.

1. Any material contained in or derived from this unpublished research may only be used by others in their writing with due acknowledgement.
2. IIUM or its library will have the right to make and transmit copies (print or electronic) for institutional and academic purposes
3. The IIUM library will have the right to make, store in a retrieval system and supply copies of this unpublished research if requested by other universities and research libraries

Affirmed by Yang Chik Binti Adam

.....  
Signature

.....  
Date

## ACKNOWLEDGEMENTS

All praise is for Allah SWT, the Exalted; May He send His peace and blessings on Prophet Muhammad (s.a.w.) and all the Messengers of Allah and their families and friends. Alhamdulillah and thank you Allah SWT for giving me the perseverance and guidance to complete this thesis.

I am particularly indebted to my supervisor, Professor Dr Aiman Nariman Mohd Sulaiman for her guidance, comments and suggestions in the course of writing this thesis. I also wish to extend my thanks to the postgraduate unit AIKOL, The Centre for Postgraduate Studies and staff of IIUM Library for their kind assistance.

I would like to express thank you to my family members, especially my mother Hajah Basrah Binti Hussein for her constant *doa* and the support throughout my studies and also to my late father Haji Adam Bin Yaakub amongst others taught me the meaning of determination and perseverance.

I am also thankful to Universiti Teknologi MARA and members of the Faculty of Law who has directly or indirectly assisted me in the course of my studies. Thank you too, to UiTM PTAR2 librarians who were very helpful to accommodate me to obtain certain materials.

# TABLE OF CONTENTS

Abstract .....	ii
Abstract in Arabic .....	iii
Approval Page .....	iv
Declaration Page .....	v
Copyright Page .....	vi
Acknowledgement .....	vii
List of Tables .....	xi
List of Figures .....	xii
List of Cases .....	xiii
List of Statutes .....	xv
List of Abbreviations .....	xvi

<b>CHAPTER ONE: INTRODUCTION .....</b>	<b>1</b>
1.1 Background of Study .....	1
1.2 Statement of Problem .....	4
1.3 Objective of Study .....	6
1.4 Area of Study .....	6
1.6 Research Methodology .....	13
1.7 Scope and Limitation of the Study .....	16
1.8 Outline of Chapters .....	19

<b>CHAPTER TWO: THE THEORETICAL DIMENSION OF DIRECTORS' LIABILITY RULES .....</b>	<b>31</b>
2.1 Introduction .....	31
2.2 The Corporation as a Nexus of Contracts Theory (contractual theory) and agency theory .....	35
2.3 The Agency Cost Theory of the Corporation / 'transaction cost economics' theory .....	42
2.4 Agency Problems and the separation of ownership and control .....	46
2.5 The Stewardship theory .....	55
2.6 Mandatory or enabling structure of corporate law .....	59
2.7 Board of Directors under the Islamic perspective .....	66
2.8 The Application Of Islamic Law Framework To Board Of Directors ..	76
2.9 Conclusion .....	80

<b>CHAPTER THREE: IDENTIFYING AND DEFINING NOMINEE DIRECTORS .....</b>	<b>84</b>
3.1 Introduction .....	84
3.2 Types of Nominee Directors .....	87
3.3 Basis for the Appointment of Nominee Directors .....	91
3.4 Legal Recognition of Nominee Directors .....	101
3.4.1 Malaysia .....	101
3.4.2 United Kingdom .....	104
3.4.3 Australia .....	107
3.5 The Problems in Relation to Nominee Directors .....	109



3.5.1 General Duties of Company Directors.....	109
3.5.1.1 The director’s duty to act bona fide in the interests of the company and to exercise their powers for a proper purpose.....	113
3.5.1.2 Duty to retain discretion.....	116
3.5.1.3 Duty to avoid conflict of interests.....	118
3.5.2 The Dilemma of nominee directors.....	119
3.5.2.1 The oppression remedy .....	121
3.5.2.2 Nominee directors representing a parent company.....	122
3.5.2.3 Reporting back to the nominator.....	123
3.6 Interviews with the Informants or Participants .....	125
3.6.1 Methodology and Approach .....	126
3.6.2 Findings and discussion.....	128
3.7 Conclusion.....	138

**CHAPTER FOUR: THE CROSS JURISDICTIONAL STUDY ON NOMINEE DIRECTORS’ DUTIES..... 140**

4.1 Introduction.....	140
4.2 The typology of the Approaches to Nominee directors’ liabilities .....	141
4.3 The position in Australia.....	147
4.3.1 Pre -2001: The Positions of Nominee Directors .....	147
4.3.2 Post 2001: The Positions of Nominee Directors .....	165
4.4 The position in the United Kingdom.....	171
4.4.1 The position on Directors’ Duties prior to Companies Act 2006 (CA 2006) .....	171
4.4.2 Companies Act 2006 (CA 2006): The Position of Nominee Directors under CA 2006 .....	179
4.5 The position in Malaysia.....	189
4.5.1 The law prior to Companies (Amendment) Act 2007 on the position of directors’ duties.....	189
4.5.4 The position of Nominee Directors Post-Companies Amendment Act 2007 .....	195
4.6 Conclusion.....	200

**CHAPTER FIVE: LIABILITY OF THE NOMINEE DIRECTOR’S NOMINATOR..... 206**

5.1 Introduction.....	206
5.2 Justifications for the nominator’s liability .....	207
5.3 Approaches to Nominator’s liability.....	211
5.3.1 Shadow directorship.....	211
5.3.2 Vicarious liability of the nominator .....	221
5.4 Conclusion.....	227

**CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS ..... 229**

6.1 Introduction.....	229
6.2 Conclusion of the Study .....	229
6.3 Findings.....	236
6.4 Recommendations .....	243
6.4. i Reviewing s.132(1E) Companies Act 1965.....	243
6.4. ii Judicial pronouncements or judicial activism.....	245

6.4. iii Extra Legal Solutions ..... 246  
6.4. iv To hold the nominator liable for the act of their nominee  
representatives..... 247

**BIBLIOGRAPHY ..... 249**

## LIST OF TABLES

<u>Table No.</u>		<u>Page No.</u>
2.1	Summary of theories relating to directors' duties	34
2.2	A Comparison of the Theoretical Perspectives on Directors' Duties	82

## LIST OF FIGURES

<u>Figure No.</u>		<u>Page No.</u>
2.1	Agency Theoretical perspective	49
2.2	The principal-agent relationship, the stewardship model	59
3.1	Company's 'A' – Board of Directors	90
3.2	Structure of Arrangement between Nominator, Nominee Director and Company	93
3.3	An Interlocking directorship	96

## LIST OF CASES

- Aberdeen Railway Co v. Blaikie Bros* (1854)1 Macq 461-472: [1843 – 1860] All ER Rep 249 at 252.
- Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614
- ASIC v Murdaca* (2008) 68 ACSR 66 P.11
- Australia v Antico* (1995) 131 ALR 1
- Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1 at pp 52-53
- Bank of Australia Ltd v Antico* (1991) 131 ALR p. 381
- Barnes v Addy* (1873-74) L.R. 9 Ch. App. 244
- Bennetts v Board of Fire Commissioner of New South Wales* (1967) 87 WN (NSW) 307
- Berlei Hestia (NZ) Limited v Fernyhough* [1980] 2 NZLR 150
- Boardman v Phipps* [1967] at AC 46
- Boulting V Association of Cinematograph Television and Allied Technicians* [1963]1 All ER 716
- Bray v Ford* [1896] A.C.44 HL at 51
- Burgoine v London Borough of Waltham Forest.* [1997] BCC 347
- Bushell v Faith* [1970] AC 109
- Cepatwawasan Group Bhd & Anor v Tengku Dato Kamal Ibni Sultan Sir Abu Bakar & 17 Ors* [2008] 2 MLJ 915, p.11
- Charterbridge Corporation Ltd. V Lloyds Bank* [1970] Ch 62
- Chloride Eastern Industries Pte Ltd v Premium Vegetables Oils Sdn Bhd* [2002] 1 CLJ
- Cobden Investments Ltd v RVM Langport Ltd* [2008] EWHC 2810 (Ch) at 52
- Coleman v Myers* [1977]2 NZLR 297
- Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Hereald Newspaper and Printing Co Ltd* [1987] Ch 1
- Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 94
- Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697
- Dawson International Plc v Coats Paton Plc (No.1)* [1989] B.C.L.C. 233 at 243
- Edman v Ross* (1922) 22 NSW 351
- Equitcorp Finance Ltd v (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50
- Euco International Sdn Bhd v P F Chan* [1984] 2 MLJ 61,
- Greenhalgh v Arderne Cinema Ltd.* [1951] Ch 286
- Harkness v Commonwealth Bank of Australia* (1993) 12 A.C.S.R 165
- Heydon's case* (1584) 3 Co Rep. 7.
- Imperial Mercantile Credit Association v Coleman* (1871) 6 Ch App 558 at 567-568
- Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332
- Inland Revenue Commissioners v Crown Court at Kingston* [2001] EWHC Admin 581;4 All ER 721 at 20
- Japan Abrasive Materials Pty Ltd v Australian Fused Materials* (1998) 16 ACLC 1,172
- Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR 297
- Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513
- Levin v Clark* (1962) NSW 686

*Lewison J in Ultraframe (UK) Ltd Fielding* [2005] EWHC 1638 (Ch) 1279ff  
*Metropolitan Fire Systems Pty Ltd v Miller* (1997) 23 ACSR 699  
*Mills v Mills* (1938) 60 CLR 150  
*Mohd Shuaib Ishak v Celcom (M) Bhd* [2008] 5 MLJ 857  
*Molomby v Whitehead and the ABC* (1985) 63 ALR 282  
*Morgan v 45 Fleurs Avenue Pty* (1986) A.C.L.R. 692 p.705  
*Natcomp Technology Australia Pty Limited v Graiche* [2001] NSWCA 120  
*Nicholson v Permakraff NZ Ltd (in liq.)* (1985) eACLC 453 pp.457- 460  
*Osborne v Amalgamated Society of Railway Servants* [1909]1 Ch 163  
*Percival v Wright* [1902] 2 Ch 421  
*Raffles Hotel Ltd v Rayner* [1965] 1 MLJ 60  
*Re A Company (Ex parte Copp)* [1989] BCLC 13  
*Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSW 1648  
*Re Enterprise Gold Miles NL* (1991) 3 ACSR 531  
*Re Hydrodam (Corby) Ltd* [1994] BCLC 180  
*Re Neath Rugby Ltd; Hawkes v Cuddy* [2009] EWCA Civ.291;  
*Re Smith & Fawcett* [1942] Ch 304  
*Re Southard & Co. Ltd.* [1979] 1 WLR 1198  
*Re Southern Counties Fresh Foods Ltd: Cobden Investment Ltd v RWM Langport Ltd* [2008] EWHC 2810Ch) p.64  
*Re Spargos Mining NL* (1991) 3 ACSR 1  
*Re Syed Ahmad Alsagoff* [1960] MLJ 147  
*Re. Broadcasting Stations 2GB Pty Ltd* (1962) NSW 686 at 701  
*Russell v Northern Bank Development Corp Ltd* [1992] BCLC 1016.  
*Santos Ltd v Pettingell* (1979) 4 ACLR 110  
*Scottish Co-operative Society Ltd v Meyer* [1959] AC 324;  
*SEC v Cheney Corp.*, 318 U.S. 80, 85-86 (1943)  
*Secretary of State for Trade and Industry v Deverell & Anor* [2001] Ch 340 350  
*SGH Ltd (formerly known as Suncorp Building Society Ltd) v Commissioner of Taxation* [2002] HCA 18; (2002) 188 A.L.R 241 at [30]  
*Shepherds Investments Ltd v Walters* [2006] EWHC 836 at 106  
*Society Co-operative Society Wholesale Ltd v Meyer* (1959) AC 324  
*SPP Ltd v Chew Beng Gim* [1993] 23 SLR 393  
*Standard Chartered Bank of Australia Ltd v Antico* (1995) 13 ACLC 1381  
*Thomas J in Dairy Contrainers Ltd* [1995] 2 NZLR 30  
*Thorby v Goldberg* (1964) 112 CLR 597  
*Walker v Wimborne* (1976) 137 CLR 1  
*Whitehouse and Another v Carlton Hotel Pty Ltd* (1987) 5 ACLC 421  
*Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285  
*Woodands Ltd v Logan* [1948] NZLR 230  
*Young v Murphy* (1994) 13 ACSR 722 at 749-750

## LIST OF STATUTES

### **Malaysia: Acts**

Companies Act 1965

Companies Amendment Act 2007

Civil Law Act 1956

### **Foreign Laws**

Australian Corporations Act 2001

UK Companies Act 2006

UK Company Directors' Disqualification Act 1986

UK Companies Act 1956

UK Companies Act 1948

UK Insolvency Act 1986

## LIST OF ABBREVIATIONS

AFBE	Asian Forum on Business Education
AICC	AIC Corporation Ltd
AICL	Australasia Investment Corporation Ltd
ALJ	Australian Law Journal
ASIC	Australian Securities and Investments Commission
CA	Companies Act
CAMAC	Companies and Securities Advisory Committee
CCM	Companies Commission of Malaysia
CEPCO	Concrete Engineering Products Bhd
CLERP	Company Law Economic Reform Program
CLRC	Corporate Law Reform Committee
CLRG	Company Law Review Group
CLRSG	Company Law Review Steering Group
CSLRC 1987	Companies and Securities Law Review Committee 1987
CSLRC 1989	Companies and Securities Law Review Committee 1989
EEC	European Economic Community
GLC	Government-Linked Companies
ICCLR	International Company and Commercial Law Review
ICSA	Chartered Secretaries and Administrators
MICG	Malaysian Institute of Corporate Governance
MLJ	Malayan Law Journal
NCSC	National Companies and Securities Commission
NEC	National Equity Corporation
NZDB	New Zealand Dairy Board
OUP	Oxford University Press
PNB	Perrmodalan Nasional Berhad
RCG	High Level Finance Committee on Corporate Governance
TCE	Transaction Cost Economic
TMB	Telekom Malaysia Berhad
SWT	Subhanahu Wa Ta'ala (Praise be to Allah and the Most High)
SAW	Sallallahu alaihi wasallam (Peace be upon him)



# CHAPTER ONE

## INTRODUCTION

### 1.1 BACKGROUND OF STUDY

A nominee director is usually appointed to the board of directors of a company to represent the interests of a specific group or class of persons such as a class of shareholders, a major creditor to the company or an employee group. In *Levin v Clark*, Jacobs J. noted that:

It is not uncommon for a director to be appointed to a board of directors in order to represent an interest outside the company: a mortgagee or other trader or a particular shareholder. It may be in the interests of the company that there be upon its board of directors one who will represent these other interests and who will be acting solely in the interests of such a third party and who may in that way be properly regarded as acting in the interests of the company as a whole.<sup>1</sup>

In practice, it is common for the class of shareholders, debenture holders or a major creditor to have authority in the company by way of either an express provision in the company's Articles or in a supplementary agreement such as a shareholders' agreement, to appoint or remove a director. In a corporate group structure, it is common for the parent company to appoint nominee directors for its subsidiary companies. The appointment of nominee directors is also common in joint venture companies.

In the Malaysian corporate set-up, it is not uncommon for family-based enterprises and government corporatised bodies to have a legitimate interest in maintaining nominee directors to oversee their interests. This expectation is legitimate

---

<sup>1</sup> [1962] NSW 686 p.700

and has commercial justification.<sup>2</sup> To reiterate the keynote address by the former Second Finance Minister and Entrepreneur Development Minister<sup>3</sup> at the Corporate Governance Conference for nominee directors of Permodalan Nasional Berhad (PNB), “as a trusted premier investment organisation with the commitment to deliver outstanding long term performance and achievement, PNB<sup>4</sup> relies on its existing investments in the various investee companies which represent a cross section of the Malaysian economy to achieve this target. As such, I fully understand the purpose and objective of PNB in appointing its nominees to the Board of Directors and its investee companies. This is necessary given that PNB as a shareholder needs to undertake close and continuous monitoring of its investments. As such, the nominee directors of PNB play a vital role. Since PNB has more than 300 companies in its stable and has appointed more than 170 nominee directors to these companies, the implementation of good corporate governance practices at PNB level augurs well for the country. All nominee directors of PNB should set an example in the eyes of the corporate world and the public to support Government efforts in enhancing principles of good corporate governance. I envisage that as a nominee director of PNB, you would uphold the responsibilities and accountability expected of you as the representative of PNB on the Board of the investee companies. Undoubtedly, you are among the few who have been carefully selected and nominated by PNB to the Board of these companies with the paramount objective to protect the best interests of PNB, as a shareholder in the company and the unit holders at large. I understand that the

---

<sup>2</sup> Philip TN Koh, Reform Realism and the Board, *Global Corporate Governance Forum*, Issue 6, (2007), p.12

<sup>3</sup> Keynote Address of YB. Dato’ Mustapa Bin Mohamed Second Finance Minister and Entrepreneur Development Minister at the Corporate Governance Conference for Nominee Directors of PNB, August 20, 1999

<sup>4</sup> In March 1978, the National Equity Corporation (NEC) or Permodalan Nasional Berhad (PNB) was conceived as a pivotal instrument of the Government’s New Economic Policy to promote share ownership in the corporate section among the Bumiputera and develop opportunities for suitable Bumiputera professionals to participate in the creation and management of wealth.

nominee directors of PNB are a pool of professionals for example engineers, architects, lawyers and entrepreneurs. Whilst your professional background is an added value in assisting you in your duties, good business ethics, sound knowledge in the field of management and proper business conduct are essential ingredients to ensure that the company is properly managed and is on the right path. The role you assume as the provider of ‘the check and balance’ in the investee company underscores the need for you to be well versed on what constitutes proper corporate governance”.

The relationship of the nominators with the nominee directors whom they have appointed is almost invariably that of principal and agent or employer and employee. Yet, acting as an agent or employee results in the nominee director being, to a greater or lesser extent, in breach of the recognized fiduciary duties of a director.<sup>5</sup> Under common law, the directors of a company are under a fiduciary duty to exercise their powers for the benefit of the company as a whole, and not for the benefit of the directors themselves, or for a section of the shareholders, or for the employee’ group of the company, the company’s holding company or subsidiary or for outsiders.

Nominee directors face difficulties when a conflict of interest and duty arises between the company on whose board they sit and the person who appointed them to the board. They are also subject to the duty not to fetter discretion. Thus, it can be seen that the law clashes with commercial reality. However, company law legislation in some jurisdictions has taken a more flexible approach in relation to the duty imposed on nominee directors. In such jurisdictions, the nominee directors are relieved of the full force of the common law obligations when they are representing the interests of their nominator. However, a relaxation of the nominee director’s

---

<sup>5</sup> Justice E W Thomas, *The Role of Nominee Directors and the Liability of their Appointors*”, in I.M.Ramsay, *Corporate Governance and the Duties of Companies Directors*, 1997, p.148

duties is accompanied by identification of the conditions that must be fulfilled before such relaxation takes effect, together with legal liability imposed on the nominator.

Nominee directors are, first and foremost, directors of a company and ought to be upheld to strict fiduciary standards. Nonetheless, consistency with principles and deference to commercial realities point to the need to extend the liability of the nominators for the actions of those whom they have appointed and who act under their control or in their interests. For directors, the incidence of the residual risk is the fundamental commercial reality of the company's organization and it should inform the law accordingly.<sup>6</sup>

## **1.2 STATEMENT OF PROBLEM**

The Companies (Amendment) Act 2007 ("Amendment Act 2007") has made many substantial changes to the Companies Act 1965.<sup>7</sup> One of the amendments were on the duties of directors. By virtue of s.132(1E) Amendment Act 2007 codifies the responsibility of a nominee director. Section 132(1E) statutorily stipulate that a director who was appointed by virtue of his position as an employee of a company and a director who was appointed by or as a representative of a shareholder, employer or debenture holder. Nominee directors must act in the best interest of the company. This provision further states that the nominee director 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, the nominee director shall not

---

<sup>6</sup> Justice E W Thomas, *The Role of Nominee Directors and the Liability of their Appointors*, in I.M.Ramsay, *Corporate Governance And The Duties of Companies Directors*, 1997, p.148

<sup>7</sup> Samsar Kamar bin Abd Latif, *The Recent Development In Company Law: The Company (Amendment) Act 2007* Sweet & Maxwell Asia, 2008, p.1

subordinate his duty to act in the best interest of the company to his duty to his nominator.<sup>8</sup>

It is a trite law that directors are under the fiduciary duties and to act in the best interest of the company. This fundamental principle has been embedded in s.132(1E) Companies Act 1965 (CA 1965). The nominee directorship status poses the difficulty to the nominee director because of the dual loyalty owed by the nominee director to the company and to his or her nominator. This gives rise to the question of the applicability of the fiduciary duties to nominee directors because nominee directors are widely used in our corporate landscape.

The basis for the appointment of nominee director is to represent the interests of his or her nominator. Most of the times the nominator is with a large shareholding in the company. Section 132(1E) CA 1965 is silent on the issue of liability on the part of the nominator.

In resolving the conflict of interests and duties on nominee directors the courts in the two comparable jurisdictions under study have adopted various views or approaches, namely the pragmatic approach which is dominant in Australia while in the UK adopted the strict approach and commencing 2011 gradually adopted the attenuated duty approach. In Malaysia, in the case of *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd*<sup>9</sup> court favoured the strict approach. However, the concentration of ownership in Malaysian corporate economy would be applicable to the adjusted fiduciary duty approach which is also known as the pragmatic approach.

In order to ensure Malaysian corporate economy is dynamic and competitive the approach on nominee directorships must be well established. Equally important is

---

<sup>8</sup> Section 132(1E) Companies Act 1965

<sup>9</sup> [2001] 2 MLJ 332

the formulation of the provision on the issue of liability of the nominator. This research is intended to recommend the requirement to review s.132(1E) CA 1965 so that to balance the accountability and efficiency arguments.

### **1.3 OBJECTIVE OF STUDY**

The main objectives of this study are:

- i) To analyse whether the law relating to nominee directors in Malaysia is able to balance accountability and efficiency arguments.
- ii) To investigate whether the nominators of nominee directors should be liable for the acts of these directors and the legal basis for liability to hold the nominators accountable for the acts of their representatives.
- iii) To clarify the Islamic perspective on directors' duties and to analyse the Islamic principles in this area as an alternative in relation to liability issues.

### **1.4 AREA OF STUDY**

The study concentrates on matters with respect to the fiduciary duties of nominee directors in Malaysia. Comparative reference is made to the law and practices in both Australia and England to provide insights as to what the law should be in Malaysia. These two jurisdictions were chosen because Malaysian company law traces its origin to English and Australian company law.<sup>10</sup> In areas of company law where no written law has been made in Malaysia, subject to certain criteria<sup>11</sup> and cut-off dates, English

---

<sup>10</sup> The earliest company law statute introduced into the /straits Settlements (comprising of Singapore and some parts of the territory now known as Malaysia) was the Indian Companies Act 1866. The Companies Act 1965 currently in force throughout Malaysia was based on the Companies Act 1961 of Victoria, Australia – see *Walter Woon Company Law* (1997, 2<sup>nd</sup> Edition) p.4.

<sup>11</sup> Sections 3 and 5 of the Civil Law Act 1956.

common law and rules of equity continue to apply. Further developments after the cut-off dates in English common law and rules of equity are highly persuasive in Malaysian courts. Due to historical reasons, decisions of company law cases from England and Australia are highly persuasive and are frequently consulted in areas where there are no decided Malaysian cases. The Malaysian Companies Act 1965, is modelled on the Australian Uniform Companies Act 1961 which in turn is modelled upon the English Companies Act 1948.<sup>12</sup> As a consequence, the history and development of company law both in England and Australia are relevant to the development of company law in Malaysia, although over the years, there has been an increasing divergence between the jurisdictions. Although superficially, Malaysian company law is similar to that of England and Australia, it is not identical. It can now be said that Malaysia is on the way to developing its own indigenous company law. Nevertheless, English and Australian judicial pronouncements on company law remain highly persuasive in interpreting the Malaysian provisions. Where gaps exist in Malaysian company law, the issue of whether those gaps can be filled by the application of the corresponding provisions of the English Companies Act 1948, is still undecided. The provisions which authorize the reception of common law are ss 3 and 5 of the Civil Law Act 1956 (revised in 1972). With respect to companies, the relevant section is s 5(1) of the Civil Law Act 1956, which states that:

“In all questions or issues which arise or have to be decided in the states with respect to the law of partnership, corporations, banking ... law to be administered shall be the same as in England at the date of the coming into force of this Act.”<sup>13</sup>

---

<sup>12</sup> S.Rachagan, J.Pascoe & A.Joshi. *Concise Principles of Company Law In Malaysia*, LexisNexis Malaysia Sdn Bhd, 2010, p.xi

<sup>13</sup> A, Bidin. Corporate Law, directors' duties and creditors protection, *The Company Lawyer*, (1998). vol.19, No.6, p.188

Borrowing the words of Corcoran,<sup>14</sup> the objectives of comparative law, inter alia, law reform include the recognition of social and commercial changes that has occurred, promotion of social and economic change. This is sometimes referred to as ‘social engineering’, a term first used by Roscoe Pound in describing the search for solutions to specific problems in domestic law and bridging the differences among legal systems, particularly, in conflict situations. Director duties in Malaysia became the highlight of the Law Reform Proposal as a result of the East Asian crisis. In 1998, the Malaysian Government announced the formation of a High Level Finance Committee that would look into establishing a framework for corporate governance and setting best practices for businesses.<sup>15</sup> The High Level Finance Committee, in addressing issues faced by nominee directors, recommended that “there should be statutory clarification of the fact that a nominee director’s primary obligation is to act in the best interests of the company and that his duty to his principal is always subject to his duty to act in the best interests of the company.”<sup>16</sup> However, no concrete proposals were formulated until 2007 with the enactment of the Companies (Amendment) Act 2007, which came into force on 17 August 2007. In the meantime, the Corporate Law Reform Committee was established on 17 December 2003.

The Corporate Law Reform Programme of the Companies Commission of Malaysia (CCM) began in December 2003 when the review of the Companies Act (CA) 1965 was initiated as part of CCM strategic direction in facilitating the development of a conducive and dynamic business and regulatory environment for

---

<sup>14</sup> S. Corcoran *Comparative Corporate Law Research Methodology*, 3 *Canberra Law Review*, (1996) p.56

<sup>15</sup> Finance Committee On Corporate Governance, Report On Corporate Governance, February 1999, Companies Commission of Malaysia, Corporate Law Reform Committee, Review of the Companies Act 1965 - Report p.ii

<sup>16</sup> Finance Committee On Corporate Governance, Report On Corporate Governance, February 1999, p.ii

<sup>17</sup> Companies Commission of Malaysia, Corporate Law Reform Committee, Review of the Companies Act 1965 – Final Report