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THE NOMINEE DIRECTOR'S TANGLED LOT

Jenton Overseas Investment Pte. Ltd. v. Townsing Henry George
Golden Village Multiplex Pte. Ltd. v. Phoon Chiong Kit

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I. INTRODUCTION

The term "nominee director" provides convenient shorthand for a director who is appointed to the board of a company on an understanding, whether formal or informal, that he represents the interests of some person *other* than the company, usually the person(s) who nominated or, by some means, appointed him.[1] Such directors are particularly commonplace in group enterprises and joint ventures, with each joint venture partner appointing its own representatives to the board of the joint venture company. It is also not unusual for investors, creditors or employees to be given a right to board representation. It is, however, trite that *all* directors, and seemingly without exception, owe an overarching obligation to serve in good faith in the best interests of the company on whose board they are members.[2] A director is also proscribed from placing himself in a position where his duties to the company conflict with his personal interests or with duties he owes to another person. These duties are embodied in section 157(1) of the *Companies Act*.[3] Clearly then, the nominee director is in a very difficult place—by the very nature of his role, the nominee director occupies a position with the greatest potential for conflict. Two recent decisions[4] of

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1 See definition in Austl., N.S.W., Companies and Securities Law Review Committee, *Nominee Directors and Alternate Directors* (Report No. 8) at 7.

2 See *e.g*. *Cheong Kim Hock v. Lin Securities (Pte.) (in liquidation)* [1992] 2 S.L.R. 349; *Goh Kim Hai Edward v. Pacific Can Investment Holdings Ltd.* [1996] 2 S.L.R. 109; *Krishna's India Pte. Ltd. v. Arulmozhi d/o Krishnan and Another* [2001] SGHC 157.

3 Cap. 50, 2006 Rev. Ed. Sing. Section 157(1) requires a director to at all times act honestly and use reasonable diligence in the discharge of the duties of his office. The Singapore courts have consistently treated the statutory duty to act honestly as a mirror of a director's general duty to act bona fide in the company's best interests: see *e.g*. *Re Kie Hock Shipping (1971) Pte. Ltd.* [1985] 1 M.L.J. 411; *Lim Koei Ing v. Pan Asia Shipyard and Engineering Co. Pte. Ltd.* [1995] 1 S.L.R. 499; *Cheam Tat Pang v. P.P.* [1996] 1 S.L.R. 541; *Kea Holdings Pte. Ltd. and Another v. Gan Boon Hock* [2000] 3 S.L.R. 129, at para. 27; *Lim Weng Kee v. P.P.* [2002] 4 S.L.R. 327 at 335; *Vita Health Laboratories Pte. Ltd. v. Pang Seng Meng* [2004] 4 S.L.R. 162.

4 *Jenton Overseas Investment Pte. Ltd. v. Townsing Henry George* [2006] SGHC 31 [*Jenton*]; *Golden Village Multiplex Pte. Ltd. v. Phoon Chiong Kit* [2006] 2 S.L.R. 307 [*Golden Village*].

the High Court of Singapore touch on the duties owed by nominee directors. These cases, both decided by Lai Siu Chiu J., provide us the opportunity to reflect on the law of directors' duties in Singapore, and its application in particular to nominee directors.

II. Jenton Overseas Investment

A. *Understanding the Facts*

The first case is *Jenton Overseas Investment Pte. Ltd. v. Townsing Henry George.*[5] The defendant's appeal was in fact dismissed by the Court of Appeal in *Townsing Henry George v. Jenton Overseas Investment Ltd (in creditors' voluntary liquidation)*.[6] The issue of nominee directorship was however not considered in the Court of Appeal. As such, whilst reference will be made to the appellate decision where necessary, it is really the High Court's treatment of the issue of nominee directorship that is the focus of this note.

The case involved convoluted facts, but in brief, concerned an investment relationship that had soured, and the actions taken by the defendant, who had been nominated to plaintiff's board by the investor ('N'), to protect the investor's interests. The principal activity of N was to invest in unlisted companies, and N's relationship with the plaintiff began with an agreement to subscribe for $2 million worth of preference shares in the plaintiff. The plaintiff itself was a holding company with no business activity whose main investment was the entire share capital of NQF, a New Zealand food manufacturing company. Pursuant to the subscription agreement, N nominated the defendant who was duly appointed to the plaintiff's board.

Unfortunately, it transpired very shortly thereafter that there were material misrepresentations in the accounts of both the plaintiff and NQF, thereby giving N the right to repudiate the agreement. In the circumstances, although the subscription monies had already been paid to the plaintiff, the issue of shares to N was aborted. The plaintiff thus owed N a debt of $2 million. However, as N "remained committed to invest in NQF",[7] the investment deal was restructured, resulting in the plaintiff being converted into a wholly-owned subsidiary of NGH, a company incorporated for that very purpose in Australia, and N's investment taking the form of convertible notes issued by NGH. The defendant was also appointed to the boards of both NGH and NQF. The debt of $2 million owed by the plaintiff was assigned to NGH. N required security for the debt, and this took the form of three charges, the validity of which was the source of some contention. Two years later, due to its worsening financial situation, NQF sold all its operating assets and business. It was the defendant's actions in relation to the sale proceeds that gave rise to this action for breach of directors' duties. N understood the charges as giving it priority over the assets of NQF after only one other creditor. The defendant, acting on this understanding, caused part of the proceeds of sale to be transferred to N. N's right to the assets

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5 *Ibid*.

6 [2007] SGCA 13 [*Townsing*]. In the Court of Appeal, the interesting question whether the principle of reflective loss applied to bar the plaintiff's action was considered, but this issue is beyond the modest scope of this piece.

7 *Jenton*, *supra* note 4 at para. 15.

was vehemently denied by the plaintiff who disputed the validity and efficacy of the various agreements in this regard. The court eventually found the agreements to be legally ineffective.

B. *Whither the Breach?*

The main issue before the court was whether the defendant had breached the duties that he owed to the *plaintiff*. Lai J. found the defendant liable as, the documents being ineffective, there was no legal justification to pay N. Further, her Honour opined that:

> [t]he defendant cannot expect this court to believe he was acting in the best interests of NQF and its sole shareholder (the plaintiff) when he spirited off the sale proceeds of NQF to pay [N]. · · ·The defendant acted in breach of his statutory duties under s 157(1) of the Companies Act and breached his fiduciary duties at common law. His actions benefited [N] at the expense of NQF and the plaintiff.[8]

As a matter of commercial reality, her Honour is undoubtedly correct. However, by the fundamental principle of company law established in *Saloman v. A. Saloman & Co. Ltd.*,[9] the assets of a subsidiary are not the assets of the holding company. The remitted sums were assets belonging to NQF. Hence, while the defendant might have been in breach of his obligations to NQF,[10] which was not in issue, whither the breach of obligations owed to the plaintiff? It might even be argued that the defendant had, when he instructed the bank to transfer the funds, acted, not so much as a director of NQF and certainly not as a director of the plaintiff, but as the plaintiff's corporate representative, *i.e.* as the sole *shareholder* of NQF.[11] It is of course trite that shareholders do not, as a general rule, owe duties of good faith to the company.[12] Even as we recognise the artificiality of the *Saloman* principle, it remains important to be able to identify some act or omission that could amount to a breach of duty by the defendant as a director of the *plaintiff*. In doing this, it is necessary, for the sake of clarity of thought and purity of analysis, to consider the present facts within a theoretical realm, a realm where it is possible to cleanly isolate the acts or inaction of the defendant and attribute such acts or inaction to his different guises. The defendant's breach of a duty that is owed to the plaintiff must therefore be located within some act *other* than the defendant's application of NQF's assets in his capacity as a director of NQF.

This point was appreciated by the Court of Appeal, which helpfully sought to "clarify the exact nature of [the defendant's] breach of duties as a director on the present facts".[13] The Court of Appeal was mindful of the need to be clear that whilst

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8 *Jenton*, *supra* note 4 at para. 137.

9 [1893] A.C. 22.

10 In *Selangor United Rubber Estates Ltd. v. Cradock (No.3)* [1968] 1 W.L.R. 1555, 2 directors who misapplied company funds under their control in accordance with the instructions of the controlling shareholder were held to have disregarded their duties as directors.

11 *Jenton*, *supra* note 4 at para. 37.

12 The obligation imposed on majority shareholders to exercise the power to alter the company's articles "bona fide for the benefit of the company as a whole" is not an obligation owed to the company, but is a constraint on the power of the majority to bind the minority: see *Allen v. Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656.

13 *Townsing*, *supra* n 6 at para. 52.

the defendant, being a director of both the plaintiff and NQF, owed similar albeit distinct duties to both companies, the court was *not* concerned with the defendant's breach of duties owed to NQF. Nevertheless, the court considered that the plaintiff, being the sole shareholder and creditor[14] of NQF, had an interest in the assets of NQF, and that any wrongful dissipation of the same would result in damage to the plaintiff's interests.[15]

Matters are however complicated on the facts because, in his guise as a director of *NQF*, the defendant had thought that he was *justified* in paying N. As a director of NQF, it would be necessary for him to ensure, aside from the question of his doubtful authority to act, that any use of NQF's assets was proper as a matter of law. From *this* perspective, the law of New Zealand is clearly relevant, and there was expert evidence that under New Zealand law, the relevant charges were valid and effective.[16] Indeed, if the only problem had been the validity of the charge documents, section 138 of New Zealand's *Companies Act 1993*, the original draft version of which our section 157C is premised, should assist the defendant. The provision explicitly allows a director of a company, in the performance of his duties as a director, to rely on expert advice (which would include legal advice), provided the director acted in good faith; made the proper inquiries where necessary and had no knowledge that such reliance is unwarranted.[17]

This was not considered in the High Court and, the Court of Appeal, perhaps as a result of counsel's submissions, focused on N's purported right to *rectify* the defective charges. However, as counsel for the *plaintiff* asserted,[18] N's right to rectify the charges was really *irrelevant* to the question of the defendant's breach of directors' duties. Indeed, the consequences of bad legal drafting should be borne by N, and not by the director who had acted on legal advice and in the apparently *genuine*[19] belief that N's right to the assets was premised on a common understanding between the parties. On the evidence, Lai J had found that "the Wongs were clearly aware of [N's] requirements, however reluctantly they may have acceded to the same".[20] At the time of the various transactions, the Wongs were the representatives of the plaintiff, and of NQF. It seemed, with respect, somewhat disingenuous of the Wongs to deny this common understanding when the restructuring of N's investment (which was meant to be in a "New Zealand food manufacturing company",[21] ie NQF), resulting in the additional corporate layer of NGH, was necessitated by the plaintiff's breach of warranties in the first place.

It is interesting that, in Lai J.'s view, even if the documentation had been effective, "it was still not within [the defendant's] duties as a director of NQF or the plaintiff or NGH, to pay the claims of creditors. That function was reserved to the accountant or equivalent person in the employment of NQF or the plaintiff or NGH".[22] With

14 The liquidators of the plaintiff asserted that NQF owed the plaintiff a debt of $4,542,286: *Jenton*, *supra* n 4 at para. 42, and *Townsing*, *supra* n 6 at para. 7.

15 *Townsing*, *supra* n 6 at para. 60.

16 *Jenton*, *supra* note 4 at para. 99.

17 Section 157C(2).

18 *Townsing*, *supra* n 6 at para. 37.

19 *Townsing*, *supra* n 6, at para. 46.

20 *Jenton*, *supra* note 4 at para. 161.

21 *Jenton*, *supra* n 4 at para. 6.

22 *Jenton*, *supra* note 4 at para. 130.

respect, this statement, as a general proposition, may be readily misunderstood. After all, the management powers of a company are vested in its board of directors, and repayment of debts owed by the company must surely fall within the general purview of these powers. However, boards are supposed to act collectively, and it was the defendant's solitary actions, "without the knowledge or consent of the other directors",[23] that provided grist for saying that the defendant had acted without the requisite authority. The real difficulty is with the facts, on a closer examination of which suggests that the defendant might conceivably have been duly authorized![24]

C. *The Nominee's Director's Lot*

What then was the nature of the duty that the defendant owed to the *plaintiff*? It could have been argued that he had failed to exercise sufficient rigour in his inquiries as to how NQF's funds had been applied, knowing, as he well did, that the application was dependant on the N's legal right to those funds. Any compromise in this regard on the defendant's part would clearly be explicable by his divided loyalty, prompted undoubtedly by the desire to protect N's interests. Would *this* be in breach of the defendant's duty to act in the best interests of the plaintiff? In the opinion of Lai J. and the Court of Appeal, the answer would be affirmative. The defendant's conduct had been "dictated by his loyalty to [N], not to the [plaintiff]",[25] and as the defendant had "*consciously and unequivocally preferred* [N's] interests over those of [the plaintiff]",[26] he was in breach of his duties. Lai J. referred[27] to Pennycuick J.'s observation in *Charterbridge Corporation Ltd. v. Lloyd Bank Ltd.*[28] that:

> Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test…in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could in the whole of the circumstances, have reasonably believed that the transactions were for the benefit of the company.[29]

A closer consideration of this aspect of the judgement is warranted. It is well-recognised that nominee directors often, if not inevitably, owe extraneous loyalties. In *Dairy Containers Ltd. v. NZI Bank*,[30] Thomas J., of the New Zealand High Court, explained the difficult position of the nominee director as follows:

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[23] *Jenton*, *supra* note 4 at para. 136.

[24] N had appointed, pursuant to the NGH charge, receivers and managers of NGH (at para. 34). According to expert evidence, both the charge and the appointment thereunder of the receivers and managers were valid under Australian law (at para. 101). Accordingly, if the resolutions passed at a meeting of NGH (at para. 35) were valid, a point that was not considered, the defendant would have been validly appointed as the plaintiff's corporate representative, in which capacity, he would have been entitled to do the acts (detailed in para. 37) which are the subject of the action.

[25] *Jenton*, *supra* note 4 at para. 130.

[26] *Townsing*, *supra* n 6, at para. 66 (italics in original).

[27] *Jenton*, *supra* note 4 at para. 135.

[28] [1970] Ch. 62 [*Charterbridge*].

[29] *Ibid.* at 74.

[30] [1995] 2 N.Z.L.R. 8 [*Dairy Containers*].

> The plain fact of the matter is that employee-directors do not undertake their responsibilities to the company of which they are a director without regard to the interests of their employer. All too often the commercial reality underlying the loyalty of employee-directors to their employers is neglected or understated. Typically, they have been appointed with a clear mandate; a mandate to protect and promote their employer's interests. They owe their engagement to their employers.[31]

Exactly what is expected of a director such as the defendant, who was appointed pursuant to an agreement made with the plaintiff itself and obviously to represent the interests of his appointor, N? The orthodox position is and remains that nominees, being directors of the company to whose board they have been appointed, owe fiduciary and other duties to the company, and not to the appointor. This requires the nominee director to exercise, at all times, his directorial powers and discretion in the interests of the company in preference to those of his appointor. This strict interpretation of the duties imposed on nominee directors is often attributed to Lord Denning's well-known exposition[32] in *Scottish Co-Operative Wholesale Society Ltd. v. Meyer*[33] on the "impossible position"[34] of the nominee director. In *Oversea-Chinese Banking Corp Ltd. v. Justlogin Pte. Ltd.*,[35] the Court of Appeal, referring to Lord Denning's comments in *Scottish Co-Operative* and in his Lordship's later decision in *Boulting v. Association of Cinematograph, Television and Allied Technicians*,[36] accepted that it was "settled law that every director owes the same responsibility to the company as a whole. It is no different where a director is the nominee of a group of shareholders or creditors".[37]

However, due regard for the *context* within which Lord Denning's statement was made, might have given pause for a closer consideration of the scope of the duty imposed on a nominee director. *Scottish Co-Operative* involved, not an action for breach of director's duties, but a petition by minority shareholders under the then U.K. oppression provision[38] for a buy-out order. It was crucial for relief that the petitioner establish that the "affairs of the company are being conducted in a manner oppressive to some part of the members (including himself)". It was with a view to establishing *this* that the conduct of the nominee directors appointed by the majority

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31 *Ibid.* at 94-95.

32 Lord Denning had said (at 366-367):

> So long as the interests of all concerned were in harmony, there was no difficulty. The nominee directors could do their duty by both companies without embarrassment. But, so soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position··· It is plain that, in the circumstances, these [nominee directors] could not do their duty by both companies, and they did not do so. They put their duty to the [majority shareholder] above their duty to the [subsidiary] ···They probably thought that "as nominees" of the [majority shareholder] their first duty was to the [majority shareholder]. In this they were wrong.

33 [1959] A.C. 324 [*Scottish Co-operative*].

34 *Ibid.* at 366.

35 [2004] 2 S.L.R. 675 [*Justlogin*].

36 [1963] 2 Q.B. 606 [*Boulting*].

37 *Justlogin*, *supra* note 35 at para. 31.

38 *Companies Act 1948* (U.K.), c. 38, s. 210.

shareholder was relevant. As Lord Denning explained:

> It must be remembered that we are here concerned with the manner in which the affairs of the textile company were being conducted. That is, with the conduct of those in control of its affairs. They may be some of the directors themselves, or, behind them, a group of shareholders who nominate those directors or whose interests those directors serve.[39]

Thus, in "subordinating the interests of the textile company to those of the co-operative society, [the nominee directors] conducted the affairs of the textile company in a manner oppressive to the other shareholders".[40] While there is no denying Lord Denning's own view of the position of the nominee director, it does not appear that his Lordship intended his comments to operate beyond the narrow compass of that particular context. This is confirmed in the later decision of *Boulting*,[41] where Lord Denning himself stated, citing his earlier decision as authority, that "if [the nominee director] agrees to subordinate the interests of the company to the interests of his patron, it is conduct oppressive to the other shareholders for which the *patron* may be brought to book".[42] Indeed, in contrast to the perceived orthodoxy of Lord Denning's view, the majority judges in *Boulting* appeared prepared to accept that the company, for whose protection the strict fiduciary rule exists, is entitled to *relax* that self-same rule as it might very well be in the company's interests to have on its board a director "who may be interested on the other side of the fence".[43]

In the present case, Lai J. applied Pennycuick J.'s "test" in *Charterbridge*. However, the issue before Pennycuick J. also was not one of directors' duties, but whether, in granting a legal charge to the Bank, the company concerned (Castleford) had acted outside of its corporate powers so that the charge was a nullity. His Honour was dealing with the plaintiff's contention that the legal charge was *ultra vires* the company because it had been "created for purposes which were not for the benefit of Castleford". This required a conclusion on the contention "that the directors of Castleford in creating these obligations were not acting with a view to the benefit of the company".[44] From the *ultra vires* perspective, applying the strict no-conflict test that is applicable to directors' duties would result in "really absurd results", because "unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be *ultra vires* and void, notwithstanding that the transaction might be beneficial to the company".[45] It was with a view to avoiding this absurdity that Pennycuick J. thought that whether the impugned transaction was for the benefit of the company had to be objectively tested.

It is perhaps testament to the invidious tension between legal theory and commercial reality that the so-called *Charterbridge* test was in fact seized upon by

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39 *Scottish Co-operative*, *supra* note 333 at 366.

40 *Ibid.* at 366-367

41 *Boulting*, *supra* note 366.

42 *Ibid.* at 627 [emphasis added].

43 *Ibid.* at 637, *per* Upjohn L.J. and also at 648 *per* Diplock L.J.

44 *Charterbridge*, *supra* note 28 at 69.

45 *Ibid.* at 74.

commentators[46] and, to some extent, the judiciary[47] as representing a more pragmatic "enterprise" approach towards directors' duties, allowing directors of a subsidiary greater leeway to consider the interests of the wider corporate group in general, and of the holding company in particular. Manifestly, the test was utilised in this spirit in *Intraco Ltd. v. Multi-Pak Singapore Pte. Ltd.*[48] to *excuse* directorial liability. However, even if we accept that the proper test in respect of a nominee director's liability *is* the *Charterbridge* test, this does not necessarily translate into greater tolerance for the nominee director's lot.[49] After all, an objective test could very well impose a *higher* standard than would a test that allows due consideration to be accorded to the subjective and peculiar circumstances of the particular nominee director. Indeed, as the tenor of Lai J.'s judgement[50] suggests, the defendant was in fact being held, by an application of this objective test, to the *strict* standard.

Although the Court of Appeal did not find it "difficult…to imagine why, as an investor, [N] acted as it did",[51] it did not take into consideration the defendant's position as a *nominee* of N in calibrating the ambit of the duties owed by N. With respect, this is a missed opportunity, especially since, in quoting Frankfurter J.[52] and Bryson J.A.,[53] the Court of Appeal was clearly cognizant of the possibility of varying boundaries for fiduciaries in different contexts, who are affected by different circumstances. Clearly then, it should not be confidently asserted that the final word in Singapore on the duties owed by a nominee director has been given. We thus have an opportunity to look afresh at nominee directorship, and to consider if the duties owed by a nominee director might be given to being validly modified by his peculiar representational position.

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46 K. Yeung, "Corporate Groups: Legal Aspects of the Management Dilemma" [1997] L.M.C.L.Q. 208 at 219; J. Ciliers, "Directors' Duties in Corporate Groups – Does the Green Light for the Enterprise Approach Signal the end of the Road for *Walker v. Wimborne*?" (2001) 13 Austl. J. Corp. L. 1 at 14.

47 In particular, Australian courts. See *e.g. Reid Murray Holdings Ltd. (in liq.) v. David Murray Holdings Pty. Ltd.* (1972) 5 S.A.S.R. 386; *Farrow Finance Co Ltd. (in liq.) v. Farrow Properties Pty. Ltd. (in liq.)* (1997) 26 A.C.S.R. 544. Interestingly, in cases where the Australian courts have applied the *Charterbridge* test, this appeared to have been a concession because the parties had agreed to the application of the test, rather than a direct approval of the test itself: see *Equiticorp Finance Ltd. (in liq.) v. Bank of New Zealand* (1993) 32 N.S.W.L.R. 50 at 146-149; *Linton v. Telnet Pty. Ltd.* (1999) 30 A.C.S.R. 465 at 472. See also discussion by Bryson J. in *Maronis Holdings Ltd. v. Nippon Credit Australia Pty. Ltd.* (2001) 38 A.C.S.R. 404 in which his Honour declined to apply the *Charterbridge* test.

48 [1995] 1 S.L.R. 313 at paras. 28-29.

49 The reality of the situation was eloquently expressed by Thomas J. as follows (*Dairy Containers*, *supra* note 30 at 95):

Loyalty inspired by [the employee-directors'] recruitment and confirmed by the confidence which employers repose in their employees is reinforced by the employer's power of dismissal, or the possibility of dismissal, if their loyalty should be seen to waver or collapse···In directing their loyalty to their employers they are responding, perhaps unconsciously, to the commercial imperative summed up in the maxim: "He who pays the piper, calls the tune." For that reason alone, most employee-directors would feel less than conscientious if they did not diligently pursue their employer's interests and reserve their primary or ultimate loyalty for their masters and not the company to which they have been appointed.

50 *Jenton*, *supra* note 4 at paras. 135–138.

51 *Townsing*, *supra* n 6 at para. 46.

52 In *Securities and Exchange Commission v. Chenery Corp* 318 US 80 (1943).

53 In *Blythe v. Northwood* [2005] NSWCA 221.

D. *Recalibrating the Scope of the Nominee's Duty*

As pointed out earlier, the law subjects all company directors to the same duties without exception. Of immediate relevance to the nominee director is the duty to act bona fide in the best interests of the company. If the nominee's actions vis-à-vis the company were motivated by the interests of his appointer, he would, on an uncompromising application of that general principle, be in breach of his duty to the company. However, the concept of "interests of the company" appears malleable, as there is a range of interests that directors are entitled to consider. Could it not then be at least arguable that the interests of the company the nominee director is obliged to have regard to are defined by the circumstances surrounding his appointment?

There are in fact cases in Australia[54] and New Zealand[55] that suggest that the ambit of the duty owed by the nominee director depends very much on the particular circumstances of his appointment. The facts of *Levin v. Clark*[56] share interesting parallels with those of the present case. L had entered into an agreement to purchase the shares of the company from PP Pty. Ltd., and contemporaneously mortgaged those shares to PP to secure payment of the purchase price. The articles of the company were subsequently altered pursuant to the sale agreement so that C & R, the defendants and governing directors of the company, could exercise their directorial powers only in the event of L's default under the mortgage agreement. L defaulted and C & R thereupon purported to exercise their powers as governing directors, removing L as director and directing the company's bankers that L no longer had authority to operate the company's bank accounts. L applied for injunctions to, inter alia, restrain C & R from acting on those resolutions, which L asserted were invalid as the directors had, in passing them, not acted in the company's interests but solely in the interests of the mortgagee. Jacobs J. of the Supreme Court of New South Wales, found that C & R had acted primarily to protect the interests of the mortgagee, but considered that it was permissible for them to so act. His Honour said:[57]

> It is of course correct to state as a general principle that directors must act in the interests of the company···However, that leaves open the question in each case—what is the interest of the company? It is not uncommon for a director to be appointed to a board of directors in order to represent an interest outside the company··· 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 will be in that way be properly regarded as acting in the interests of the company as a whole. To argue that a director particularly appointed for the purpose of representing the interests of a third party, cannot lawfully act solely in the interests of that third party, is in my view to apply the broad principle, governing the fiduciary duty of directors, to a

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54 *Levin v. Clark* [1962] N.S.W.R. 686 [*Levin*]; *Re Broadcasting Station 2GB Pty. Ltd* [1964-5] N.S.W.R. 1648 [*Re Broadcasting Station*]; and *Japan Abrasive Materials Pty. Ltd. v. Australian Fused Materials Pty. Ltd* (1998) 16 A.C.L.C. 1172 [*Japan Abrasive*].

55 *Berlei Hestia (N.Z.) Ltd. v. Fernyhough* [1980] 2 N.Z.L.R. 150 [*Berlei*].

56 *Levin*, *supra* note 54.

57 *Ibid.* at 700.

> particular situation, where the breadth of the fiduciary duty has been narrowed, by agreement amongst the body of shareholders.[58]

On the facts of *Levin*, it is patent that the sole reason for the exercise, if at all, of the power conferred by the altered article on the governing directors was to protect the mortgagee's interests. The plaintiff, who effectively held all the shares in the company, had himself agreed to this, and there being no minority interests to unbalance the equation,[59] the plaintiff cannot now deny that the general fiduciary principle had, by his own consent, been varied. Jacobs J. said:

> By agreement with the plaintiff, [C & R] remain in the company so that upon default arising under the security agreement they can immediately commence to act in the affairs of the company in order to protect the interests of the mortgagee of the shares. It does not follow· · ·that by acting in the interests of the mortgagee, and solely in the interests of the mortgagee, those directors necessarily cease to act in the interests of the plaintiff, and admittedly the plaintiff is the registered holder of the shares, but it would be artificial to ignore the interests of the mortgagee in these circumstances.[60]

Jacobs J.'s view is not entirely radical; being in fact consistent with the view expressed by the majority in *Boulting*.[61] In a similar vein, Mahon J. of the Supreme Court of New Zealand made the following observations in *Berlei*:[62]

> Notwithstanding that the Australian directors are the nominees of the Australian company, they nevertheless have responsibilities to the whole body of shareholders· · · But despite the width of that proposition, there have been attempts to bring this theoretical doctrine of undivided responsibility into harmony with commercial reality, upon the basis that when Articles are agreed upon whereby a specified shareholder or group of shareholders is empowered to nominate its own directors, then there may be grounds for saying that in addition to the responsibility which such directors have to all shareholders as represented by the corporate entity, they may have a special responsibility towards those who nominated them. Such a view proceeds on the basis that the Articles were so constructed with the intent and belief that the institution of such a special responsibility towards one class of shareholders was conducive to the interests of the company as a whole. …As a matter of legal theory, as opposed to judicial precedent, it seems not unreasonable for all the corporators to be able to agree upon an adjusted form of fiduciary liability, limited to circumstances where the rights of third parties vis-a-vis the company will not be prejudiced.[63]

Would this view be spurned by local courts? This remains to be seen. In *Justlogin*,[64] while affirming the traditional approach towards duties owed by directors, the Court of Appeal nevertheless took pains to emphasise that "the duty is a *subjective* one and

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58 *Ibid.* at 700-701.
59 The only other shareholders were C & R, who each held one director share each.
60 *Levin*, *supra* note 54 at 701.
61 *Supra* note 36. See text to note 43, *supra*.
62 *Berlei*, *supra* note 55.
63 *Ibid.* at 166.
64 *Justlogin*, *supra* note 35.

it is fulfilled provided it is exercised bona fide in the interest of the company".[65] The tenor of the Court of Appeal's qualifier may optimistically be taken as an indication of preparedness to at least consider an alternative perspective, one that might involve a close consideration of the subjective circumstances under which the nominee director was appointed, and a determination of the *scope* of duty imposed that is consequent on that consideration.

If we apply this approach to the facts of the present case, the argument might go something like this. The original plan for N to invest in the plaintiff was clearly to the latter's benefit. In Lai J.'s words, "the Wongs were desperate for an investor who could inject additional capital into the plaintiff and ultimately into NQF· · ·shareholders had poured substantial moneys· · · into the plaintiff and/or NQF by the time [N] came onto the scene. However, more capital was required…NQF had turned out to be a bad investment. It was unlikely that its existing shareholders would have agreed to pump further funds into NQF even if they had the wherewithal to do so".[66] Her Honour must have been referring to the shareholders of the plaintiff, as the plaintiff itself held all the issued shares in NQF. The defendant's appointment to the plaintiff's board could therefore be seen in this light.

It will be recalled that N was entitled to repudiate the original investment agreement as a result of the plaintiff's breach of the warranties under the agreement. In spite of the unpropitious start, N remained committed to the investment, but on the condition the deal be restructured,[67] and in a manner that gave N security over the assets of the plaintiff and of NQF.[68] In the circumstances, therefore, it might have been at least arguable that N's continued involvement, which would clearly redound to the general good of the plaintiff, had been obtained at a price. And this was the implicit recognition by the plaintiff and its shareholders that N's nominee had a special responsibility towards N, which would necessitate acceptance that the defendant's duty to the plaintiff had been attenuated, at least to the extent that acting to protect N's interests as a secured creditor would not amount to a breach of duties owed to the plaintiff. Unfortunately, the particular argument was not made before her Honour and the resolution of this aspect of the nominee director's conundrum will have to await another dawn.

It should be pointed out that a consequence of applying the afore-discussed approach is that the *majority* of a company, whose decision represents corporate consent, would effectively be given the ability to define the standards of loyalty expected of a nominee director. This then leads to the argument that any minority interests would be adversely affected.[69] However, this is the precise reason for cases such as *Scottish Co-Operative*,[70] which deal with the issue of allegedly disloyal directorial actions in such contexts as evidence of minority oppression. This merely recognises the reality that the nominee directors are effectively pawns of their appointers, and legal responsibility for the ills suffered by the minority, if any, should rightly fall on the majority shareholders who facilitated it.[71]

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65 *Ibid.* at para. 31 [emphasis added].
66 *Jenton*, *supra* note 4 at para. 151.
67 *Ibid.* at para. 15.
68 *Ibid.* at para. 16.
69 See P. Redmond, "Nominee Directors" (1987) 10 U.N.S.W.L.J. 194 at 204.
70 *Scottish Co-operative*, *supra* note 33.
71 See *Re Broadcasting Station*, *supra* note 54 at 1663-1664.

III. Golden Village Multiplex

A. *Facts*

This brings us to the second case—*Golden Village Multiplex Pte. Ltd. v. Phoon Chiong Kit*,[72] the facts of which are distinctly less convoluted.[73] The plaintiff company was the vehicle through which joint venture partners, hailing respectively from an Australian cinema conglomerate and a Hong Kong cinema conglomerate, agreed to operate cinema complexes in Singapore. The terms of the joint venture were found in a Shareholders' Agreement, to which the plaintiff was also party, which gave each joint venture partner the right to nominate three directors to the board of the plaintiff. The defendant was a nominee of the Hong Kong conglomerate, and also sat on the board of another company (the "Hong Kong company") within the Hong Kong conglomerate with whom the plaintiff was, at the time of the action, embroiled in a dispute. The dispute related to the plaintiff's entitlement to exercise certain rights[74] under an agreement (the "Transfer Agreement"), which was denied by the Hong Kong company. At a board meeting of the plaintiff, the defendant had supported the plaintiff's exercise of its rights. However, some two months thereafter, the defendant had written to the plaintiff, in his capacity as director of the Hong Kong company, alleging that the plaintiff was in breach of *its* obligations under the agreement. The plaintiff then commenced an action against the Hong Kong company, which applied to strike out the action on the ground that the plaintiff's lawyers were not properly authorised.[75] In this application,the defendant had filed affidavits on behalf of the Hong Kong company. The nub of the plaintiff's case was the defendant's apparently "inconsistent conduct".[76] Lai J. held that:

> In openly siding with [the Hong Kong company] in its dispute with the plaintiff, the defendant, who wears two hats as a director of both companies· · ·, is clearly acting in conflict of his duties as the plaintiff's director.[77]

In arriving at this conclusion, her Honour referred to the judgement of the Court of Appeal in *Kea Holdings Pte. Ltd. v. Gan Boon Hock*.[78] However, it should be noted that the factual matrix in that case is very different from that in the present case. In *Kea Holdings*, it was the defendant director himself who, while a director of the plaintiff, acquired a majority stake in and became a director of another company. The Court of Appeal was of the view that the defendant's dual directorship was not of itself a breach of duty, as long as this fact was disclosed to the plaintiff company who approved the same. The actual breach of duty by the defendant, however, was

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72 *Golden Village*, *supra* note 4.

73 The facts are distilled partly also from the related decisions in*Golden Village Mulitplex v. Golden Harvest Films Distribution (Pte.) Ltd.* [2006] 3 S.L.R. 599 [*Golden Harvest* (H.C.)]; and on appeal, *Golden Harvest Films Distribution (Pte.) Ltd. v. Golden Village Mulitplex* [2006] SGCA 44 [*Golden Harvest* (C.A.)].

74 The Transfer Agreement gave the plaintiff the right to call upon the Hong Kong company to take over certain obligations and for the latter to pay to the plaintiff certain sums.

75 This was the subject matter of the decision in *Golden Harvest* (H.C.), *supra* note 73; and on appeal, *Golden Harvest* (C.A.), *supra* note 73.

76 *Per* Andrew Ang J. in *Golden Harvest* (H.C.), *supra* note 73 at para. 18.

77 *Golden Village*, *supra* note 4, at para. 37.

78 [2000] 3 S.L.R. 129 [*Kea Holdings*].

not that he had preferred the interests of the other company, but that he "had misled the [plaintiff]··· into believing that there was no buyer in the market when in fact [his other company] was interested in purchasing similar vessels", thereby causing the plaintiff to suffer a loss. By this "material misrepresentation",[79] the defendant was clearly not acting in the best interests of the plaintiff. *Kea Holdings* therefore did not involve a *nominee* situation, which would typically see the company *itself* forcing the director's "duplicity", so to speak, by appointing the director to the board of another company. The applicability of the ruling in *Kea Holdings* to the present case is therefore at best suspect.

B. *Reconsidering the Facts*

Her Honour was also of the view that the defendant was "completely misconceived"[80] in relying on the fact that the plaintiff had not, prior to the striking out application, objected to his acting on behalf of the Hong Kong company vis-à-vis the plaintiff. With the greatest respect, this argument should perhaps not have been dismissed so summarily. The company's right to relax or attenuate the duties that the director would otherwise owe to it is not entirely without authority. We can find parallels with the concept of *prospective* ratification, or more accurately, release of the director from his directorial duties.[81] When a director seeks the fully informed consent of the company prior to embarking on a venture, which might, for example involve a conflict of interest, or substantial risk, he is obtaining the necessary *authority* for so acting. With the anterior or prior authorisation, there would be no breach of duty, and hence nothing to "ratify".[82] As Vinelott J. in *Movitex Ltd. v. Bulfield*[83] explained:

> The resolution in general meeting protects the director not because it operates to release him from the consequences of a breach of the self-dealing rule but because, to the extent that the company gives its informed consent to the transaction *there is no breach*; the conflict of duty and interest is avoided.

In a similar manner, might it not be arguable that in a joint venture, the partners, being the only shareholders in the corporate joint venture vehicle, had agreed to *adjust* the nature of duties owed by their respective nominees on the company's board? Clearly, it would preferable if the nominee's recalibrated obligations had been explicitly recognised in the shareholders' agreement together with a concomitant definition of scope in the company's articles of association. Failing this, it might nevertheless be possible to discern, from a close scrutiny of the agreement between the joint venture partners and the attendant facts, the understanding and expectations of the partners vis-à-vis their nominee directors. The Supreme Court of Western Australia did precisely this in *Japan Abrasive*.[84] Three shareholder companies held equal

79 *Ibid.* at para. 29.
80 *Ibid.* at para. 38.
81 In *Regal (Hastings) Ltd. v. Gulliver* [1967] 2 A.C. 134n at 150, Lord Russell had observed as follows: [The directors] could, had they wished, have protected themselves by a resolution (*either antecedent or subsequent*) of the Regal shareholders in general meeting. In default of such approval liability to account must remain (emphasis added).
82 See *Winthrop Investments Ltd. v. Winns Ltd.* [1975] 2 N.S.W.L.R. 666.
83 [1988] B.C.L.C. 104.
84 *Japan Abrasive*, *supra* note 54 at 172.

shares in the joint venture company, and each was entitled to nominate two directors to the board of the company. The issue before the court was whether, in considering a resolution to approve the entry into a project by the company, the nominee directors were "entitled to vote entirely in accordance with the wishes of the shareholders who nominated them".[85] Templeman J. considered that what was central to the dispute was the true construction of the Shareholders Agreement, proceeded to subject the agreement to a close examination. His Honour than concluded that:

> It is always open to the shareholders, by unanimous agreement, to attenuate the fiduciary duties which the directors of their company would otherwise owe it. That was done in *Levin v. Clark*· · ·Jacobs J. summarised the position thus: "The breadth of the fiduciary duty has been narrowed by agreement amongst the body of the shareholders." And in my view, that has been done also in the present case.[86]

A closer examination of the facts as reported suggests that the dispute was really between the joint venture partners, as the plaintiff did not appear to have been party to the Transfer Agreement.[87] The plaintiff's entitlement to exercise those rights only kicked in at *the request of the Australian partner*.[88] The essence of the arrangement between the two conglomerates therefore appeared to have been for any company within the Hong Kong conglomerate to bear such loss as might eventuate from the joint venture. It is therefore hardly surprising that the plaintiff, led by the Australian nominees,[89] adopted the position that it did. It should also be noted that effective control of the plaintiff company was really in the hands of the Australian partner, as it had, through the Chairman of the board, a casting vote over management issues.[90] Thus, if anything, it would have been the Hong Kong partner, whose position closer approximates that of a minority shareholder. Seen from *this* perspective then, it would, with the greatest respect, be overstating the scope of directors' duties to conclude that the defendant had been in breach, seeing that the gravamen of the case was really *not* one of breach of duties.

IV. Conclusion

Difficult questions therefore remain in the area of nominee directorships. Whilst judicial tools allowing a more nuanced approach do exist, it may be that the solution should be a legislative one.[91] In the meantime however, it is hoped that the courts will continue to be sensitive to the particular factual matrix, so as not to deny the nominee director his rightful expectation of judicious treatment.

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85 *Ibid.* at 175.

86 *Ibid.* at 178, references omitted.

87 In both Lai and Ang JJ.'s respective accounts of the facts, the parties were companies of the Australian conglomerate, companies from the Hong Kong conglomerate including the Hong Kong company, and the sole shareholder of the plaintiff: *Golden Village*, *supra* note 4 at para. 17; *Golden Harvest* (H.C.), *supra* note 73 at para. 9.

88 *Golden Village*, *supra* note 4 at para. 18; *Golden Harvest* (H.C.), *supra* note 73 at para. 9.

89 The action against the defendant was initiated by a nominee of the Australian conglomerate: *Golden Village*, *supra* note 4, at para. 1.

90 See *Golden Harvest* (C.A.), *supra* note 73 at para. 33.

91 See *e.g. New Zealand Companies Act 1993*, s. 131(4); *Australia's Corporations Act*, s. 187.