Directors should be mindful of a large number of responsibilities when exercising their powers

Divided loyalties – the issue of directors' duties in joint ventures

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Every company lawyer is taught from an early stage that a director owes their duties to the company, and not to the shareholders or any individual shareholder. This is sometimes referred to as the rule in *Percival v Wright [1902] 2 Ch 401*. In relation to companies which operate as joint ventures, it is relatively common for the parties to provide for individual shareholders to be able to appoint a director to represent their interests on the board. However, as Lord Denning famously pointed out in *Boulting v ACTAT [1963] 2 QB 606, 626,* a director nominated by a shareholder still owes their duties first and foremost to the company. That general position was recently confirmed by the Privy Council in *Central Bank of Ecuador v Conticorp SA [2015] UKPC 11*.

It is well known that BVI company law has been modified to allow the parties, if they so choose, to modify the effect of directors duties such that a director nominated by a particular shareholder may exercise their powers in the best interests of the shareholder first, and the company second (BVI Business Companies Act 2004, section 120(4)). This provision has been deployed in a number of high profile joint venture transactions, as well as a multitude of smaller and less famous ones. What has never been satisfactorily resolved by the courts is the degree to which those potentially conflicting duties must be resolved. It is clear that a director will still owe duties to the company, however, it is not clear to what extent those duties may be suborned when the section is invoked and the interests of the company and one of its shareholders come into conflict.

However, even where parties do not put their directors within the ambit of section 120(4), BVI law takes a generally more sympathetic line in relation to directors who look out for the interests of the shareholders directly.

In section 132(2A) dealing with the power of a company to indemnify members of the board, the statute affirms that the power arises so long as the director has acted in the best interests of the company or "a shareholder or shareholders of the company".

Further, in relation to the power to make administration orders under Part II of the Insolvency Act 2003, the power of the court to make an order depends upon the directors or other applicants being able to

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demonstrate various grounds, including the "rehabilitation of the company or of one or more companies in a group of companies of which the company is a member" (Insolvency Act 2003, section 76(1)(a)).

Similarly, the BVI Commercial Court has taken what might be seen as a more commercially realistic approach to directors' duties. In *Ciban Management Corporation v Citco (BVIHCV 2007/0301)*, Bannister J indicated that the court would take a more pragmatic approach when assessing the conduct of a nominee director. That case did not involve a joint venture, so the word 'nominee' is used in a different sense from the way Lord Denning used it in *Boulting*. However, the court affirmed that where the beneficial owner of a company was party to an arrangement where the nominee director was expected to act upon the recommendations of a third party, that same beneficial owner could not subsequently complain about the director doing so. That intuitively feels correct. Further, it is respectfully suggested that the decision can probably be extrapolated: if two parties agree (for example in a shareholders' agreement) that one or more directors are expected to discharge their roles with reference to a particular person, they should not subsequently be able to argue that this is inappropriate. Furthermore, if the company is a party to that arrangement, either by express agreement or by acquiescence, it should similarly not be entitled to complain.

The role of a director is hemmed in by statutory and fiduciary duties, and people filling that role need to be mindful of a large number of responsibilities when exercising their powers. In relation to joint ventures, it is respectfully suggested that the more flexible and realistic approach to discharging those duties under commercially agreed arrangements is to be preferred over the "forced altruism" of older English common law rules.

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