CORPORATE GOVERNANCE

The fiduciary duties of directors

Fiduciary duty is the highest duty of care which the law can impose. BY ROBSON LEE

THE office of a director in a company carries with it the assumption of fiduciary duties, which primarily concern the exercise of their powers as agents of the company, and the control of the property and assets of the company as trustees of the company.

A person whose office carries fiduciary duties must at all times act in the best interests of the beneficiaries. Fiduciary duty is the highest duty of care which the law can impose. The duty-holder must subordinate his own interests in preference for the beneficiary's interests in the event of a conflict. In broad terms, a director must at all times act in good faith and with reasonable care and diligence.

The Singapore Companies Act requires a director to always act honestly in the discharge of the duties of his office. The Act does not replace the common-law obligations of directors but supplements them. It also imposes both civil and criminal sanctions on directors by providing that:

- The director shall be liable to the company for any profit made by him or for any damage suffered by the company; and that
- He shall have committed an offence and on conviction, be subject to a fine not exceeding S$5,000 or to imprisonment of a term not exceeding one year.

Duty to shareholders

In most cases, the commercial and business interests of a company would coincide with the interests of the shareholders. Courts will be slow to interfere with business decisions of the board, unless it can be established that the board has acted in bad faith, intending to prejudice the interests of the shareholders or certain classes or factions of shareholders, or that no sensible board would have come to the decision that has been challenged.

When directors exercise their powers in disregard of the interests of any minority shareholder or have been oppressive to the minority, the Act provides the minority shareholders in question with the right to seek judicial relief.

Duty to creditors

The law imposes directors with a duty to present and future creditors if a company is insolvent or put in a situation where its creditors will be prejudiced. The Act makes it an offence for a director to contract a debt knowing that there is no reasonable or probable expectation that the company would be able to repay it.

The Act further makes it an offence for directors to carry on the business of a company with intent to defraud its creditors. Under the Act, the court can declare the director to be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company.

Conflicts of interest

A person owing a fiduciary duty to another shall not be allowed to place himself in a position where he has, or can have, a personal interest conflicting, or which may possibly conflict, with this duty.

When a director breaches his fiduciary duty by reason of a conflict of interests, the company may seek the following judicial remedies:

- A court injection to restrain the director from pursuing his personal interests or the interests of a third person;
- The accounting of the profits or gains that the director had in fact received, regardless of whether the company had suffered a loss;
- The recovery of any property received and retained by the director as a result of the breach;
- The recovery of compensation for any loss suffered by the company by reason of the director preferring his own personal interests or the interests of a third party; and/or
- The rescission of the transaction that is tainted with the director's breach and the restoration of the parties to their original positions as if the transaction never took place, provided the transaction is capable of being reversed.

The duty-holder must subordinate his own interests in preference for the beneficiary's interests in the event of a conflict.

Director-company dealings

Dealings between a director and the company could potentially give rise to issues of conflicts of interests.

A director can enter into a transaction with the company, provided he has made sufficient disclosure of any conflict of interests, and obtained the relevant approval from non-interested directors.

The Act requires a director to declare to an independent board the nature of his interest in a transaction or proposed transaction as soon as practicable after the relevant facts have come to his knowledge.

There is case law that renders a director accountable to the company for profits made from the transaction if he fails to make adequate disclosure to a fully independent board or shareholders.

The test, when it comes to dealings between the company and a third party associated with its director, is whether, on the facts, there exists a real and sensible possibility of a conflict arising in the mind of a reasonable man looking at the circumstances.

In most cases, the issue is determined by considering whether the director may, whether directly or indirectly, gain some form of pecuniary benefit from the transaction. A director may breach his fiduciary duty when he secures non-pecuniary benefits which are incompatible with his duties as a director of the company and the interests of the company.

The Act provides that a director who has a direct or indirect interest in a contract with the company must disclose this interest at a meeting of directors as soon as practicable. Failure to make such disclosure would render the contract voidable at the request of the company and may expose the director to criminal sanctions.

This provision does not apply where the director is merely a member or creditor of the company who is entering into a contract with the director's company.

Business opportunities

In general, there is no duty upon a director to refrain from engaging, for his own benefit, in the same kind of business as that carried on by the company, provided:

- There is no express restraint-of-trade clause if there is an employment contract between the director and the company;
- There is no unauthorised use or disclosure of the company's confidential information;
- There is no improper use of the company's assets and property; and
- There is no breach of the director's fiduciary duty to act in good faith and in the interests of the company and his fiduciary and statutory duty to act with reasonable diligence.

The general rule regarding business opportunities available or under consideration by the company is that the directors are not free to divert or destroy such business opportunities without the proper authority of the company.

The rule also applies to business opportunities which the company might reasonably be expected to be interested in, given its present field of business activities.

Directors' right to compete

It would appear that there is no blanket prohibition against a director from competing with the company in which he is a director, or that a person cannot be a director of two competing companies. As long as the potential conflict is disclosed to the company and approved, the holding of cross-directorships is not per se a breach of fiduciary duty.

It should, however, be noted that such a prohibition may be imposed by implied or express agreement between the company and the director through the use of, for example, restrain-of-trade clauses and the implied obligation to devote full time and attention to the affairs of the company.

It should also be noted that the director should not utilise the property and assets of the company for the benefit of the competing company; disclosure to or utilisation by the competing company of confidential information belonging to the company; or the diversion of business opportunities away to the competing company.

Improper use of information

Confidential information cannot be used or disclosed by a director without the consent or authorisation of the company of such information.

The Act provides that an officer of the company shall not, at any time, make improper use of any information acquired by virtue of his position as an officer of the company to gain an advantage for himself, whether direct or indirect, or for any other person, or cause detriment to the company.

The Act covers improper use by a director of his position to gain an advantage for himself or for any other person or to cause detriment to the company. The test is whether the director had obtained an unfair advantage through an abuse of his position. Consequently, it is irrelevant whether it concerns merely information or otherwise.

A director in breach of this statutory restriction shall be accountable to the company for any profit made by him or for any damage suffered by the company as a consequence thereof. A criminal penalty is also imposed.

Mr Lee is Partner at Gibson Dunn & Crutcher LLP.