

Companies commission of malaysia law company business partnership essay

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1. Clarifying the relationship between the board of directors and shadow directors. According to the section 4(1) of the Companies Act 1967 (CA 1967) has defined "director" as any person occupying the position of director of a corporation by whatever name called and included a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director. In this section, it has refers to a de facto director that is a person who carries out the roles as the position of director with or without any appointment. For instance, a person has resigned as director but he continues to play an active role in the company similar to the roles played by a director. While, as well as refers to a shadow director that is person who does not claim or purport to act as a director but made the board of director to accept and carries out such person's directions and instructions. The term of "shadow director" does not used in the Act it is practically impossible to hold such persons accountable to the company since it must first be proven that the entire board is accustomed to act in accordance to the person's instructions or directions. The meaning of "director" is also defined under common law of *Coventry v Dickson*[1] and *Corporate Affairs Commission v Drysdale*[2], which had traced the entire history of the legislation behind the word "director". In this case, it is clearly to impose sanctions and liabilities against persons who have in defence to allegations of breaches of duties and they claim that they are not directors, which mean persons who were never appointed as directors are not entitled to any benefits nor defences. The acts of these individuals are also invalid unless in the case of a person whose appointment was defective according to section 127 of the CA 1967. Thus, the Corporate Law Reform

Committee (CLRC) view that it needs to be clarified that the definition is for purposes of liability and does not entitle such a person that is those who were never appointed as directors to any rights or benefits under the CA. There is a test to determine whether he is a person whose directions or instructions would be followed by directors of a corporation. The test applied in *Datuk Sahar bin Arpan v Public Prosecutor*[3]. In here, the court held that to establish that a defendant is a shadow director, it is necessary to prove that the defendant directed those directors how to act in relation to the company and that those directors acted in accordance with such directions and that they were accustomed so to act. Whereas in *Re Hydrodam*[4], a case in UK; on the fact, there were two corporate directors of a parent company of Hydrodam (Corby) Ltd, which was a wholly owned subsidiary of Landsaver MCP Ltd, itself a wholly owned subsidiary of Midland City Partnerships Ltd, which was, finally, a wholly owned subsidiary of Eagle Trust plc, a TV conglomerate chaired by David James, Baron James of Blackheath. The liquidator alleged that the two directors of Eagle Trust; Leslie Thomas and Dr Hardwick, were liable for wrongful trading, and contended they were liable as shadow directors under the section 251 of the UK Companies Act 2006. The court held that there were a need to establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is, first, a board of directors claiming and purporting to

act as such; and, secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others. The CLRC recommend that the definition of 'director' under section 4 (1) of the CA 1967 should be amended to state as follows (by adding the words in italics) " includes any person occupying the position of a director of a corporation by whatever name called and includes a person in accordance with whose direction or instructions the majority of the board of directors of a corporation is accustomed to act and an alternate or substitute director". Besides that, CLRC also recommend that it is not necessary to introduce a separate definition for " shadow director" but the shadow director should be subject to the same duties and responsibilities as the directors. In my opinion, I agree that the section 4 (1) of the CA 1967 should be amended to include " majority" and need not to have a separate statutory definition of the term " shadow director". This is because by adding the word of " majority", the person who hide behind and give directions as well as instructions would not be easily to escape the liabilities, responsibility and duties as the directors. Thus, this amendment section would be clear that a person is a shadow director if he controls all the directors or a majority of the directors, but he is not a shadow director if he controls only one director or a minority of the directors. Furthermore, this may result the nominee director owing duties of care to one another in closely held joint venture companies. Therefore, the term " shadow director" is no necessary to separate the definition.