



If an NED accepts the appointment on the understanding that he/she is not expected to partake in business decision-making but is merely a nominee director, the NED should promptly disclose his/her nominee status as mandated by the new section 386AL.

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Non-executive directors ought to exercise discretion

It is incumbent on the NED to carefully review the specific role that he/she has agreed to undertake with respect to business decision-making. **BY JULIE LY HUAN**

THE long-running battle between Sakae Sushi and its former director Andy Ong has ended with a final judgment that there was “systemic abuse” by Mr Ong to misappropriate funds.

Any systemic abuse requires accomplices. The Sakae case is illuminating not only for how it uncovered Mr Ong’s systemic abuse (against the court’s brilliant analysis of the technical aspects of the law), but also for how it scrutinised his accomplices. Particularly interesting is how the court admonished Ho Yew Kong, a non-executive director (NED), for “unthinkingly” acting in accordance with Mr Ong’s directions in signing business contracts on behalf of the company.

The notion that a director may act in accordance with the directions of another person has also featured in recent changes to the law. In 2017, a new section (386AL) was introduced in the Companies Act, to refer to such a director as a nominee and to compel disclosure of the person for whom he/she is a nominee.

How do these recent developments impact the position of NEDs in business decision-making? Do they conflict with a previous case in December 2016, where two NEDs were let off the hook for alleged negligence in business decision-making? How well do they sit with another provision in the Companies Act that allows NEDs to rely on advice from others?

To analyse this, it is useful to briefly consider again the intriguing position that NEDs hold. On the one hand, an NED is chosen because of his/her willingness to assume the position of director despite the position’s non-executive status – meaning the NED does not and is not expected to supervise the day-to-day operations of the company. On the other hand, the NED is not spared the scrutiny of the court when things go awry, as seen in the Sakae case.

In December 2016, two NEDs were sued for negligence in business decision-making on behalf of Prima Bulkship Pte Ltd. They had delegated all functions relating to a business contract to other persons, to the extent that they were completely unaware of the terms of the contract. However, the court ruled that they were not to be blamed. In contrast, the NED in the Sakae case who was similarly unaware of the terms of the business contracts he signed was

admonished for “unthinkingly” acting in accordance with Mr Ong’s directions.

So why the two contrasting outcomes? In the Prima case, the NEDs used in their defence a Nominee Director Indemnity Agreement (NDI Agreement) which they had earlier signed with the company stating that they were to provide routine services and would not act in any executive capacity or undertake any commercial decision.

The court accepted the NDI Agreement as evidence of the purpose for which they were appointed, adding that it had an impact on the standard of care expected of them. It finally ruled that they were not blameworthy even though they were unaware of the terms of the business contract.

Interestingly, the NED in the Sakae case also raised a similar defence that he had a shared understanding with the company, that it would be left to Mr Ong and his team to manage the company with little or no interference by himself.

However, unlike the Prima case, the court dismissed his defence as it felt that the facts did not show any such shared understanding. Instead, the pleadings showed a contrary position – that he was appointed to perform the role of guarding against conflicts of interests by Mr Ong, and maintaining independent oversight of the company’s affairs. Hence, his “unthinkingly” acting in accordance with Mr Ong’s directions was not acceptable.

OTHER PROVISIONS OF THE COMPANIES ACT

There are several sections of the Companies Act which are relevant to the role of NEDs. One is section 157C, which allows NEDs to rely on advice from other persons. However, the reliance is permitted only if the director satisfies some conditions, one of which is that he/she must have made proper inquiry when the need for inquiry is indicated in the circumstances.

The Sakae case reinforces the importance of making inquiry. The court found the NED negligent for failing to make the necessary inquiries to satisfy himself that the business contracts he signed were in the company’s interests and for failing to inquire about the terms of the contracts.

Drawing from this, I would proffer some practical pointers for other NEDs to consider:

If an NED accepts the appointment on the understanding that he/she is not expected to partake in business decision-making but is merely a nominee director (eg for company to fulfil the statutory requirement of having one director ordinarily resident in Singapore) the NED should promptly disclose his/her nominee status as mandated by the new section 386AL. The mandatory disclosure may have been introduced for other reasons, but NEDs can use it to their advantage in cementing their reliance on the Prima case to be absolved from blame.

Any other NED will be expected to partake in business decision-making, and must, at the very least, make inquiries to satisfy himself that the decisions made are in the interests of the company. The Sakae case emphasised this. Further, if the NED needs to use section 157C to justify his/her reliance on others, making the necessary inquiries is crucial.

However, not all is bleak here. While the law mandates that NEDs must make inquiry, the law is not blind to their different status.

There is a famous Australian case where the law considered the different status of NEDs versus the executive director. In this case, some NEDs and the executive director were sued for negligence when an employee breached company policies and caused massive losses.

While the executive director was found negligent in failing to supervise the employee, the NEDs were absolved from blame because they had sought verification from the company’s management as well as external auditors that the policies were observed, and were entitled to rely on the assurances given by them. In other words, the NEDs had made sufficient inquiry given their non-executive status. This Australian case has been cited extensively in our own courts.

Overall, it is incumbent on the NED to carefully review the specific role that he/she has agreed to undertake with respect to business decision-making, and then act as a reasonable person would, in that same role. That will be the yardstick against which NEDs are measured.

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