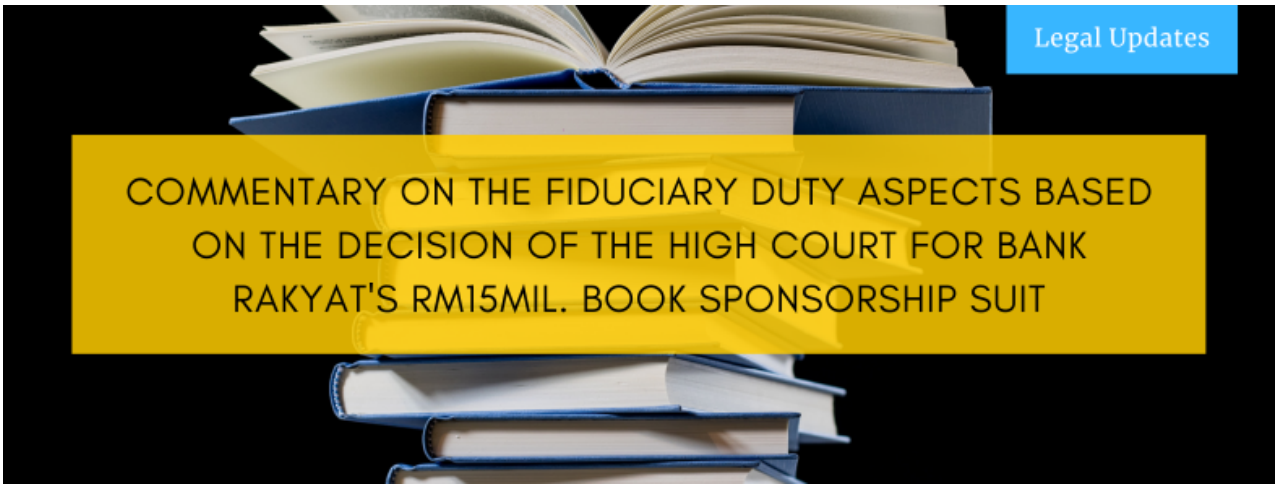

Facts

The High Court recently reached a decision in a case involving the breach of fiduciary duties by two former top executives of Bank Kerjasama Rakyat Malaysia Berhad ("**Bank Rakyat**"), Tan Sri Abdul Aziz Zainal, the former Chairman, and Datuk Mustafha Abd Razak, the former Managing Director.

Both individuals were found to have failed in their duty to act in the best interests of Bank Rakyat. This verdict pertains to their involvement in sponsoring a book about Malaysia's former Prime Minister, Datuk Seri Najib Razak, in 2016.

The legal action was initiated by Bank Rakyat ("**Plaintiff**") against five defendants. The first two defendants were the former top executives of the Plaintiff, as introduced earlier. The third defendant, Zilerie Global Sdn Bhd, is the purported publisher of the book titled "*Antara 2 Zaman Najib Tun Razak – Mendepani Cabaran dan Menggalas Sejuta Harapan*".

The fourth defendant, Nor Alira Binti Ramli, is a lawyer who served as a stakeholder on behalf of the publisher in relation to the sponsorship of the book. Lastly, the fifth defendant, Muhammad Ghazali bin Abdul Majid, is a director of the third defendant.

In the course of events, the first defendant agreed to meet with the fifth defendant to discuss a proposal to sponsor the aforementioned book, with the intention of boosting the former Prime Minister's political image.

The second defendant was later summoned to join the meeting, during which the fifth defendant disclosed that the sponsorship amount could go as high as RM15 million.

The first defendant urged the second defendant to discreetly consider the sponsorship application, citing that the Prime Minister had enough problems at that time.

The second defendant later instructed his personal assistant to prepare the necessary paperwork for the sponsorship application by the third defendant. On the same day, the personal assistant approached one of Bank Rakyat's Senior Vice Presidents to manually prepare the application paperwork, bypassing the bank's electronic documentation system.

A physical copy of the sponsorship memorandum was created and approved by the second defendant just a day later. The third defendant issued an invoice, and following internal processing by Bank Rakyat, RM15 million in funds were released to the fourth defendant. However, despite the release of funds, there was no credible evidence of the book being printed.

Court Decision

The High Court has ordered the Defendants to be jointly and/or severally liable to pay RM 14,991,283.29 to the Plaintiff, Bank Rakyat, along with RM1 million in exemplary and aggravated damages imposed jointly and severally upon the third, fourth and fifth Defendants. Additionally, each Defendants are also responsible for covering costs amounting to RM20,000, subject to allocator.

Legal Issues

Specifically, against the first and second Defendants, the court considered whether the said Defendants had breached their fiduciary, contractual responsibilities and duty of care owed to the Plaintiff.

Among other things, the court in this case also addressed allegations of conspiracy to defraud against the Defendants and unjust enrichment. However, this article focuses only on issues relating to the first and second Defendants' fiduciary duties to the Plaintiff.

Following the *Charterbridge Corporation Ltd v Llyods Bank Ltd*[1] principle, it is the duty of the directors to act in "the interest of the company". The objective test is whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company.

The Court found that an honest and intelligent director would not have believed that the said sponsorship was for the benefit of the Plaintiff.

A reasonable and diligent director would have investigated the RM15 million sponsorship involving the then Prime Minister. The Defendants' secretive approval, without knowledge of the Board, indicated external motivations. The court dismissed their justifications as post-factum attempts to justify their wrongful conducts.

Analysis

According to section 213(1) of the Companies Act 2016 ("**Act**"), a director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company.

In *Re Smith and Fawcett Limited*,[2] it was emphasised that a director's duty to act in the best interest of the company entails acting in bona fide based on their judgment, not necessarily how a court might interpret it. This was reaffirmed by the Federal Court in the case of *Tengku Dato Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd* and another appeal[3].

The problem with a purely subjective test is identified by Bowen LJ in *Hutton v West Cork Railway Co.*[4] that "bona fide cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational."

The Tengku Dato Ibrahim Petra case balanced this subjective test with an objective element, which is to consider what a reasonable person in the director's position would believe.

In reaching this decision, Mohamed FCJ cited the case of *Charterbridge* which emphasized the objective assessment of whether an honest and intelligent man in the director's position, considering the complete context, could have reasonably believed that the transaction was in the company's best interest.

Given the current case that we are discussing, the court had applied the Charterbridge test. Rosemary Teele Langford and Ian M. Ramsay in "Directors' Duty to Act in the Interest of the Company: Subjective or Objective?" argued that the objective test in Charterbridge diminished the significance of taking consideration into account, which is a fundamental aspect of the duty.[5] Mandating the consideration also fosters accountability among directors.

Furthermore, it prevents the paradoxical scenario where a director who provides insufficient consideration could be found in violation of their duty, while a director who gives no consideration to the company's interest might not be deemed to have breached their duty due to the application of Charterbridge test.

While such scenarios could potentially arise, in our specific case, we are of the view that the court had correctly applied the Charterbridge test, and adverse outcomes were thus averted.

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1. Charterbridge Corporation Ltd v Llyods Bank Ltd [1970] 1 Ch 62.

2. Re Smith and Fawcett Limited [1942] 1 CG 304.
3. Tengku Dato Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2017] MLJU 1976.
4. Hutton v West Cork Railway Co (1883) 23 Ch D 654.
5. Langford, Rosemary Teele and Ramsay, Ian, Directors' Duty to Act in the Interests of the Company: Subjective or Objective? (March 7, 2015) Journal of Business Law, 2015, Issue No. 2, pp. 173-182, U of Melbourne Legal Studies Research Paper No. 730, available at SSRN <https://ssrn.com/abstract=2575009>.

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