

**SKRINE**

**Fiduciary Duties  
and Board Members**

**Harold Tan**

31 May 2011

# Fiduciary Duties Defined

---

## 1. Fiduciary

- One who owes to another the duties of good faith, trust, confidence and candor;
- One who must exercise a high standard of care in managing another's money or property.

## 2. Fiduciary Duty

- A duty to act with the highest degree of honesty and loyalty in the best interest of the beneficiary.

# Fiduciary Duties Defined

---

## 3. Three (3) general characteristics of fiduciary obligations

- Discretionary powers
- Discretion can affect beneficiary's interest
- Beneficiary is vulnerable to the fiduciary holding the discretionary power.

*[Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 (CA)]*

# Port Authorities Act 1963(“PAA”)

---

1. Established all Port Authorities other than the Penang & Bintulu Ports.
2. Covers:
  - Klang Port
  - Johor Port
  - Kuantan Port
  - Kemaman Port
  - Tanjung Bruas Port.

# Port Authorities Act 1963 (“PAA”)

---

## 3. Members:

- Chairman
- General Manager
- 5 to 9 Members

# Fiduciary Duties of Members

---

- ❑ PAA sets out powers and duties of Port Authorities.
- ❑ But is silent on the scope of duties of their Members.
- ❑ Nevertheless, a Guideline issued by the Prime Minister's Department in 1998 offers guidance on the Member's duties.

# Guidelines

---

1. Prime Minister's Department on 21.7.1998 issued
  - ❑ Garis Panduan mengenai Peranan dan Tanggungjawab Kementerian, Lembaga Pengarah dan Ketua Eksekutif Dalam Pengurusan Badan Berkanun Persekutuan” (“**Guidelines**”).

# Guidelines

---

## 2. Clause 5.2

### “5.2 Tugas Fidusiari

5.2.1. Ahli Lembaga Pengarah hendaklah sentiasa menyedari bahawa mereka adalah mewakili Kerajaan di dalam Lembaga Pengarah Badan Berkanun. Oleh itu, mereka mempunyai hubungan fidusiari dengan Badan Berkanun yang dianggotainya. Ahli Lembaga Pengarah hendaklah bersikap jujur apabila membuat keputusan, menyokong atau menentang sesuatu perakuan. Tugas fidusiari seorang Ahli Lembaga Pengarah adalah:

- (a) Tidak menggunakan kedudukannya sebagai Ahli Lembaga Pengarah untuk memperolehi keuntungan bagi dirinya, khususnya menyalahgunakan sebarang wang, harta atau maklumat Badan Berkanun.
- (b) Tidak melakukan sesuatu yang bercanggah dengan kepentingan Badan Berkanun.
- (c) Tidak menyerahkan tugas fidusiarnya kepada pihak ketiga.
- (d) Menjalankan tugasnya dengan bersungguh-sungguh serta dengan kemahiran dan ketekunan yang sewajarnya, dan jika perlu, mendapatkan nasihat ikhtisas mengenai perkara tertentu.
- (e) Menghormati kepercayaan dan keyakinan yang telah diamanahkan oleh pihak yang melantik beliau sebagai seorang Ahli Lembaga Pengarah.”

# Fiduciary Duties

---

## Common Law Duties:

- Duty to act in good faith;
- Duty to exercise reasonable care, skill and diligence;
- Duty not to make a profit out of their position of trust and confidence;
- Duty not to put themselves in a position of conflict
- Duty not to act for their own benefit or the benefit of a 3<sup>rd</sup> Party.

# Duty to act in good faith

---

## 1. Members to always:-

- Exercise powers in interest of Port Authorities.
- Not misuse or abuse their powers.
- Avoid conflict of interest.
- Not to make secret profits.
- Not misappropriate assets of Port Authorities.

# Duty to act in good faith

---

## 2. Subjective test.

*Re Smith & Fawcett Ltd* [1942] Ch 304 held:

- ❑ in the context of companies directors, directors must act in good faith in what they consider- and not what the courts may consider- is in the best interest of the company.

# Duty to exercise reasonable care, skill and diligence

---

Members to always exercise:-

- Reasonable care, skill and diligence with
- The knowledge, skill and experience expected of them.

**SKRINE**

Your Trusted Legal Partner Since 1963

---

**Malaysian Law Firm of the Year 2008, 2009&2010, Who's Who Legal Awards**

# Professional Advice

---

1. Members may seek advice in carrying out their duties.
  - Officers
  - Experts
  
2. Reliance on such advice is reasonable if
  - It is made in good faith; and
  - After making an independent assessment of the information relied on.

# Professional Advice

---

3. Independent assessment requirement:
  - Member must consider relevant views and materials
  - Bring judgment to bear in relation to the matter.
  
4. Mere reliance on judgment of others who are more experience may not be satisfactory.

# Duty to avoid conflict of interest

---

No conflict rule is very strict against a fiduciary

*Saudah Sarju & Anor v. Rudiah Md Sarjoo; Mohd Shah Ishak & Anor (Intervener)* [2008] 1 LNS 725.

□ Jeffrey Tan J:

“A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealousy all transactions between such person so that the protector may not use his influence...to his advantage...”

**SKRINE**

Your Trusted Legal Partner Since 1963

---

**Malaysian Law Firm of the Year 2008, 2009&2010, Who's Who Legal Awards**

# Duty to avoid conflict of interest

---

*Magnifine Sdn Bhd v. Yap Mun Him* [2005] 6 CLJ 413

□ Richard Malanjum J

“...Indeed even with a full and frank disclosure the no-conflict and no-profit rule would not have excused or exempted him from his fiduciary duty to act *bona fide* in the interest of the Plaintiff and for proper purposes...

...It must be remembered that the no-conflict rule and no-profit rule are indeed very strict against a fiduciary.”

**SKRINE**

Your Trusted Legal Partner Since 1963

---

Malaysian Law Firm of the Year 2008, 2009&2010, Who's Who Legal Awards

# Section 3A of the PAA

---

## 1. Section 3A of the PAA provides:-

(1) No matter or thing done and no contract of any kind entered into by the authority and no matter or thing done by any member of the authority or by any employee thereof or any person whomsoever, acting under the direction, of the authority shall, if the matter or thing was done and the contract entered into *bona fide* for the purposes of carrying out this Act, subject any such member or employee or any other person acting under the direction of the authority personally to any action, liability, claim or demand wheresoever in respect thereof.

(2) Any expenses incurred by the authority or any member, employee or other person so acting under the direction of the authority shall be paid out of the funds of the authority.

# Section 3A of the PAA

---

2. Plain reading of the section suggests that except failure to perform duties in good faith for the purposes of carrying out the Act, Members are immune from actions brought personally against them by an external party.
  
3. Hansard dated 10.2.1972
  - ❑ Suggests that Section 3A Immunity does not extend to protect Members from breach of their fiduciary duties to the Port Authorities.

# Hypothetical scenarios

---

## Scenario 1

A Port Authority proposes to:

- dispose of some of its landed properties
- for a consideration of RM 5 million
- in accordance with a valuation report prepared by the Government Valuers.
- A proposal was prepared and presented to the Members for deliberation.

## Question:

What must the Members do in order to discharge their fiduciary duties?

# Hypothetical scenarios

---

## Scenario 2

A port authority proposes:

- to engage a contractor to carry out refurbishment works.
- By way of an open tender.
- A company whose shareholders are closely related to one of the Members submits a bid.

## Question:

What must the interested Member do under such circumstances?

# SKRINE

## THANK YOU

Unit No 50-8-1, 8th Floor, Wisma UOA Damansara, 50, Jalan Dungun, Damansara  
Heights 50490 Kuala Lumpur

Tel:603 20813999, Fax: 603 20943211,

Email: [tkl@skrine.com](mailto:tkl@skrine.com),

Website: <http://www.skrine.com>