

Nominee directors: you can nominate but not dominate



The position of “nominee” director is an interesting one. They are openly appointed to represent the interests of a third party (e.g. a shareholder or creditor or investor) whilst at the same time owing all the duties of an ordinary director.

The duties of a director are extensive (and codified in sections 171 to 177 of the Companies Act 2006) and include as a key requirement the duty to promote the success of the company. To a lawyers eye, the position of nominee director is therefore fraught with potential conflict of interests and fertile ground for boardroom disputes. The case of [Hawkes -v- Cuddy, re. Neath Rugby Limited](#) provides some guidance for nominee directors.

In this case, which has a complex factual background, the court found that in order to assess the basis on which a nominee director should exercise his powers it was necessary to look at the whole factual background not just the law. This factual background included the basis for the appointment, the articles of the company and the terms of any shareholders agreements. The latter two could modify the legal position such that what might otherwise be breach of a fiduciary or other duty was in fact authorised by the company.

On a general note, the court concluded that an appointed director “without being in breach of his duties to the company, may take the interests of his nominator into account, provided that his decisions as a director are in what he genuinely considers to be the best interests of the company.”

What this means is that in a situation where there is a conflict of interests between the company and the appointer then any decision made by the nominee director must be capable of being justified as being in the best interests of the company. A nominee director cannot, without risk of a claim of breach of duty, simply vote as instructed to do so by his appointer. The appointer may nominate but not dominate.



In practical terms, how much this judgment helps nominee directors is open to question. Where such a director is employed by or contracted to the appointer it will be a tough director who can say to their appointer – sorry but I am voting against your interests because it is not in the company’s interests. The position of nominee director remains a difficult one and anybody contemplating the role should be fully aware of the risks.

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