Nominee Directors: Professionals acting as nominees must understand that in common law, there is no such term


By Hara Vasiliou & Marios Kofteros*

In a recent decision issued by Judge Mathikolonis, sitting at the District Court of Limassol, in the matter of P.T Platinum Public Limited ("Platinum")-(in liquidation)[1] where the Joint Liquidators applied, inter alia for the public examination of its directors and auditors, one of the directors sought to defend his actions on the basis that he was acting as a "nominee" director stating that, *"well I don't really know, I can't really help, it is not my fault, I was just carrying out instructions"*, the judge commented *"with regard to such assertions, I note that his appointment was duly registered at Registrar of Companies and, in any event, it has not been pointed out to me at what passage of Cap. 113, one can find the type of appointment he claims to be holding".*

The position of the director in Platinum is representative of the attitude of a number of professionals in Cyprus, which seem to lack a fundamental understanding of the position they hold, their duties and obligations, when they agree to act as nominee directors; this term does not exist in our legislation and they conveniently tend to forget it!

Nominee directors are those appointed to the board of a company to represent the interests of their appointor, shareholder(s) or ultimate beneficial owners ("UBO's") and/or other stakeholder(s). This puts them on a collision course with their duties to the companies in respect of which they hold office. In principle, directors have a duty to avoid conflicts of interest and to exercise judgment independently, whilst promoting the success of their companies.

Instead of acting in the best interests of their companies, occasionally, however, they deviate from their role and responsibilities and act as professional intermediaries of corporate vehicles and/or structures which, in reality, facilitate the concealment of criminal proceeds. As Nicholas J. Lord put it *"it is the underlying finances and persons that they serve, rather than the market commodities and services per se, that are criminal".*[2] Thus, professional intermediaries are at the centre of many scandals and their misuse occurs at "*the interface of legal–illegal activities".*

[1] Access full judgement on http://www.crigroup.com.cy/news/recent-judgment-in-favor-of-joint-liquidators-approving-the-public-examination-of-nominee-director-and-auditor/

[2] Nicholas J. Lord (2019) Other People's Dirty Money: Professional Intermediaries, Market Dynamics and the Finances of White-Collar, Corporate and Organized Crimes

Potential conflicts with any of these duties are readily apparent in a commercial reality where nominee directors are expected to at least consider the interests of their appointor. This theme of conflict between commercial reality and legal duties owed to the company continues to apply when the company to whose board the nominees have been appointed enters insolvency.

In those circumstances, the directors' duties to act in the interests of the company shifts towards a duty to act in the best interest of the company's creditors. This has implications for nominee directors, particularly those appointed by shareholders and/or UBO's, because in those circumstances, it is unlikely that the directors' duty owed to the creditors is compatible with the interests of their appointor.

Nominee directors are de jure directors of companies to whose boards they have been appointed to act. Under common law, any person occupying the position of director, by whatever name called, is a director and therefore, subject to the same directors' duties.

Often, insolvency practitioners are required to deal with liquidations where fraud is apparent from the outset. Fraudulent trading is when a company either carries on business with the intent of purposefully defrauding its creditors or, it was set up as a means to achieving fraud. Fraudulent trading, if proven, constitutes a criminal offence and is punishable by fine and also imprisonment.

In an insolvent liquidation the actions of all directors, including nominees and/or shadow[3] directors, must be scrutinised for misconduct or fraudulent trading[4].

UBO's are often, effectively, shadow directors and although some nominee directors may be under the illusion that in such capacity they are not responsible for their actions and cannot be held accountable or that the indemnities they enjoy from the UBO's shall protect them, unfortunately, they are very much mistaken!

When conducting fraudulent transactions pursuant to instructions from UBO's, nominee directors are effectively aiding and abetting their principals to defraud creditors and they would be foolish to believe that in the event of insolvent liquidation and court action brought by the liquidator, they will escape unharmed from repercussions and/or they will not be held accountable for their actions.

[3] A shadow director is a person in accordance with whose directions or instructions the directors of a company are accustomed to act. Under this definition, it is possible that a director or the entire board, of a holding company, and the holding company itself, could be treated as a shadow director of a subsidiary.

[4] See relevant case article on http://www.crigroup.com.cy/wp-content/uploads/2020/04/Article-Seeking-justice-in-multi-jurisdictional-fraud-100420-.pdf

Provided they are appropriately indemnified they might be financially compensated, but are they willing to sacrifice their reputation and possibly their freedom? In the event nominees are prosecuted for fraud or any other criminal offence, they shall be the ones to serve a prison sentence and any indemnity they hold does not provide them with an escape route.

**Marios Kofteros is a Licensed Insolvency Practitioner and Hara Vasiliou is a Lawyer - both employed at CRI Group www.crigroup.com.cy which specialises in all aspects of corporate and personal insolvency.*
