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Case Update: *Zaharen Hj Zakaria v Redmax Sdn Bhd & other appeals* [2016] 7 CLJ 380 (CA)

This is a note on a recent Court of Appeal decision on directors' duties towards a company.

Redmax Sdn Bhd ("the company") brought an action in the High Court against two former directors (D1 and D2) for breach of their fiduciary duties in unlawfully paying out monies from the company to third parties based on fictitious transactions and documents. At the material time, D1 and D2 were the managing director and finance director, respectively, of the company.

D1's defence was that he was duly authorised by the company to make the payments to the third parties, while D2's defence was that he had approved the payments based on D1's instructions and would be guilty of insubordination were he to disobey D1's instructions. The High Court allowed the company's claim against D1 but dismissed its claim against D2. Dissatisfied, D1 filed two appeals against the High Court's decision: one in allowing the company's claim against him, and another for dismissing the company's claim against D2. The company also filed an appeal against the High Court's decision to dismiss its claim against D2.

The Court of Appeal, in allowing the company's appeal, held that the monies that had found their way to the unauthorised third parties would not have been possible without the knowledge and deliberate facilitation of D2. Being a director of the company at the material time, D2 had a legal duty to protect the interests of the company. That duty continued for as long as D2 remained a director of the company and, therefore, his defence ought not to apply, in the circumstances of this case, in his favour. Although there were no errors committed by the High Court on the salient and material facts, the Court of Appeal could not agree on the ultimate finding that D2 was legally justified in doing what he did.

The Court of Appeal in dismissing both D1's appeals found that the case against D1 had been overwhelming. The payments to the third parties were not justified and, in fact, substantial sums of monies that were returned by the said third party companies were in fact paid to D1. The case against D1 was clear and made out more than sufficiently so as to entitle the High Court to enter judgment against D1.

As this case illustrates, the duty of a director is an onerous one. He cannot rely on justifications such as "*following instructions*" and "*duty to obey instructions of a superior*". The legal duty of a director is to protect the interests of the company, and that duty continues for as long as one remains a director of that company.

The Court of Appeal decision may also be viewed here:

<http://www.kehakiman.gov.my/directory/judgment/file/W-02-320-02-2014.pdf>

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