

The law must be vigorously applied against wrongdoers

The Edge - 21/10/2017
Pg. 59

The company, as an institution and a legal fiction, is a great invention of capitalism. It has survived for centuries, always adapting to free market ideas and laissez-faire, while being sufficiently versatile to adopt different models, even for a command economy.

In Malaysia, the company is by far the most popular method of carrying on business, in contrast to partnerships, sole proprietors and the like. More than 1.3 million companies have been incorporated, with probably about half a million actually carrying on business. The shares of about 1,000 public companies are traded on Bursa Malaysia.

At the heart of a company is its directors. Higher management rests with the directors, whether collectively or more often in a single individual.

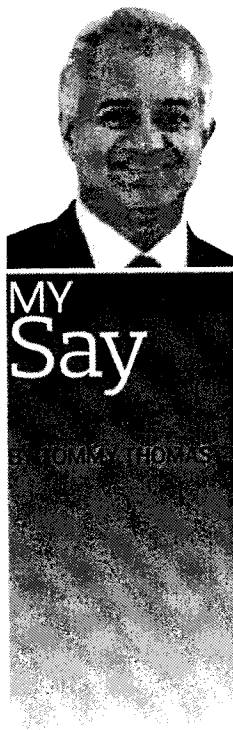
Acts of Parliament or statutes have always dominated company law, perhaps more than most branches of civil law. The first enactment on the subject in Colonial Malaya was the adoption in the Straits Settlement of the Companies Act of India 1886. Subsequently, five Ordinances were enacted prior to Merdeka. The major companies legislation that served us for more than half a century was the Companies Act of 1965, modelled on the 1948 Act of England and the 1961 Act of Victoria, Australia.

The current version is the Companies Act 2016: a mammoth Act containing 620 sections and 13 schedules running to 577 pages. And yet, large portions of company law are found in case law decided by judges over the centuries.

Trust is one such doctrine. Applied to company law, it simply means that directors of companies are trustees of all properties and assets belonging to their companies. It is as plain as that.

How is a director who is trustee of his company's assets expected to look after such assets? Honestly and prudently!

He has a duty to preserve and protect such assets. I accept that "The Trust Compass" con-



templated in your theme is wider than the concept of a director being a trustee.

But I suggest that to understand the concept of "trust" from the perspective of a director, how he or she deals with the properties of the company is a good place to start.

Directors cannot steal assets from companies, or divert them to other entities where directors have an interest. Hence, conflict of interest must be avoided.

As to honest dealings with regard to assets of companies, directors must appreciate that the law imposes an objective standard.

If I may be permitted to quote the words of Lord Nicholl in delivering the speech for the Privy Council in 1995 in an appeal involving the Royal Brunei Airlines: "In most situations, there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes or ears, or deliberately not ask questions, lest he learns something he would rather not know, and then proceed regardless ..."

Resetting the Trust Compass suggests that in previous generations, trust was common place, and that a deviation has taken place in recent times. It presupposes better behaviour in the past.

I am not convinced with this premise. From the time companies were used in Malaysia, the actions of dishonest and fraudulent directors have attracted much public attention. In the early 1970s, Amos Dawe and the Mosbert Group were the by-words of poor corporate governance. The next decade saw the rise of George Tan, the Carrian Affair and BME. The trend continued into this century. Hence, when the 1MDB frauds were designed