Nominee directors and insolvent companies

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INTRODUCTION

A nominee director is a director appointed to the board of a company to represent the interests of his appointor on that board. He may be appointed by a shareholder, a creditor or another stakeholder. This puts such a director on a collision course with the duties he owes as a director to his company. This chapter will analyse three directors’ duties in some detail, namely the duty to avoid a conflict of interest, the duty to exercise judgment independently and the duty to promote the success of the company. Potential conflicts with any of these duties are readily apparent in a commercial reality where the nominee director is expected to at least consider the interests of his appointor. This chapter will show that the law has moved on from an absolutist approach where the director was estopped entirely from considering his appointor’s interests to an approach by which the director is at least allowed to take into account such outside interests and follow them at least where there is a congruence between the company’s and the appointor’s interests.

This theme of conflict between commercial reality and legal duties owed to the company continues to apply when the company to whose board the nominee has been appointed nears or enters insolvency. In those circumstances, the directors’ duties to act in the interest 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, because in those circumstances it is unlikely that the directors’ duty owed to the creditors is compatible with the interests of his appointor.

The chapter begins by outlining the content of the duties most likely to be violated by a nominee director before analysing the law’s response to the difficult conflict between commercial reality and legal duties. The last section is concerned with analysing these principles in the context of an insolvency.

WHAT IS A NOMINEE DIRECTOR?

A nominee director stands apart from his fellow directors by virtue of having been nominated by a shareholder or other stakeholder of a company to represent the stakeholder’s particular interests.¹

However, despite his special interest appointment, a nominee director is usually a de jure director of the company whose board he has been appointed. Section 250 of the Companies Act 2006 (”CA 2006”) states that “any person occupying the position of director, by whatever name called” is a director and, therefore, subject to the same directors’ duties. It follows that prima facie a nominee director is subject to the same duties as the remainder of his board. Confirmation of this can be found in Lord Denning’s speech in Boulting v Association of Cinematograph Technicians.² His Lordship recognised their distinct commercial position but felt unable to deviate from the usual standard of care applicable to company directors. Ahern rightly concludes that, in law, nominee directors do not constitute a separate class of directors.³

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¹ Boulting v Association of Cinematograph Technicians [1963] 2 QB 606, 626 (Lord Denning)
² ibid
³ Ahern, Nominee directors’ duty to promote the success of the company: commercial pragmatism and legal orthodoxy, [2011] LQR 118 at p123
The difficulty for nominee directors arises because even though they are treated like other, non-special interest directors, there is usually an expectation that they will act with some awareness of their appointors’ interests. This can range from a mere expectation of loyalty to legal duties owed to the appointor, though more than the mere appointment is required to create such duties.  

Nominee directors are de jure directors of the companies to whose board they have been appointed. They are not a distinct class of directors and they owe the same duties to the company as other directors do whilst, at the same time, representing, through expectation of loyalty or legal duty, the interests of their appointor. This can create difficulties in carrying out their duties as directors. The next section will briefly outline those duties most likely to be affected by a director’s dual status as nominee to his appointor and fiduciary to the company.

DIRECTORS’ DUTIES AND ISSUES FACED BY NOMINEE DIRECTORS

Conflict of interest
In Bray v Ford Lord Herschell described the rule against conflicts of interests as the “inflexible rule...that a person in a fiduciary position is not, unless otherwise provided...allowed to put himself in a position where his interest and duty would conflict.” The rule applies with equal force where a director’s duty to his appointor and the duty to the company conflict. Section 175 CA 2006 now puts this rule on a statutory footing, stating that a “director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.”

The rule against the conflict of interest has the potential to make every appointment of a nominee director uncomfortable. It would be most unusual for a nominee director to not be subject to at least an expectation of loyalty towards his appointor. In many situations, the nominee director will be an employee or even an officer of the appointor and for that reason be subject to legal duties to his appointor. Given that the duty against conflicts of interests is expressed as a duty to avoid a situation in which a conflict, direct or indirect, may occur, this puts the whole concept of nominee directorship into question.

Independent judgment
A fiduciary, including a nominee director, must avoid fetters on his discretion and must reach his decision independently. Section 173 CA 2006 states that “a director of a company must exercise independent judgment.”

Clearly, a prior agreement with an appointor to vote a certain way would violate this duty. However, it is easy to see how this duty can cause problems to even the most conscientious nominee director. The interests of his appointor will be on his mind and the expectation of loyalty, perhaps combined with a realistic commercial expectation that he will lose his appointment if he votes against the interests of his appointor, can all be said to affect the independence of his judgment.

Promote the success of the company
Lord Greene MR said in Re Smith & Fawcett that directors “must exercise their discretion bona fide in what they consider – not what the court may consider – is in the interests of the company and not for any collateral purpose.” This has now been codified in section 172 CA 2006: “A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole...” In doing so, the director must have particular regard to a number of factors listed in section 172(1).

The interest of the company is not a particularly well-defined concept and the reformulation to “success of the company for the benefit of its members” does little to clarify it. However, it is well-settled that the interest and success of a company has to be assessed...
from the perspective of the shareholders, present and future. There is some debate as to how far the list of factors in section 172(1) CA 2006 amends this but it remains clear that preferring the interest or success of a particular shareholder or a particular stakeholder violates the duty in section 172. This is clear partly because the equality of members is one of the factors listed in section 172(1).

It is easy to see how a nominee director can struggle with fulfilling the requirements of the duty to act in the best interests of the company, to promote its success, when his appointor approaches him with a particular interest that the appointor wishes to further. How far the director can take those interests into consideration when discharging his duty under section 172 CA 2006 is the key question in the next section where the approach to directors’ duties in the context of nominee directors will be analysed.

THE LAW’S APPROACH TO THESE DUTIES IN THE CONTEXT OF NOMINEES

Conflict of interest
The width of section 175 CA 2006 may lead to the conclusion that the mere acceptance of a directorship by a nominee violates the duty to avoid conflicts of interest. However, the law has taken a different path and has generally allowed nominees to take directorships. This is for a number of reasons.

First, section 175(4)(a) CA 2006 states that the duty is not infringed “if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest.” This means that even though the appointment of a director may cause the possibility of a conflict of interest there is no breach of duty where an actual conflict is not reasonably likely. In many cases of nominee directorships this will be the case, particularly where the nominee director is the nominee of a sole shareholder, or the director of a number of group companies. Interests are unlikely to diverge in those cases.

Secondly, section 175(4)(b) CA 2006 allows a director to act in circumstances where there would otherwise be a conflict of interest where the other directors have authorised the matter. Such authorisation should be sought where there is some doubt about the alignment of interests between appointor and company so as to prevent any suspicion of a conflict from arising.

Thirdly, section 180(4)(b) CA 2006 provides that if the company’s articles authorise certain conflicts of interest, nothing done in accordance with those articles violates section 175. This is a useful provision for joint venture companies, for example, where the articles of the joint venture company are purposely drafted to accommodate the fact that the parent companies will wish to appoint nominee directors to the board of the joint venture company.

Lastly, the courts have been willing to overlook the fact that the duty is to avoid the possibility of a conflict of interest and have instead focused on the actions of the director. A director is not expected to resign or step aside when a conflict arises between the interests of the appointor and the interests of the company but is, instead, expected to prefer the interests of the company. This is an onerous task.

It follows from this analysis that a nominee director will rarely be affected by the duty to avoid conflicts of interest in section 175 CA 2006. Instead, the focus will be on the exercise of his powers where the courts will inquire whether he acted in the interest of the company or, in violation of his duties, preferred the interests of his appointor.

Independent judgment
Selangor United Rubber Estates v Cradock* illustrates the potential for nominee directors to violate their duty to exercise their judgment independently. In this case, two directors of a company acted on the express instructions of their appointing shareholders, assuming that their primary duty lay with their appointor. Unsurprisingly, the court found that this amounted to an abdication of responsibility and the directors could not be said to have exercised their judgment at all, let alone independently.

* Note 6
One way to protect nominee directors is to provide in the articles of association of the company that the director may act in accordance with his appointor’s wishes. Section 173(2)(b) CA 2006 provides that the duty to exercise independent judgment is not infringed by the nominee director acting “in a way authorised by the company’s constitution.” This section was introduced with nominee directors in mind.9

Promote the success of the company
Even if any potential conflict of interest can be dealt with through authorisation or otherwise and if the nominee director has constitutional authorisation to take into account the wishes of his appointor, there is still the overarching duty to promote the success of the company, to act in its best interest. This is a particularly important duty in the context of nominee directors because, by definition, they represent a sectional interest in the company, be it shareholder, creditor or employees, whose interests may differ from the interests of the company as a whole.

The interest of the company and the success of the company is defined in terms of benefit accruing to the shareholders, present and future, as a whole. This remains the case even with the inclusion of a list of stakeholder interests in section 172 CA 2006.

It follows that it is illegitimate for a nominee director to undertake to a majority shareholder that he will not use his powers unless the interests of the company and the majority shareholder coincide.10 The interest of the company cannot be equated to that of the majority.

However, nominee directors are, in practice, granted some discretion because the requirement under section 172 is that the director, in good faith, considers that the action promotes the success of the company. The test is, therefore, subjective. Lord Greene MR in Re Smith & Fawcett11 placed great emphasis on that part of the test that determined that it was for the directors, not the court, to determine what is in the best interest of the company.

Despite the subjective nature of the test, a director will have failed his duty if no reasonable director could, in good faith, have considered his decision to promote the success of the company. Re Southern Counties Fresh Foods12 illustrates that there is an objective limit to the director’s discretion.

**TO WHAT EXTENT CAN THE NOMINEE DIRECTOR TAKE INTO ACCOUNT AND ACT IN THE INTERESTS OF HIS APPOINCTOR?**

It is clear that a conflict of interest can be managed and even authorised and that the duty to exercise independent judgment can be adjusted through the company’s constitution. The foregoing discussion also showed that the overarching duty to act in the best interest of the company remains and that the company’s interest cannot be equated to that of a stakeholder. It follows that the key question faced by the nominee director is the extent to which he can take into account and further the interests of his appointor in making his decisions as a director of the company.

The traditional or ‘absolutist’13 approach has been to acknowledge that nominee directors are a commercial reality and are in a difficult position but to insist upon them exercising their powers subject to the same duties as other directors without being able to take into account the interests of their appointor. Lord Denning illustrates this well when he said ‘there is nothing wrong in [having nominee directors]. It is done every day. Nothing wrong, that is, so long as the director is left free to exercise his best judgment in the interests of the company’.14

Scottish Co-operative v Meyer15 exemplifies this traditional approach. CWS, the majority shareholder of ST&M, appointed the majority of the directors to the board of ST&M. The other directors were the minority shareholders in the company. CWS operated a competing business to ST&M and aimed at destroying

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10 Ashburnton Oil NL v Alpha Minerals NL (1971) 123 CLR 614
11 Note 7
12 [2008] EWHC 2810 (Ch) at [53]
13 Ahern, Note 3, p.129
14 Note 1, 626 (Lord Denning)
15 [1959] AC 324
ST&M’s viability. The nominee directors did nothing to prevent this. The court found this to be an example of oppression of the minority and CWS was ordered to purchase the shares of the minority.16 In the course of his judgment Lord Denning said that “as soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position… they probably thought that “as nominees” of [CWS] their first duty was to [CWS]. In this they were wrong”.17 Even though the directors were not held personally liable in this case, Lord Denning was in no doubt that in preferring the interests of the appointor they placed themselves in breach of duty. Despite recognising that their position was ‘impossible’, Lord Denning was in no mood to make their position easier through recognising the commercial expectation that nominee directors at least consider the interests of their appointor. The interests of the company have to be the sole determining factor in the decision making process of any director.

In Kuwait Asia Bank v National Mutual Life18 the Privy Council confirmed that in exercising their duties as directors of a company nominee directors had to ignore the interests and wishes of their appointor.19 A bank was beneficially interested in a New Zealand money broker and had appointed two directors who were also employees of the bank. The money broker had gone into liquidation and the depositors, unsecured creditors, claimed against the shareholders in a claim similar to that in Scottish Co-op. The claim failed, but the Privy Council repeated the position that nominee directors owed their duty only to the company and could not take into account the interests of their appointor.

This approach has rightly been criticised as too strict.20 Statements such as Lord Cullen’s in Dawson International plc v Coats Paton Plc (No 1)21 that ‘directors have but one master, the company’ simply ignore the commercial reality faced by nominee directors. Lord Denning’s approach, which recognises that commercially nominees are bound to take account of their appointor’s wishes but then refuses any legal recognition of this, is unworkable. This is not to say that the nominee director should not ignore the appointor where there is an actual conflict of interest, but it is unacceptable that the nominee must always disregard the interests of his appointor.

The impracticality of this traditional approach is, to some extent, recognised in more recent case law which emphasises that a nominee director can take into account the interests of his appointor so long as he does not prefer that interest over the interest of the company if there is a conflict. Ahern terms this the “corporate primacy approach”.22 Ultimately, the director will only be able to further his appointor’s interests to the extent that there is congruence of goals between the appointor and the company, although it must be emphasised that much depends on the director’s subjective assessment of that congruence. As Ahern points out, conceptually, the distance between this and the absolutist approach is small.23

This corporate primacy approach is well represented by Jacobs J’s judgment in the Australian case of Re Broadcasting Station 2GB.24 The 60% owner of a broadcasting company appointed directors to the board of that company. The nominee directors refused to give any details of negotiations with the broadcasting authority to the other directors. As in Scottish Co-op the claim was by the minority shareholder for oppression by the majority. Jacobs J rejected the idea that nominee directors could not take into account the interests of their appointors. Instead, he said, there would only be a violation of the directors’ duties if the directors would act in accordance with their appointor’s wishes even if they were of the view that their actions were contrary to the company’s interests. This makes express the need for directors to prefer the interests of the

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16 Under section 210 Companies Act 1948. Today, such an action would fall within the unfair prejudice provisions in section 994 CA 2006.
17 Note 15, 366-7 (Lord Denning)
18 [1991] 1 AC 187
19 Ibid, 222.
20 Ahern, Note 3; Crutchfield, Nominee Directors: the law and commercial reality, [1991] Company Lawyer 136
21 [1989] BCLC 233 at 243
22 Ahern, Note 3, page 131
23 Ibid
24 (1964-1965) NSWE 1649
company but allows directors to act in the interest of the appointor where there is no conflict. Jacobs J emphasised that this was so independently of any shareholder agreement which might allow a nominee director to put the interests of the appointor first. He acknowledged that this approach denies "any right in the company as a whole to have each director approach each company problem with a completely open mind, but...to require this of each director is to ignore the realities of company organisation". It follows that the difference to Lord Denning’s traditional approach in *Scottish Co-operative* lies in the extent to which the director needs to make up his mind independently and without influence from his appointor. On Jacobs J’s approach, the director has to act in the interest of the company, as is required by Lord Denning’s approach. However, Jacobs J permits the director to come to the conclusion that he is acting in the interest of the company without a ‘close personal analysis of the issues’, hence giving him the freedom to follow his appointor’s wishes.

The English courts appear to prefer this approach over the more traditional statements that the interest of the appointor may play no role in the decision making process. *Re Neath Rugby Club* concerned an unfair prejudice petition under section 459 of the Companies Act 1985. A company, N, was owned by H and C. N owned a further company, O. C had been appointed as N’s nominee on the board of O to protect and further N’s interests. It transpired that C had put O’s interests first ahead of those of his appointor, N. Unsurprisingly, the Court of Appeal found that C had acted correctly. However, in the course of his judgment, Stanley Burnton LJ emphasised that a nominee director could, without being in breach of his duties to the company, take the interests of his appointor into account, provided that he genuinely considered this to be in the best interest of the company. This approach is almost indistinguishable from that of Jacobs J in *Re Broadcasting Station*.

Whilst there seems to have been a relaxation of the traditional approach, it remains clear that even if a director can take into account the interests of his appointor, he must not prefer them over those of the company if there is a conflict of interest. It is for this reason that a third strand of case law is of particular significance. A number of cases have pointed out that directors’ duties can be amended to take into account the particular circumstances of nominee directors. It has already been seen that sections 180(4)(b) and 173(2)(b) CA 2006 allow adjustments to the duties to avoid conflicts of interests and to exercise judgment independently through the company’s constitutions. A similar trend is discernible more generally in the case law. *Levin v Clark* is another decision by Jacobs J. In this case, directors nominated to the board of the company by a mortgagee were held to be entitled to act primarily in the interests of the mortgagee after a default by the mortgagor company. Jacobs J emphasised that the scope and content of the fiduciary duty to act in the best interest of the company depended on the circumstances of each case. In particular, the question was what the interest of the company was. In circumstances where a mortgagee appointed a director to represent his interests on the board of the company, the interest of the company might best be served if that director acts in the interest of the mortgagee in the case of a default.

The best interpretation of this paragraph is not that a director may prefer the interests of his appointor over those of the company he serves. Instead, it should be read in the way suggested by Warren J in *Re Southern Counties Fresh Food*. He emphasised that directors’ duties, including the duty to act in the best interest of the company, are capable of being attenuated with the unanimous agreement of the shareholders. However, Warren J seems to have intended to put some room between the English cases and the Australian cases when he said that “the strictness of the “no conflict” and “no profit” rules are well established in English law whatever flexibility might be seen in the

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25 Ibid at p1648
26 Ibid at p1663
27 Note 4
28 Now section 994 CA 2006
29 [1962] NSWR 686, referred to in *Re Southern Counties Fresh Food* [2008] EWHC 2810 (Ch) at [60]
30 Ibid at p700
31 Note 29
32 Ibid at [64]
Australian cases”. It was important to Warren J that any relaxation in the fiduciary duties of a director was agreed by the shareholders. Whether such a relaxation was agreed depended on the particular facts of a case. He added that “absent an express agreement, a compelling case will...need to be made out if any sort of qualification of the duty is found to exist”.

He concluded that it was unlikely that as a matter of English law shareholders could agree to release the director from his duty to act in the best interest of the company. In relation to other directors’ duties, however, in particular in relation to the duty to provide independent judgment, the shareholders could, by agreement, relax the standard of care required.

Nothing in Warren J’s judgment should be read to reverse the subtle shift from the traditional approach to the corporate primacy approach. Warren J did not say that to take the interest of the appointor into account was to violate the duty to act in the best interest of the company. Moreover, as already seen, in Re Neath, a later case of the Court of Appeal, it was emphasised that to take the interest of the appointor into account was compatible with the duty to act in the best interest of the company.

It can, therefore, be concluded with some certainty that the traditional approach, reflected by Scottish Co-operative and Kuwait Asia Bank, has been replaced by a more realistic attitude to nominee directors. There is now a recognition in the cases and in statute that the conflicts faced by nominee directors and the ‘fetters’ on their independent judgment can be managed. More importantly, it is clear that a nominee director can take into account his appointor’s interests when deciding what action is in the best interest of his company, particularly when the shareholders have taken the precaution of agreeing this. Nevertheless, there has not been a shift away from the fundamental principle that a director, nominee or otherwise, has to act in the interest of, or to promote the success of, the company. Notably, there is judicial authority that this duty cannot be abrogated from even by shareholder agreement. However, even here it must be remembered that it is for the directors, not the court, to determine what is in the interest of the company and, as has been recognised in the Australian cases, that it may well be in the interest of the company to have some outside interest reflected on its board.

**Nominee Directors of Insolvent Companies**

The most notable effect of a company entering insolvency is that the interests of the creditors have to be taken into account in the directors’ discharge of their duties. In his well-known statement in Kinsela v Russell Kinsela Pty Ltd (in liq), Street CJ said:

“In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company’s assets. It is in a practical sense their assets and not the shareholders’ assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration.”

Dillon LJ approved this principle in Liquidator of West Mercia Safetywear Ltd v Dodd & Anor. The director of a company was found guilty of breach of duty when he disregarded the interests of the general creditors of his insolvent company.

This proposition was more recently affirmed in Colin Gwyer v London Wharf (Limehouse) Ltd. Two of three of the directors of a company, Limehouse, approved a settlement of possession proceedings with one of the creditors alone.

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33 Ibid at [65]
34 Ibid
35 [1986] 4 NSWLR 722 at p730
36 [1988] 4 BCC 30; also see Nourse LJ in Brady v Brady {1987) 3 BCC 535 at p552 where his Lordship stated that the interests of the company in this context are in reality the interests of the existing creditors alone.
37 Ibid at p33
38 [2002] EWHC 2748 (Ch)
members of the company that made concessions to that member but offered little to the other members. This happened in circumstances in which the company was insolvent and would be wound up within 21 days. One of the directors was appointed by the member who would benefit from the settlement. Leslie Cosmin QC, sitting as Deputy High Court Judge, found that the interested director could still vote on the resolution because the articles of Limehouse expressly provided that a director with an interest in a board resolution was entitled to form part of the quorum for the meeting and could vote on any resolution. However, he then continued that even when the articles permitted a director to vote on a resolution in which he was interested, such a provision did not relieve him of his general duty to exercise his power to vote in good faith in the interests of the company. This reflects the position as previously discussed. A conflict may be authorised, but the duty to promote the success of the company remains.

It followed that the nominee director in Colin Gwyer was required to act in the best interest of the company, not in the best interest of his appointor. However, Leslie Cosmin QC then referred to Liquidator of West Mercia Safetywear and said that where a company was insolvent or of doubtful solvency or on the verge of insolvency and the creditors’ money was at risk, the directors, when carrying out their duty to the company, have to consider the interests of the creditors as paramount and take those into account when exercising their discretion. The test, he said, was whether an intelligent and honest man in the position of the director concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company but that in considering the benefit of the company the director must have been capable of believing that the decision was in the interest of and for the benefit of the creditors. In the event, it was not possible to give a positive answer to this question in the circumstances where all claims against the member were given up for very little concessions from that member. The resolution was void.

In short, on an insolvency or on the verge of an insolvency the directors have to act in the interests of the creditors rather than in the interests of the shareholders as a whole. The interest of the company is, in reality, the interest of the existing creditors.

The effect of that on nominee directors was evident in Colin Gwyer itself. The remainder of this chapter will outline these effects in more detail.

Conflict of interest
The analysis of the directors’ duty to avoid conflicts of interest does not change in any substantive manner because of the company’s insolvency. The director continues to be estopped from acting when there is a conflict of interest, unless the conflict is authorised, either by the directors under section 175(4)(b) CA 2006 or by the articles under section 180(4)(b) CA 2006. Leslie Cosmin QC in Colin Gwyer made clear that such authorisations survive the insolvency of a company and are not affected by the fact that the duty to promote the success of the company is now subject to the duty to act in the benefit of the creditors.

Independent judgment
Colin Gwyer shows that the court will investigate whether a director has exercised his judgment independently from ulterior purposes. In the case itself, Leslie Cosmin QC found it difficult to believe that the directors could have exercised their judgment independently, particularly in the case of one of the directors who did not inform himself properly as to the settlement offer. However, there is again nothing to suggest that the duty to exercise independent judgment is affected by the insolvency of the company.

Promote the success of the company
The biggest impact on directors’ duties is felt in relation to the duty to act in the best interest of the company. The principles identified earlier in relation to nominee directors in general should continue to apply in relation to nominee directors of insolvent companies. However, the fact that the duty to promote the success of the company makes place for a duty to act in the interest of the creditors changes the effect of those principles.
As seen before, the nominee director of a shareholder may take into account the interests of his appointor when these interests overlap with those of the company or when the shareholders have agreed that the nominee may consider those interests. In neither case can the director act in a way that is contrary to the success of the company, however. In an insolvency, the director has to act in the best interests of the creditors, in a way that is likely to achieve the best result for the creditors. Practically, this means that a nominee director will rarely be able to consider the interest of his appointor because the interests of the creditors are likely to diverge fundamentally from those of the appointor shareholder in a way that the interests of a (solvent) company and its shareholders would not diverge (in many cases). Even if the nominee director is authorised by the articles to consider the interests of his appointor there is no scope for preferring that interest over that of the creditors. The duty to act in the interest of the company continues to rule supreme only that the usual equation of the interest of the company with the interest of its shareholders has been replaced with a definition in terms of the interest of the creditors.

A creditor may also have an interest in appointing a nominee director to a company on the verge of insolvency. In that case, the nominee director may wish to act in the interests of his creditor appointor seeking to maximise the return to that particular creditor. The considerations for that nominee director will be similar to those faced by the nominee director appointed by a shareholder. The duty to act in the interests of the creditors is, like the duty to act in the interests of the company, one to act for the benefit of all the creditors as a whole and to not prefer the interests of one particular creditor.

In this context, attention should also be drawn to the rules against the preferential treatment of creditors under the Insolvency Act 1986. Under section 238 of the Insolvency Act 1986 (“IA 1986”) transactions entered by a company at an undervalue are voidable. A similar effect befalls transactions that prefer one creditor over another under section 239 IA 1986. These provisions are plainly relevant to a creditor appointed nominee director in addition to the general duty to treat all creditors equally that follows from the duty to act in the best interest of the creditors as a whole.

**CONCLUSION**

Nominee directors face a difficult conflict. On the one hand, the commercial reality of their position requires them to take into consideration the interests of their appointor. On the other hand, the law requires them to act exclusively in the interests of their company and to do so with independent judgment and without conflicts of interests. The law has taken cognisance of the obvious difficulties here, although early cases did not go beyond pronouncements to the effect that nominees were placed in an ‘impossible’ position. In more recent cases, English law has begun to accept that nominee directors can take into account the interests of their appointors so long as this interest does not conflict with the interests of the company, so long as acting in the interests of the appointor is also most likely to promote the success of the company. A recognition that fiduciary duties, including directors’ duties, are context sensitive and can be amended by beneficiary, in this case shareholder, consent has further helped the position of nominee directors. In insolvency cases, nominee directors have to be aware of these principles and, in particular, have to be aware that the interests of their appointing shareholders and the company’s creditors are likely to diverge. Nominee directors appointed by creditors need to be aware that their first duty is to the creditors as a whole. English law continues to place great emphasis on the importance of a director’s duties to his company. Any relaxation that allows the director to consider the interests of his appointor must be seen in this light and subject to the paramount duty to act in the best interests of the company.