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# The Dangers of Unappointed Directorships

Do you influence the decision making in the company or do you instruct or direct others to do so? Could you be deemed to be a director of the company?

Even without the official title of “director” you could still, due to your actions and decisions, be deemed a director of a company meaning you could be held liable for failing to carry out the duties of a director. Sanctions for breach of such duties could include personal liability for damages, restitution of a director’s profits to the company and rescission of a company contract. In extreme cases, where a company is insolvent but has continued trading during its insolvency period, a director could be accused of wrongful trading and held personally liable for the debts accrued during the insolvency period. Therefore, it’s vital to know whether you are a director or not. In this article, we cover the different types of director and discuss a recent case which has shed more light on the subject.

There are three types of director:

- appointed (or *de jure*) directors;
- *de facto* directors; and
- shadow

## Appointed directors

Appointed directors are those officially appointed by the company and registered at Companies House. They owe the statutory duties set out in the Companies Act 2006 (the “CA 2006”), e.g. the duty to promote the success of the company, as well as fiduciary and common law duties such as the duties to act in good faith and exercise reasonable care and skill in relation to the company. Such a director should be aware that they could be held liable for a breach of any such duties.

## ***De facto* directors**

A director is “any person occupying the position of a director, by whatever name called”<sup>[1]</sup>, which is why a *de facto* director falls within this definition, i.e. they are someone who carries out the decisions and actions that a director would, but they have not officially been appointed a director. A *de facto* director owes the statutory duties set out in the CA 2006 as well as fiduciary duties, breaches of any of which can result in liability, regardless of the lack of formal appointment of the director in question. Determining whether a person is a *de facto* director turns on the facts of each case, but there are certain factors that assist in making such a determination. A particular factor is whether that person took on the purpose and prestige of a director, and whether they took on such responsibility as if they were a director, including having a role within the corporate governance of the company. Furthermore, it has been deemed that somebody’s job title is not conclusive, rather the court will review their actual actions and decisions. Someone being consulted about directorial decisions is not the same as them actually making the decisions, therefore not necessarily causing them to be a *de facto* director.<sup>[2]</sup>

## **Shadow directors**

A shadow director “means a person in accordance with whose directions or instructions the directors of the company are accustomed to act”<sup>[3]</sup>, i.e. somebody from whom the appointed directors take instruction or direction. A shadow director owes fiduciary duties regarding the instructions or directions he gives to the appointed directors and the duty of good faith in relation to the same<sup>[4]</sup>. Someone who provides instructions or directions with the understanding that such will be acted upon has assumed at least some form of responsibility for the company’s affairs and the courts have held that they should therefore, be held accountable as such<sup>[5]</sup>.

## **An update on the distinction between shadow and *de facto* directors**

The recent case of *Popely v Popely* [2019] EWHC 1507 (Ch) helps to shed some light on how a court analyses directorship and determines the distinction between a shadow director and a *de facto* director. *Popely* was a case where the claimants brought a claim against the defendant for alleged fraud and breach of fiduciary duty as a *de facto* director in relation to company payments.

It involved a dispute between brothers John Henry Popely (“John Snr”) and Ronald Albert Popely (“Ronald”) in relation to Casterbridge Properties Limited, an offshore company (“Casterbridge”), which they set up together in 1997. The shares in Casterbridge were held for John Snr and Ronald by a BVI company as nominee in proportions of 30% and 70% respectively (and then later by family trusts on behalf of both brothers’ families). Neither brother was a registered director of Casterbridge, rather it had a sole corporate director which was controlled by trustees.

The claimants, John Snr’s sons who were the beneficiaries of the family trust, argued that, during the course of 1998 and 1999, Ronald caused over £4 million to be paid to himself or his family trust. Due to his actions, the

claimants argued that Ronald was a *de facto* director of Casterbridge and was therefore in breach of his fiduciary duty as well as having acted fraudulently.

From various case law authorities, (including *Smithton Ltd v Naggar [2014] EWCA Civ 939*), the presiding judge, HHJ Hacon, concluded that the following points were relevant to the determination of a *de facto* directorship:

1. “the overall question to be answered when determining whether an individual is a *de facto* director of a company is whether the individual was part of the corporate governing structure of the company and whether he assumed a role in the company which imposed on him the fiduciary duties of a director.

- this is a question of fact and degree, to be assessed objectively by reference to all the relevant evidence;
- merely being involved in the management of the company or exercising a degree of influence over its decision making is not in itself enough;
- an act will qualify as an act done in the capacity of a *de facto* director if the corporate governance of the company requires that an act of that nature can be done only by someone having the capacity of a *de jure* [appointed] director;
- in general, the corporate governance of the company will have to be investigated in order to know whether the act in issue was directorial in nature; and

2. if the individual enjoyed some other capacity in which he could properly have done the act, it will not have been done as a *de facto* director” [\[6\]](#)

HHJ Hacon also made the following comments in relation to distinguishing between a *de facto* and shadow director:

1. “it is possible for an individual to be simultaneously a *de facto* director and a shadow director of a company. The capacity in which he acts in relation to the company will depend on the nature of the act;

- an act cannot be simultaneously carried out both in the capacity of a shadow director and a *de facto* director; and
- an act which takes the form of directions or instructions to *de jure* [appointed] directors will be an act done in the capacity of shadow director.”[\[7\]](#)

HHJ Hacon concluded by stating the fact that Ronald was a signatory for Casterbridge’s bank account did not

make him a *de facto* director, as other corporate entities had signatories that were not directors nor would be considered such. It was further concluded that no other evidence had been provided to show that Ronald had caused the payments to be made acting as a *de facto* director, rather his instructions to make payments would be deemed to have been given in his capacity as a shadow director and, as such, he could not be in breach of a fiduciary duty owed by a *de facto* director.

## Conclusion

The key point for anyone who is concerned about his status is to note that it is possible to be a *de facto* director and shadow director simultaneously, but when analysing an event/act/decision it can only have been carried out in the capacity of one or the other, not both. Distinguishing between the two is necessary because it will determine to what liability the director (of whatever description) is open. If in doubt, it seems wise to seek advice to remove that doubt but in the meantime to act in such a way as to uphold the highest standards of probity as if one was an appointed director.

If you require advice regarding directorships, distinguishing between roles of those employed in your business or any other form of corporate and commercial work, do not hesitate to contact any member of LA's experienced corporate and commercial team.

[1] section 250 Companies Act 2006 c.46

[2] *Smithton Ltd v Naggar* [2014] EWCA Civ 939

[3] section 251(1) Companies Act 2006 c.46

[4] *(1) Vivendi SA (2) Centenary Holdings III Ltd v (1) Murray Richards (2) Stephen Bloch*[2013] EWHC 3006 (Ch)

[5] *(1) Vivendi SA (2) Centenary Holdings III Ltd v (1) Murray Richards (2) Stephen Bloch*[2013] EWHC 3006 (Ch)

[6] *Popely v Popely* [2019] EWHC 1507 (Ch)

[7] *Popely v Popely* [2019] EWHC 1507 (Ch)