

## Are you a 'director'?

As a result, no doubt, of the economic downturn there seems to have been an increase in the number of cases brought against the directors of a company, particularly by liquidators and administrators, seeking to recover monies from those directors. But who exactly is a 'director' of a company?

The statutory definition of a director, set out in the Companies Act 2006, refers to 'any person occupying the position of a director by whatever name called'. So a person need not be called a director in order to be construed as such: what is more important is the particular functions they perform in relation to the company.

There are essentially three categories of persons who could be directors of a company: de jure directors, de facto directors and shadow directors.

**De jure** directors are the easiest category to identify. This refers to people who have been validly appointed as directors, with the internal rules of the company in relation to their appointment having been complied with and their appointment having been notified to Companies House.

**De facto** directors are people who act as directors of a company without having been validly appointed. There is no hard and fast rule here and whether someone will be classed as a de facto director will depend upon the particular circumstances of the case and the particular role of that person at the relevant company. General guidance was provided, however, in the 2008 case of *Gemma Ltd v Davies* where it was held that it had to be shown that the person undertook functions in relation to the company which could properly only be discharged by a director.

It is not necessary for the person to be 'held out' as a director by the company as what matters is not what the person is called but rather what they do. The person must have participated in directing the affairs of the company on an equal footing with the other directors and not in a subordinate role. He must have assumed the status and functions of a director and have exercised 'real influence' in the corporate governance of the company.

**Shadow directors** are given a statutory definition by the Companies Act 2006 which states that they are people 'in accordance with whose directions or instructions the directors of the company are accustomed to act'. To prove that someone is a shadow director, therefore, it is first necessary to identify the company's directors (whether de jure or de facto). Having done that, it must then be shown that the relevant 'shadow director' instructed those directors how to act and that a consistent majority of those directors were accustomed to acting in accordance with those instructions.

In the recent case of *The Liquidator of Mumtaz Properties Ltd v Saeed Ahmed* the court considered whether it was possible for a person to be simultaneously both a shadow director and a de facto director. It was held that the two concepts are 'almost invariably' mutually exclusive: the concept of a shadow director is aimed at someone who controls the board without being formally appointed; a de facto director, on the other hand, is someone who acts as a director but without having any degree of control.

In summary, therefore, a de jure director is someone who has been validly appointed to the office of a director; a de facto director is someone who 'overtly' acts as a director but who has not been validly appointed; and a shadow director is someone who acts 'covertly' and in accordance with whose instructions a consistent majority of the directors are accustomed to act.



De jure and de facto directors are both subject to the same fiduciary and statutory duties, including the statement of seven general duties set out in the Companies Act 2006. The mere fact that a person has not been validly appointed as a director of a company will not enable him to avoid liability which would otherwise attach to him if he has been carrying out the functions of a director and is in fact a de facto director.

Case law shows that shadow directors are not subject to the same fiduciary duties as de jure and de facto directors. Instead, the question of whether a shadow director does owe any fiduciary duties to a company (and, if so, which ones) will depend upon whether that person is in a fiduciary relationship with the company. That, in turn, will depend upon the position and functions of that shadow director in relation to the company. A shadow director who does not deal directly with, or claim any right to deal directly with, the company's assets will not be subject to any fiduciary duties (and therefore will not be subject to the statutory duties).

However, a shadow director who does deal directly with the company's assets or who has been acting in the furtherance of his own interests may well be subject to fiduciary duties. Again, there is no hard and fast rule and, whilst the specific circumstances of each case will need to be carefully examined, it would be sensible for any person acting as a shadow director to err on the side of caution and assume he is subject to the same fiduciary and statutory duties as de jure and de facto directors.