



Beyond Governance
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De facto or Shadow Directorships

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De facto or Shadow Directorships

What does the legislation say?

Under s251 of the Companies Act 2006, a shadow director is defined as:

“a person in accordance with whose directions or instructions the directors of a company are accustomed to act.”

What does the case law say?

Instant Access Properties Limited (in liquidation) v Bradley Rosser and Others [2018] EWHC 756 (Ch).

This was considered most recently in the case of Instant Access Properties Limited (in liquidation) v Bradley Rosser and Others. The liquidators of IAP alleged that Mr. Rosser and others were shadow directors of IAP who had breached their fiduciary duties. IAP sourced off-plan properties overseas for purchase by its members. The developers who sold the properties paid a commission to IAP, which it shared (tax efficiently) with two offshore companies. Mr. Rosser and Others held interests (via discretionary trusts and foundations) in IAP and the two offshore companies.

MorganJ stated in his judgement that “the question whether a person is a de facto director, or a shadow director depends upon the specific facts of each case. There does not appear to be a clear legal test to help one decide whether a person is or is not a de facto or a shadow director. For the purpose of deciding that question, it is necessary to focus on what the person actually did in relation to the company”.

In his judgement, at paragraph 246, MorganJ said “...I do have very extensive evidence, both documentary and oral, as to what Mr. Rosser actually did in connection with ITS and IAP and the evidence bears out many of the specific points made in this note. Of particular interest in the note are the statements: "Ran the group from January 2004" and "had final say on all agreements/ contracts". The note referenced is one made by the Company Secretary in 2008, which summarised Mr. Rosser's role.

Later (paragraph 249) MorganJ says “...my conclusion is that Mr. Rosser and Mr. Moore were shadow directors at least in relation to some parts of the activities of IAP”. However, ultimately he found that there had been no breach of fiduciary duties since very substantial work had been done by those providing their services through the offshore companies.



Sukhoruchkin v Van Bekestein [2014] EWCA Civ 399

In Sukhoruchkin v Van Bekestein, the Chancellor (Sir Terence Etherton) referred to existing case law and said that it was apparent that the law was "not entirely settled as to the circumstances in which a shadow director owes fiduciary duties". MorganJ concludes "...that to attempt to define the duties of a typical shadow director may not be helpful".

What are the implications of being shadow director?

The IAP case illustrates that it is not an offence in itself to be a shadow director. However, a shadow directorship does give rise to a number of onerous responsibilities and duties and can lead to those individuals attracting significant personal liability, including:

- a potential liability to contribute to the company's assets following insolvency (where wrongful or fraudulent trading is established);
- disqualification as a director; and
- criminal sanctions and personal liability for breaches of directors' duties.

It is also relevant that most Directors' and Officers' Liability Insurance policies will not cover shadow directors. The benefit of these policies in the event of such litigation is not to be underestimated.

How do you protect yourself against being deemed a de facto/shadow director?

Looking at the issue from a practical perspective, the following steps may help to protect the position of an individual who is in regular contact with the directors of a company:

- confirm the scope of the role via a written consultancy agreement which clearly defines the basis of the individual's involvement;
- keep a written record of all conversations/advice – make it as detailed as possible and date it;
- consider asking the company to appoint the individual as a director to formalise their position and give full visibility of facts, advice, and decisions – this will also ensure insurance cover against potential personal liability; and
- if you are unsure how to proceed, take professional advice.



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Conclusion

Unfortunately, there is no legal test to determine whether an individual is a shadow director but there are many common traits which demonstrate a level of control over the organisation, company or group such as 'had final say on all agreements/contracts.

With this in mind careful monitoring must take place of those sitting alongside the board of directors to ensure they do not accidentally become 'badged' a director and thus incurring all of the liability of being a director but none of the kudos and associated remuneration.