

Are You a *De Facto* Director?

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A company acts through its directors. Therefore, if the conduct of a director is detrimental to the company, he may be held liable and accountable. The question is: Can you be liable if you are not a named director but perform the functions of one?

The Companies Act 2016 defines the term “director” as “*any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the majority of directors of a corporation are accustomed to act and an alternate or substitute director.*”¹

Thus, a person can be a “director” even though he is not formally appointed as one. This is known as “*de facto*” director. Millet J in *Re Hydrodam (Corby) Ltd*² explained that a *de facto* director is:

“... a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company’s affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.”

The High Court in *Cepatwasan*³ laid down an important marker that the term “director” in the statute “*is not necessarily defined by his designation as such but rather by the dominant or controlling role that he plays in running the company. The above definition*⁴ encompasses a *de facto* as well as a shadow director”. Further, an individual as well as a corporate body may be construed as *de facto* directors.⁵

1 Companies Act 2016, s 2
2 [1994] 2 BCLC 180
3 *Cepatwasan Group Bhd & Anor v Tengku Dato’ Kamal Ibni Sultan Sir Abu Bakar & 17 Ors* [2008] 2 MLJ 915 (HC)
4 Companies Act 1965, s 4
5 *Standard Chartered Bank of Australia Ltd v Antico & Ors* (1995) 18 ACSR 1



In determining whether an individual is a *de facto* director, the following factors⁶ can be considered, i.e. whether:

- he directed others;
- he committed the company to major obligations;
- he participated on an equal level in collective decisions made by the board;
- the company held him out as a director;
- he used the title “director”;
- he had proper information on which to base decisions; and
- he had to make major decisions.

It is important to determine whether a person is a *de facto* director. This is invoked to impose director’s duties and liabilities on someone who held himself out as a director and performed functions as one even though the company did not appoint him. Such person ought to be held to the standard of conduct required of directors and should not be permitted to avoid liability purely for want of formal appointment. This principle is also stated in *Sazean Engineering*:⁷

“... *de facto* and shadow director are treated as a director under the Companies Act 1965 for the purpose of attaching liability on them as by their conduct, the law attaches on them a fiduciary duty which they owe to the company which they seek to control or ‘orchestrate’.”

Some instances in which individuals were found to be *de facto* directors are as follows:

- The court⁸ found that the defendant remained a *de facto* director of the company notwithstanding his resignation. His continued control was borne out by the fact that he remained a sole signatory for cheques, thereby having control of the company’s finances. The court also found that the managing director of the company executed his functions at the direction and behest of the defendant.

⁶ *Wellness Group Pte Ltd v Paris Investment Pte Ltd and others* [2018] 2 SLR 973 (SGCA)

⁷ *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd* [2019] 1 MLJ 495 (CA)

⁸ *CTI Leather Sdn Bhd v Hoe Joo Leong & Ors* [2012] 10 CLJ 287 (HC)



- The court⁹ found that even though the defendant was not formally appointed as a director, his involvement in the company's business activities showed that he was the driving force behind the whole scheme and not merely a consultant.
- The court¹⁰ found that the defendant was a *de facto* director as the evidence showed he was present at formal and informal meetings where matters in relation to the companies were discussed. Whatever the defendant recommended were implemented and he had a decisive say in the major decisions of the company and the members often deferred to his views.
- The court¹¹ found that the defendant was a *de facto* director although he was not re-elected as director in the general meeting. The defendant continued to participate in the management of the company. The court found that the defendant fell within the definition of "director" and was liable for breach of duties even when his office expired.

Conclusion

Even if the name of the person who played a controlling or commanding role in the company is not registered in the company's books, he or she could very well be a *de facto* director and can be held liable for breach of directors' fiduciary duties.

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⁹ *Mistmorn Pty Ltd (in liq) & Wily v Yasseen* (1996) 21 ACSR 173 (FCA)

¹⁰ *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2011] 1 SLR 582 (HC)

¹¹ *Corporate Affairs Commission v Drysdale* (1978) 22 ALR 161 (HCA)

