

## Shadow Director – The Puppet Master

By SM Shanmugam & Siew Hui Yi



SM Shanmugam  
Partner  
Corporate & Commercial Disputes  
E: [ssm@lh-ag.com](mailto:ssm@lh-ag.com)

A shadow director is a creature of statute. It stems from the wide definition of “directors” in the Companies Act 2016: “... a person in accordance with those directions or instructions the majority of directors of a corporation are accustomed to act”.<sup>1</sup> In other words, they direct or instruct *de jure* directors to act in certain ways.

Just last year, the Malaysian High Court found a former premier “was a shadow director” and that he “had enormous influence and wielded an overarching position of power...” in a company.<sup>2</sup> One indispensable reference depicts a shadow director in these words: “...this rather sinister individual is in actuality a puppeteer. He pulls the strings and his puppets on the board dance”.<sup>3</sup>

In *Re Hydrodam (Corby) Ltd*,<sup>4</sup> the court described a shadow director as follows:



Siew Hui Yi  
Associate  
Corporate & Commercial Disputes  
E: [shy@lh-ag.com](mailto:shy@lh-ag.com)

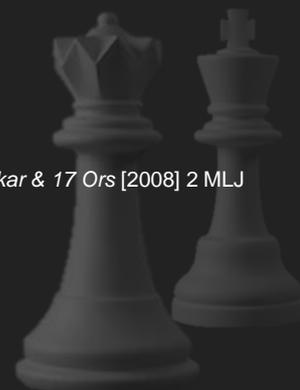
“A shadow director... does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company.”

A shadow director can also be a corporation. In *Re A Company (Ex parte Copp)*,<sup>5</sup> a bank used its position as debenture holder to play a controlling role in the affairs of the company. In the Australian case of *Standard Chartered Bank of Australia Ltd v Antico*,<sup>6</sup> the court held a holding company liable as a shadow director of its subsidiary on the basis of the controlling role it exercised over the board of directors of its subsidiary.<sup>7</sup>

In determining whether one is a shadow director, there has to be evidence of:

- a dominant or controlling role over the company’s affairs; or
- a pattern that *de jure* directors did not exercise any discretion or independent judgment but were merely complying with the instructions or directions of the shadow director.<sup>8</sup>

1 Companies Act 2016, s 2  
2 [2020] 8 CLJ 319 (HC)  
3 *Walter Woon on Company Law I* (Second Edition)  
4 [1994] 2 BCLC 180, Chancery Division  
5 [1989] BCLC 13, Chancery Division  
6 [1995] 18 ACSR 1, SC  
7 Both cases are cited in *Cepatwasan Group Bhd & Anor v Tengku Dato’ Kamal Ibni Sultan Sir Abu Bakar & 17 Ors* [2008] 2 MLJ 915 (HC)  
8 *Penisular Fibre Industries Sdn Bhd v Tan Yoke Chin* [2013] 1 LNS 119 (HC)



One must also ask: Did the directions or instructions relied and acted on by *de jure* directors carry real influence in the corporate affairs of the company?<sup>9</sup>

Under the Companies Act 2016, it is also necessary to show the appointed directors are accustomed to act in accordance with the directions and instructions of the shadow director. Judicial pronouncements shed light on what amounts to “directions and instructions” and “accustomed to act”:<sup>10</sup>

- Giving directions and instructions in relation to the company that can only be discharged by a director
  - The Federal Court of Australia in *Ho v Akai Pty Ltd (in liq)*<sup>11</sup> outlined the test to establish shadow directorship as such: “... *the influence or control exercised by a shadow director may be strategic in character, defining the context in which, or conditions upon which, the company operates, or else contriving the transactions of significance to the company.*”<sup>12</sup>
  - Put simply, one has to look at the influence and control exercised by a shadow director, how he or she defines the operation of the company/orchestra transactions significant to the company. There must be evidence of a controlling or commanding role exercised by the shadow director over *de jure* directors.<sup>13</sup>
- ‘Accustomed to act’
  - To construe a person as a shadow director, there must be shown existence of a pattern that *de jure* directors customarily adhere to the instructions or directions of a shadow director<sup>14</sup> or evidence that the shadow director systematically participated in the affairs of the company.<sup>15</sup> It has to refer to acts on more than one individual occasion but over a period of time and as a regular course of conduct.
  - The Chancery Division in *Re Unisoft Group Ltd*<sup>16</sup> interpreted the term “shadow director” and the meaning of the phrase “accustomed to act” as follows:

<sup>9</sup> *Re Kaytech International plc* [1999] 2 BCLC 351, Chancery Division

<sup>10</sup> *Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 17 Ors* [2008] 2 MLJ 915 (HC) [2006] FCAFC 159, Australian FC [Federal Court of Australia – Full Court?]

<sup>11</sup> Affirming the decision in *Australian Securities Commission v AS Nominees Ltd & Ample Funds Ltd* [1995] 133 ALR 1, Australian FC

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697 (CA)

<sup>15</sup> [1994] 1 BCLC 609, Chancery Division

<sup>16</sup>



“... those words can only mean ... that the shadow director must be, in effect, the puppet master controlling the actions of the board. The directors must be (to use a different phrase) the ‘cat’s paw’ of shadow director. They must be people who act on the directions or instructions of the shadow director as a matter of regular practice. The last requirement follows from the reference in the subsection to the directors being ‘accustomed to act’. That must refer to acts not on one individual occasion but over a period of time and as a regular course of conduct”.

- This was also stated in *Re Lo-Line Electric Motors Ltd.*<sup>17</sup>

“... in order to establish that a person was a ‘shadow director’ ... there had to be proof of a pattern of conduct in which a *de jure* director of a company was accustomed to act on the instructions or directions of the alleged shadow director and in order to establish that a person was a *de facto* director it was necessary to show that he undertook functions in relation to the company which could properly be discharged only by a director. The test for a shadow director was not satisfied if all that could be shown was that a *de jure* director acted on the instructions or directions of the alleged shadow director in relation to one event at the end of the company’s life.”

In a recent case, one of the respondents was held to be a “puppet master” of the companies, given his absolute control in them and that he made all major decisions in relation to the companies. Evidence showed that he was the directing and controlling mind of these companies.

## Conclusion

By law, a shadow director shares the same duties and obligations as a *de jure* director. Due to the shadowy nature of the role, it is obviously challenging to prove someone to be the shadow director of a company. Thus, proper assessment must be made before a claim is filed against a person or even a corporation for breaches committed as a shadow director. Otherwise, the claim runs the risk of being struck out summarily.

Editor: Koay Sook Kuan

If you have any queries, please contact associate, **Siew Hui Yi ([shy@lh-ag.com](mailto:shy@lh-ag.com))** or her team partner, **SM Shanmugam ([ssm@lh-ag.com](mailto:ssm@lh-ag.com))**.

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