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Putting *De Facto* Directors into the spotlight

A recent case in the UK Supreme Court has drawn attention to the consequences faced by de factor directors of companies. But what exactly is a de facto director and what are their duties to their company, both in trading and in insolvency?

A de facto director is a person who is not appointed as a director of a company, but who carries out the work of a director and is considered by the board to be a director. The courts have previously described a de facto director as "A person who assumes to act as a director….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".

This is important because de factor directors owe the same fiduciary duties (such as the duty not to make secret profits and the duty to avoid conflicts of interest) and ordinary duties (such as duty to disclose an interest in company business and the ordinary duty of skill and care) that the appointed directors owe to the company.

Further, if a company becomes insolvent then a de facto director could face the same penalties the appointed directors face (for example, disqualification or wrongful trading).

In the recent case, the appellant (Mr Holland) set up 42 separate companies, the shareholders of which were individual contractors who carried out work for him.

It was anticipated that these 42 companies would pay corporation tax at the lower 'small business' rate. HMRC, however, assessed that the companies should pay the corporation tax at the higher rate.

The companies were unable to meet the higher rate of tax and were placed into administration.

The sole director of each of the 42 companies was a company (B) and their company secretary was another company (C).

Mr Holland was a director of companies B and C and their sole shareholder was another company which was owned by Mr Holland.

The argument in the case was that Mr Holland, as a director of companies B and C, was a de factor director of the 42 separate companies and thereby liable for the decisions taken by the directors of the 42 companies.

HM Revenue & Customs argued that this meant he was personally liable to make a contribution to the unmet tax liabilities of the 42 companies.

The court, however, held that Mr Holland was not a de factor director of the 42 companies and was therefore no liable to make any contributions. The court stressed that simply carrying out his duties as a director of companies B and C (being the

director and company secretary of the 42 companies) did not, by itself, mean that Mr Holland was a de facto director of the 42 companies.

A good result for Mr Holland in this particular case, with his bacon only being saved by the corporate structure he had put in place.

However, the message to remember is that if you carry out the same tasks and functions as the appointed directors, have the power to participate in board decision-making, and are considered to all intents and purposes to be a director, then you are likely to be a de facto director.

Consequentially, you will owe various duties to the company, both in trading and in insolvency.

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