

UK Legal Update: De facto vs Shadow Directorships

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In a recent case, *Smithton Ltd v Naggar* [2014] EWHC 680 Ch, the Court of Appeal reconsidered the **difference between *de facto* and shadow directors**.

A *de facto* director is a person who performs the functions of a director but who has not been formally appointed as such (s250 Companies Act 2006 (“**CA 2006**”)). Whereas, a shadow director is a person in accordance with whose directions or instructions the directors of the company are accustomed to act (s251(1) CA 2006).

Smithton Ltd (the “**Company**”) claimed for loss suffered after two of its clients became insolvent and defaulted under their contracts. Both of these clients were introduced to the Company by Mr Naggar, who was a director of the holding company, Dawnay Day International Limited. The Company claimed that Mr Naggar was either a *de facto* or a shadow director and had breached his statutory duties towards the Company, in particular, his obligations to disclose conflicts when he had introduced the two clients.

It was held that Mr Naggar was neither a shadow director nor a *de facto* director. The judgment stated that although the test is an objective one, there is no set question used to identify if an individual is a *de facto* or shadow director. Nevertheless, in doing so a number of key issues were identified which should be considered when determining the role an individual has played in a company, including:

- it is more important to look at whether the individual has assumed responsibilities of a director rather than consider if there has been an invalid appointment;
- whether the company held the individual out as a director;
- whether the members of the board follow the decisions taken by the individual, or whether the individual was only ever consulted on matters;
- whether the individual assumed the responsibilities taken by other members of the board;
- the aggregate effect of the individual’s actions and the activities carried out by the individual outside of the period in question; and
- the wider corporate structure and context in which the individual was carrying out his/her activities.

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