



Shadow Directors In the BVI: Who Are They, What Duties Do They Owe and What Are Their Risks?

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As a major incorporation jurisdiction, the issue of shadow directorships is an important and practical one for the BVI. There are 3 types of company director recognised by BVI law¹: (1) those who are validly appointed as director (“*de jure*” directors); (2) those who assume to act as director, without having been appointed validly or at all (“*de facto*” directors); and (3) shadow directors.

Whilst it is well-established that *de facto* directors owe the same fiduciary duties as *de jure* directors, the position is far from clear in relation to shadow directors. With that in mind, and in light of the number of shadow directorships (or, at the very least, potential shadow directorships) in the BVI², this article is intended to provide a summary of the present legal position, both in terms of who is a shadow director, and in relation to what duties such directors owe to their BVI companies.

What is a Shadow Director?

According to the *Insolvency Act 2003* (“IA 2003”), a “shadow director” is “a person in accordance with whose directions or instructions a director or the board of a corporate body may be required or accustomed to act”³. There are a number of authorities on the meaning of those words, but ultimately it is a question of fact in each case whether or not directions or instructions were given and whether or not the directors (or at least a governing majority of the board) were “required” or “accustomed” to act on the basis of them. The mere giving of instructions or directions does not make someone a shadow director; it is only where they are translated into action by the board (on more than one occasion) that the question arises.

What duties do Shadow Directors owe to a BVI company?

Presently there is no BVI authority that directly addresses this question.

However, some assistance may be derived from considering the English decision, *Ultraframe (UK) Ltd v Gary Fielding and Ors* [2005] EWHC 1638 (Ch) in which Lewison J (as he then was) took the view that a shadow director does not usually owe any fiduciary duties to the company, unless he has voluntarily assumed responsibility in relation to a particular asset, for example by becoming the sole signatory on the company’s bank account. That view was nevertheless rejected by Newey J (as he then was) in *Vivendi SA and anor v Richards and anor* [2013] EWHC 3006 (Ch), who stated, in contrast, that shadow directors do

¹ Although only the first two types of director appear to be included within the definition of a “director” in s.2 of the *BVI Business Companies Act, 2004*.

² No doubt as a result of the number of nominee directors.

³ Although a person is not regarded as a shadow director by reason only that the director or the board act on advice given by him in a professional capacity, or he is acting as an insolvency practitioner in relation to the company: see s.6(1)(b) and s.6(2)

(at the very least) owe fiduciary duties in relation to the directions or instructions that they give to the board of the company. He went on to say that shadow directors should at least act in the company's interests, rather than their own, when giving such directions and instructions.

Both of those authorities were revisited by Morgan J in *Instant Access Properties Ltd (in liquidation) v Rosser and Others* [2018] EWHC 756 (Ch). However, rather than reconciling those existing judgments, Morgan J instead proposed a broader test, which he said could be applied in any given case, namely “*whether in all the circumstances of the case the individual owed fiduciary duties, and if so what duties, to the company*”.

Ultraframe and *Vivendi* were cited by the EC Court of Appeal in *Mark Byers and Mark McDonald (as joint liquidators of Pioneer Freight Futures Company Limited) and Anor v Chen Ningning* BVIHC VAP2015/0011 (unreported, 12 June 2018). However, that decision (which appears to have been heard prior to the decision in *Instant Access Properties*, but handed down afterwards) did not address the question of shadow directors' duties, as the Court had already concluded, on the facts, that Ms Chen was not a shadow director of the company in question.

In summary, unlike the position with ordinary or *de facto* directors, the most that can be said in respect of shadow directors is that they may owe a duty of good faith (or loyalty to the company) when giving directions or instructions to the board, and will almost certainly owe fiduciary duties if they voluntarily assume responsibility for a particular company asset. Aside from that, it appears that the Court will have to determine on a case by case basis whether the relevant individual expressly or impliedly undertook or assumed a position of trust and confidence or whether there was a legitimate expectation that he would not use his position in a way adverse to the interests of the company. The extent of the particular duty will also depend on the particular facts. The position, it is fair to say, is fluid.

What are the risks of being a Shadow Director?

There are a number of potential risks for an individual (or entity) who is found to be a shadow director, particularly where the company has gone into insolvent liquidation. In those circumstances, the liquidator has the ability (among other things) to bring a claim against a shadow director for any breaches of his fiduciary duty (under common law, in equity or (arguably) under s.254 of the IA 2003⁴). A liquidator of an insolvent company may also bring an action against a shadow director (in a suitable case) for insolvent trading or (in theory) fraudulent trading.⁵ Further, given the breadth of the definition of a director in the IA 2003, a shadow director also falls within the category of persons who could, in theory, be made the subject of a disqualification order. That could, in turn, prevent him from acting *inter alia* as a director⁶ or taking part in the promotion, formation or management of a BVI company. If there is sufficient funding within the course of the liquidation, a shadow director can readily find themselves being pursued for potentially significant sums of money.

Conclusion

Given the prevalence of nominee directorships (and shareholders) in the BVI, it is very likely that there are a substantial number of individuals (particularly beneficial owners) who fall within the definition of a “shadow director”. As a result, they may, unbeknownst to them, owe fiduciary duties to those companies. Therefore, given the risks if those duties are found to have been breached, it is important that those individuals (at the very least) take legal advice before: (1) voluntarily assuming responsibility for any company assets; and/or (2) providing directions or instructions to the board of a BVI company that is insolvent or is likely to become insolvent.

⁴ Applications under s.254 can be brought against an existing or previous “officer of the company”, which phrase includes a “director”. In England and Wales, it appears that shadow directors are not “directors” for the purposes of the equivalent provision, namely s.212 of the Insolvency Act 1986: see *Re Paycheck Services* [2010] UKSC 51 at [22], [55]. However, among other things, the definition of a “director” in the English Insolvency Act is not as broad as the definition of a director in the IA, 2003.

⁵ Under ss.256 and 255 of IA, 2003

⁶ Which seems to include acting as a *de jure*, *de facto* or shadow director

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