

ITB13 Directors Part 1



defining a director

introduction

A limited company is a **legal** entity, but not a **human** entity, and therefore needs humans to deal with the outside world!

The directors of companies therefore play critical roles in the affairs of their companies and in relation to commercial life generally. As members of a board (of directors), directors **direct** the decision-making of the company and will oversee the management of that company. Their actions determine what happens with any other person or entity that interacts with the company.

The law regards directors as "fiduciaries" - that is, someone who is in a position of trust and control in relation to others and the affairs of others. The law therefore, through the Companies Act 2006 ("CA2006") and other legislation, imposes many statutory and legal responsibilities and obligations on directors to ensure they deal fairly with their own company's affairs and other people.

However, bizarrely, the law does not lay down any qualifications or require a particular kind of experience for a person to be appointed as a director, despite the onus on responsibilities!

The conduct of a director in dealing with, and managing the affairs of, a company is therefore of great interest when that company becomes insolvent and investigations into the conduct of a director form the backbone of an Insolvency Practitioner's investigations into the affairs of any company they are appointed over.

definition of a director

Anybody can say they are a "director" (...of finance, of a company, of HR...etc) but from my point of view as an IP, "director" has specific legal effects.

The CA2006 does not define a director specifically, other than to say (s.250) it is "...any person occupying the position of director, by whatever name called." This is very important, as for my purposes, a person doesn't need to be registered as a director at Companies House to be investigated as a director.

Executive and Non-Executive

These are not mentioned in CA2006, but everyday language will often refer to them, broadly as:

Executive: having a general managerial day-to-day role within a company; or

Non-Executive: having a specific role for managing one particular aspect of a company, usually not on a day-to-day basis.

For my purposes, having either of these descriptions attached to a title of "Director" is irrelevant – the fact remains is that they are described as a director and therefore subject to investigation.

Directors recognised at Law

Legislation has generally been crafted to apply to three main types of director:

1. "De jure" Directors

This is the most common, everyday director, who has been formally appointed with their consent in accordance with the company's articles, and who will be registered as a director at Companies House. Most people who deal with a director will be dealing with this type of director.

2. "De facto" Directors

Whilst there is no strict legal definition within legislation of this type of director, there is a long history of case law that describes this type of director as "...a person who assumes the functions and status of a director, while never being appointed according to law." A good example of this is someone who is described as "Sales Director" or something similar and runs the sales (etc) functions of a company with them having a controlling say in things, but have not been appointed and registered as a director.

Most people dealing with someone of that title would naturally assume they are an appointed [de jure] director, when they have never been appointed and registered at Companies House. Generally, a *de facto* director has the same duties as a *de jure* director.

A rule of thumb is that if someone describes themselves as a "director" you cannot be faulted for assuming they are a correctly appointed director with all the powers and authority that attach to the position. In these cases, it may come down to examining exactly what they did as a role and a Court may have to decide if they can be prosecuted for misconduct as a director or not.

3. Shadow Directors

Sounds nefarious? It often is! A shadow director has a legal definition at Section 22(5) of the Company Directors Disqualification Act 1986 and Section 251 of CA2006 which is:

"...a person in accordance with whose directions or instructions the [de jure] directors of the company are accustomed to act."

In practice, a shadow director is someone who instructs the Board how to act ("pulls the strings") from the background (shadows) and is very often unknown to anyone else outside the company.

It should be noted, however, that s.251(2) CA2006 also states that "A person is not to be regarded as a shadow director by reason only that the directors act on advice given him by him in a professional capacity." Essentially, professional advisors such as accountants, solicitors, financial advisers et al are not shadow directors providing they are acting within their advisory capacity and not managing the affairs of the company directly. IP's also fall within this exemption!!

A word of caution: whilst a Bank will not usually be regarded as a shadow director, this has come up in cases before now, particularly if the bank is specifically directing who should be paid what, rather than just generally enforcing a lending limit or other banking covenant.

The Director's position as Fiduciary

A *fiduciary* holds a position of trust and the easiest way to bring this home, is that a director will (usually) control the bank account of the company and will have control over that money.

When a company becomes insolvent, even the most honest of directors can get things wrong or try and "look after" themselves or favoured suppliers/customers. The most common examples of this could be paying themselves back for a director's loan but not paying anyone else or only paying favoured suppliers and not creditors generally.

When a director acts outside of his statutory powers, or in breach of legislation, or outside those actions allowed in the company's own Articles, then he commits a "breach of fiduciary duties" and can be prosecuted for such under various legislation.

I will cover the duties of a director in Part 2 and the penalties for such breaches (including breach of fiduciary duties) in Part 3. I will also cover the disqualification of a director in Part 4.

in summary

If someone says they are a director, you can assume that they have a position of trust and control in the company, and rely on their authority, unless you suspect otherwise!

You can easily check for a properly appointed [de jure] director by checking at Companies house using <https://beta.companieshouse.gov.uk/> by searching for the limited company concerned and checking the record – it only takes a few minutes.

Alternatively, give me a call and I can check for you!

If you are concerned over your own position as a director and what the actual or potential insolvency of your company may mean for you, then please call me and we can chat it through!

there is no substitute for expert advice

I have been advising individuals and businesses suffering financial distress since 1986, a substantial part of that time having been spent within the Insolvency and Business Recovery practices at two of the "Big Four" UK accountancy firms.

In that time I have come across many instances where a particular insolvency process has proven to be a blessing in disguise for someone who may have no idea of what they can do.

As a Fellow of the Association of Business Recovery Professionals (also known as "R3" - Rescue, Recovery and Renewal) you can be assured that I am an expert in my field and will be able to help with an individual's needs.

Get in touch



Please call me for further information or to arrange a free initial meeting.

Martin Williamson

t: 01782 594344

f: 01782 595883

help@ipd-uk.com

www.ipd-uk.com



Suite 1 Marcus House
 Park Hall Business Village
 Park Hall Road | Stoke on Trent
 ST3 5XA