



De Facto And Shadow Directors In Malaysia: Hidden Liabilities In Corporate Structures

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Corporate governance is, in formal terms, entrusted to a company's board of directors. In practice, however, the exercise of decision-making power is often less confined. Individuals who are neither formally appointed nor publicly identified as directors may nonetheless play a decisive role in shaping corporate affairs.

Malaysian company law recognises this reality and responds with an intentionally expansive conception of directorship, one that prioritises substance over form and attaches legal responsibility to the exercise of real control.

A Substance-Based Statutory Framework

This approach is reflected in *Section 2* of the *Companies Act 2016 (CA 2016)*, which defines a director to include "any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the majority of directors of a corporation are accustomed to act and an alternate or substitute director". The definition is both inclusive and functional, ensuring that liability cannot be avoided merely because the formalities of appointment have not been observed. It is within this statutory framework that the concepts of de facto and shadow directorship operate.

De Facto Directors: Assumption Of Office In Practice

A de facto director is one who, without formal appointment, assumes and performs the functions of a director in practice. The issue is necessarily fact-sensitive and turns on whether the individual has, in substance, taken part in the management of the company at a level properly attributable to the board.

Malaysian courts have consistently affirmed that the classification of a director is not a question of title but of role and authority. In *Peninsular Fibre Industries Sdn Bhd v Tan Yoke Chin* [2013] 1 LNS 119 (HC), the High Court emphasised that the issue as to whether the defendant was a de facto director is a question of mixed fact and law, hence close examination to the facts of each case would be required.

Similarly, in *Cepatwawasan Group Bhd v Tengku Dato' Kamal* [2008] 2 MLJ 915, the High Court stressed that to construe a person as a shadow or de facto director, there must be shown the existence of a 'pattern' or 'custom' in which the shadow or de facto directors plays a controlling role over the de jure directors in respect of the management of the company. These decisions reflect a consistent judicial unwillingness to allow form to prevail over substance where corporate control is concerned.

Shadow Directors: Influence, Control, And Habitual Compliance

De facto directorship addresses individuals who openly assumes the role of a director, whereas the doctrine of shadow directorship operates more expansively, extending liability to those remain outside the formal structure of the board yet exercise decisive influence over it.

Section 2 of the *CA 2016* focuses on whether the majority of directors are "accustomed to act" in accordance with a person's directions or instructions, a requirement that imports the need for a regular course of conduct rather than acts on one individual occasion. The critical question is whether the board has, in practice, surrendered its independent judgment and come to act in habitual compliance with another's wishes.

The test for a shadow director would be 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. The authorities had clearly set out, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others must be shown to satisfy the statutory threshold. (See *Re Hydrodam (Corby) Ltd* [1994] B.C.C. 161).

Illustration In Practice: Former Prime Minister Najib's Case

The High Court's decision in *PP v Dato' Sri Mohd Najib Hj Abd Razak* [2020] 8 CLJ 319 provides a useful illustration of how such control may be identified in practice, albeit in a criminal context. Although the case did not turn on a formal determination of shadow directorship as a matter of company law doctrine, the court's findings disclosed a pattern of sustained and pervasive influence over SRC International Sdn Bhd in the absence of any formal appointment.

In particular, the court applied company law concepts of shadow directorship by analogy, particularly through s.402A of the Penal Code, which imports company law notions of “director” and “agent”. In their judgement, the nexus between the shareholder resolutions and other directions of Najib and the directors of SRC is unmistakable from the evidence, demonstrating that the directors were accustomed to acting in accordance with Najib’s instructions on the utilisation of the SRC funds.

Following the Court of Appeal’s affirmation of the High Court’s finding that Najib functioned as a shadow director, it has been clearly illustrated that individuals operating behind the scenes may nonetheless attract substantive legal responsibility, extending beyond civil obligations to encompass criminal liability in certain circumstances. (See *Dato’ Sri Mohd Najib Hj Abd Razak v. PP* [2022] 1 CLJ 491)

Legal Consequences: Director-Level Duties Without Appointment

The legal consequences of falling within the definition of a ‘Director’ are significant. Once an individual is properly characterised as a director, whether de facto or shadow, the full range of statutory and fiduciary duties under the *CA 2016* applies. These duties arise from the conduct of such individual, not from the existence of a formal appointment, and they carry with them potential civil and, in appropriate cases, criminal liability.

This gives rise to a category of risk that is often insufficiently addressed: individuals who exert real influence over corporate decision-making may incur director-level obligations without ever consciously assuming the role.

The Business Judgment Rule: Limits In Informal Governance

The position is further complicated when one considers the operation of the business judgment rule under *Section 214* of the *CA 2016*. In principle, the protection afforded by the rule extends to all persons who fall within the statutory definition of “director”. In practice, however, its utility may be more difficult to establish for shadow directors. The rule presupposes participation in a structured decision-making process characterised by good faith, proper purpose, and informed deliberation. Where influence is exercised informally, outside the confines of board procedures and without the benefit of documented reasoning, it may be considerably more difficult to demonstrate that these requirements have been satisfied. The protection is therefore not unavailable, but it may be less readily invoked.

Conclusion: Accountability Follows Control

What emerges from this analysis is a clear and consistent principle: Malaysian company law is concerned not with how authority is labelled, but with how it is exercised. The doctrines of de facto and shadow directorship operate to ensure that individuals who assume control, whether openly or indirectly, are held to the same standards of accountability as formally appointed directors. The absence of title does not preclude the existence of responsibility; on the contrary, it may serve only to obscure it until subjected to judicial scrutiny.

For companies and those who interact with them, the implications are immediate. Informal influence, if sufficiently entrenched, may carry with it unintended legal consequences. The line between advisory involvement and effective control is not always clearly drawn, but once crossed, it brings with it the full weight of directorial duties. In this respect, the law delivers a consistent message: those who exercise power in substance will be deemed as directors in law, whether they choose to assume the title or otherwise.

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