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# Briefing

## A Director by Another Name: the *De facto* Director



INSTITUTE OF DIRECTORS  
IN IRELAND

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A director is any person who occupies the position of director, by whatever name called<sup>1</sup>. So for the purposes of the Companies Act 2014 (the “**Act**”) it is the role assumed by the person in the company and not the person's title that determines whether he or she is, in fact, a director. The *de facto* director is a category of persons who assume the role of director despite not having been properly appointed and duly registered (as would be the case for a *de jure* director<sup>2</sup>).

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### ***De facto* director**

There are two scenarios that can give rise to a *de facto* directorship. First, a person could have agreed to the appointment as director but the appointment is defective because it did not comply with the Act or with the company's constitution, which is a matter of record. The Act provides that the acts of a director shall be valid notwithstanding any defect which may afterwards be discovered in his or her appointment. The rationale for this being that, if persons are held out, and act as, directors, third parties are entitled to assume that they are directors when dealing with them. Subject to limited exceptions, as between the company and such third parties, the acts of such directors will bind the company.

Second, a person who is held out as a director by the company and who performs duties which should only be carried out by a director can be deemed a *de facto* director. This is generally a matter of fact and is determined on an objective basis regardless of the persons' belief or understanding.

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<sup>1</sup> Section 2(1) of the Companies Act 2014.

<sup>2</sup> Directors who are properly appointed to the board and registered in the company's books and the Companies Registration Office records.

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## Responsibility and liability

A *de facto* director is often subject to many of the legal responsibilities of a *de jure* (or registered) director. Both can be held personally liable for breaches of duty to the company or for failure to comply with certain legislation. The Act provides that fiduciary duties owed by a registered director are expressly applied to, and owed by, a *de facto* director, such as the duty to act in the company's interests and to avoid conflicts. A *de facto* director can also be disqualified as a director with many cases involving persons who were alleged to be *de facto* directors based on applications to disqualify those persons from acting as directors.

A person found to be a *de facto* director will likely be in breach of provisions of the Act because he or she will not have complied with the necessary formalities or have made the appropriate disclosures. For example, the Act expressly states that a *de facto* director shall be subject to the Act's provisions in relation to the duty to disclose his or her interest in contracts made by the company. There is no definitive test in determining whether a person is a *de facto* director but a recent UK case serves as a reminder of some of the factors that will be taken into account in making such a determination.

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## The Case

The UK High Court<sup>3</sup> considered two questions. First, whether an individual was a director despite not being registered as such in the UK Companies House and, second, how to assess whether certain wrongful acts were carried out in the capacity of director. In determining that the director was not shown to have acted as a *de facto* director and that he had not acted fraudulently, the court held that:

- when determining whether an individual was a *de facto* director of the company the overall question was whether the individual was part of the corporate governing structure and whether the individual assumed a role which imposed on him or her the fiduciary duties of a director, which was a question of fact and degree;
- merely being involved in the management of the company or exercising a degree of influence over the company's decision making was not, in itself, enough; and
- an act would qualify as an act done in the capacity of a *de facto* director if the company required that act to be done only by someone having the capacity of a registered director.

It was further held that when determining whether the alleged wrongful acts are carried out by an individual in his or her capacity as a director, it would have to be determined whether the act was directorial in nature and whether it could only be done by someone having the capacity of a director.

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3 *Popely v Popely* [2019] EWHC 1507 (Ch). As Irish & English law is quite similar the care is likely to be of persuasive authority in Ireland but is not binding on an Irish Court.

## Factors indicating a *de facto* directorship

Other UK and Irish case law has identified circumstances where a person has acted as a *de facto* director which confirm that a person can assume the role of a director without obtaining any formal appointment or title where the person:

- had been held out as a director or had claimed or purported to act as such;
- was considered by the company or by third parties to be a director;
- sought to be called or acquiesced to being called a “director”;
- was an authorised signatory on the company’s bank mandates;
- met regularly with the *de jure* directors (all of whom considered the person to have acted as a director) at what were called board meetings;
- had responsibility for the finance function of the company without being an employee; or
- in addition to one or more of the above facts, held a substantial shareholding in the company.

Other acts of a *de facto* director can include acting as sole signatory for the company’s bank account, negotiating with third parties on behalf of the board, recruiting and appointing senior management positions and the power to intervene to prevent some act being taken on behalf of the company.

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## Wrongful acts

In determining whether certain wrongful acts were carried out in the capacity of director it is worth asking questions, such as the following:

- is the person part of the governing structure and participating in directing the affairs of the company in relation to acts complained of?
  - is the person the sole person or a substantial or predominant influence in directing the matters being complained of?
  - if the person’s role relates to only part of the affairs of the company, is that the part on which the complaint is based?
  - to what extent is the person accountable to others and does the person have the power to intervene to prevent some act being taken on behalf of the company?
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## Preventative action

There are several risks associated with *de facto* directorships, not least the possible reputational risks for persons who are found to be *de facto* directors. There are the consequences of failure to make the correct Companies Registration Office filings, failure to maintain company registers, failure to submit correct annual returns as well as the risk and consequences of disqualification. Certain steps should be taken to avoid these situations arising:

- managers who attend board meetings and / or meetings with suppliers or customers as if they were directors should not hold themselves out as directors;
- the scope of persons' authority should be clearly defined in writing and the scope of managers' authority should be made clear to both internal and external parties; or
- any person who thinks that he or she is or might be a *de facto* director should consider becoming formally appointed (as a *de jure* director) so their position is certain.

Individuals are often found to be *de facto* directors if they are key to the management of the company or continue to be involved in the management of the company even after their appointment as such has ended. Where a director has resigned from his or her position, that person should not be held out as a director and steps taken to ensure that they only act upon the instructions of the board.

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## Conclusion

Whether a person is at risk of being a *de facto* director is a question of fact. Courts are likely to take a purposive approach and will seek to identify and hold liable those persons who exercise real influence in the management of the company. Directors' and officers' liability insurance in the company's name should be checked to ensure that it would cover liability imposed on any *de facto* directors.

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## Further Information

Publications that address some of the areas referred to in this briefing are available on the Institute of Directors [website](#) and include the Directors' Handbook.

*Further information is available from*



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