

Law Report

Duties of director of corporate director

Supreme Court
Published November 30, 2010

Revenue and Customs Commissioners v Holland

Before Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Collins of Mapeisbury, Lord Clarke of Stone-cum-Ebony and Lord Saville of Newdigate
Judgment November 24, 2010

The human director of a corporate director of a company was not a de facto director of that company, who was thereby liable for the misuse of its assets. If his actions were done entirely within the ambit of the discharge of his duties and responsibilities as a director of the corporate director.

The Supreme Court so held by a majority, Lord Walker and Lord Clarke dissenting. When dismissing the appeal of the Revenue and Customs Commissioners against the decision of the Court of Appeal (Lord Justice Ward, Lord Justice Rimer and Lord Justice Elias) (*The Times* July 28, 2009, [2010] Bus LR 259) allowing an appeal by the defendant, Michael Holland, against a decision of Mr Mark Cawson, QC, sitting as a deputy Chancery Division judge ([2009] Bus LR 1, [2008] STC 3142) that he should contribute to the assets of 42 insolvent companies, pursuant to section 212 of the Insolvency Act 1986, on the ground that he was a de facto director of those companies and had been guilty of misfeasance and breach of duty in causing the payment of dividends to the companies' shareholders when the companies had insufficient distributable reserves to pay their creditors. The sole director of each of the 42 companies was a corporate director, of which the defendant was a director.

Mr Michael Green, QC and Mr Adam Sher for the commissioners;
Mr Peter Knox, QC, Mr Aidan Casey and Ms Helen Pugh for Mr Holland.

LORD HOPE said that, in order to seek the remedy provided by section 212 of the 1986 Act, the Revenue had to plead and prove against the defendant that he was a de facto director of the composite companies.

How was that to be done? It was plain from the authorities that the circumstances varied widely from case to case. All one could say, as a generally, was that all the relevant factors must be taken into account. But it was possible to obtain some guidance by looking at the purpose of section 212.

The liability was imposed on those who were in a position to prevent damage to creditors by taking proper steps to protect their interests.

Those who assumed to act as directors and who thereby exercised the powers and discharged the functions of a director, whether validly appointed or not, had to accept the responsibilities of the office.

So one had to look at what the person actually did to see whether he assumed those responsibilities in relation to the subject company.

The problem, however, was that the defendant was doing no more than discharging his duties as the director of the corporate director of the composite companies. Everything that he did was done under that umbrella.

The Revenue was unable to point to anything that he did which could not be said to have been done by him in his capacity as a director of the corporate director.

When asked what it was that lay outside his performance of that role, the Revenue said that it was simply the quality of his acts. He did everything. He was the decision maker, and he was the person who gave effect to those decisions.

In *In re Hydrodam (Corty) Ltd* ([1994] 2 BCLC 180, 184), Mr Justice Millett rejected the proposition that, where a body corporate was a director

of a company, its own directors must ipso facto be de facto directors of the subject company.

He said that attendance at board meetings and voting with others did not, without more, constitute him a director of any company of which his company was a director.

However, Mr Justice Millett's judgment indicated that the "without more" requirement that he had in mind would not be satisfied by evidence that the individual director of the body corporate was actually giving instructions in that capacity to the subject company and the subject company was accustomed to act in accordance with those directions.

That would not be enough to prove that the individual director assumed a role in the management of the subject company which imposed responsibility on him for misuse of the subject company's assets.

A company was at law a different person from its directors and it was the intention of the enactment that that distinction should be recognised.

His Lordship did not think that one could not overcome that distinction by pointing, as the Revenue sought to do, simply to the quality of the acts done by the director and asking whether he was the guiding spirit of the subject company or had a real influence over its affairs.

As a test, that would create far too much uncertainty. Those who acted as directors of a corporate director were entitled to know what it was that they could and could not do when they were procuring acts by the corporate director.

That was as true of a case such as the present, where the affairs of the corporate director were effectively in the hands of one individual, as it was where there was a board comprised of several directors who always acted collectively.

The question was one of law and it was a question of principle. The guiding principle could be expressed in the following way, unless and until Parliament provided otherwise.

So long as the relevant acts were done by the individual entirely within the ambit of the discharge of his duties and responsibilities as a director of the corporate director, it was to that capacity that his acts must be attributed.

It was, of course, right to bear in mind the interests of the creditors. Their protection lay in the remedies that were available for breach of the fiduciary duty that rested on the shoulder of every director.

But the essential point was that for a creditor of the subject company to obtain those remedies, the individual had to be shown to have been a director, not just of the corporate director but of the subject company too.

On the facts accepted by the deputy judge, it had not been shown that the defendant was acting as de facto director of the composite companies so as to make him responsible for the mis-use of their assets.

LORD COLLINS, concurring, said that the question was whether the defendant was part of the corporate governing structure of the composite companies and whether he assumed a role in those companies which imposed on him the fiduciary duties of a director. His Lordship would answer that he was not.

LORD WALKER, dissenting, said that the court's decision would, he feared, make it easier for risk-averse individuals to use artificial corporate structures in order to insulate themselves against responsibility to an insolvent company's unsecured creditors.

Lord Clarke also delivered a dissenting judgment and Lord Saville delivered a judgment concurring with Lord Hope and Lord Collins.

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