



Corporate Turnaround and Insolvency

Do shadow directors owe duties too?

The High Court decision in (1) *Vivendi SA (2) Centenary Holdings III Ltd v (1) Murray Richards (2) Stephen Bloch* ([2013] EWHC 3006) affirms the view that shadow directors also owe fiduciary duties to companies and can be sued for breach of duty and negligence. What lessons can the case teach practitioners?

The background

This case surrounded Mr Bloch, a “de jure” (formally appointed) director of Centenary Holdings, and Mr Richards, a consultant to the company who had promised in his agreement to faithfully serve Centenary and use his best endeavours to promote its interests. This case involved an allegation that Bloch (and Richards, as shadow director) had caused Centenary to make nine payments of over £10 million between 2004 and 2005, by way of a series of loans and investments to other entities.

Vivendi had acquired Centenary and maintained the action against Richards and Bloch by way of an assignment from Centenary’s liquidator of the case it had originally commenced against them.

The issues

The issues (as regards a shadow director) were: (i) whether Richards had been a shadow director; (ii) if so what (if any) duties he owed to Centenary; (iii) whether the payments made were in the interests of Centenary’s creditors; and (iv) whether Richards had dishonestly assisted the breaches of duty by Bloch. The last issue was of particular significance, as since the claim was not issued until May 2011 (more than six years after the last of the payments was made), Vivendi and Centenary would only avoid their action being statute-barred if they could establish dishonesty under S.21(1) of the Limitation Act 1980.

What did the court decide?

On the first issue, the court found that Bloch was accustomed to acting in accordance with Richards’ direction or instructions, and Richards therefore satisfied the test for shadow directorship.

On the duties issue, there were good reasons for thinking that a shadow director owed fiduciary duties, not least because in giving directions or instructions to de jure directors, a shadow director assumed responsibility for a company’s affairs. It was also said that although shadow directors’ duties were not statutorily provided for, the consequences of being found to be a shadow director must evidence Parliament’s perception that a shadow director could bear

responsibility for a company’s affairs. The court finally observed that a shadow director’s role in a company’s affairs might be just as significant as a de jure director’s, and that public policy pointed towards statutory duties being imposed on shadow directors.

On the issue of the payments, the fact that Centenary was insolvent at January 2004 (and that Bloch and Richards were aware of those issues) meant that none of the nine payments were in the creditors’ interests – they were simply an attempt by the pair to extract Centenary’s remaining cash before it failed in order to thwart creditors. The likelihood was also that the payments were to benefit Richards or companies associated with him.

As to dishonesty and breach of duty, the court decided that both Bloch and Richards had acted both dishonestly and in breach of their duties. They had acted in ways which they did not believe were in Centenary’s or its creditors’ interests and had sought to extract money before Centenary foundered. That being the case, their conduct was contrary to normally acceptable standards of honest behaviour and succeeded.

What does this mean for practitioners?

Shadow directorship can sometimes be a marginal issue and difficult to establish. This case clearly sets out the principles to be considered and the threshold one has to pass in order to bring actions against shadow directors.

Provided it is not appealed, it serves as a useful statement that shadow directors **do** owe fiduciary duties, and can be pursued (notwithstanding limitation) if dishonesty on their part can be established. We will be watching any appeal with great interest.

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