EXAMINING THE CONCEPT OF *DE FACTO* DIRECTOR IN CORPORATE GOVERNANCE

Anthony O Nwafor*

*Professor of Law, School of Law, University of Venda, South Africa

Abstract

There are different categories of persons involved in the execution of the company's affairs, but not all have the capacity to bind the company as the embodiment of the company itself. Those who exercise acts of management and control over the company's business are usually referred to as the directors. Where persons who satisfy the statutorily prescribed qualification standard are duly appointed by the shareholders to exercise control and manage the affairs of the company function in that capacity, they are usually identified as de jure directors. But where there is no such appointment, or irregular appointment, the law demands, for the protection of those dealing with the company, that the role performed by the person be examined to ascertain whether such a person is a de facto director. The more difficult part lies in identifying a de facto director where the subject company has a corporate body as its director. The extant judicial authority suggests that the human person in the corporate director must be performing functions which are beyond the natural call of duty in relation to the corporate director to constitute a de facto director of the subject company. The paper argues that the standard is satisfied in any case where the human person is involved in the initiation and execution of the affairs of the subject company, and more so where the conducts of the subject company are patently unlawful.

Keywords: Director, De Facto Director, Corporate Director, Corporate Governance, Statute, Common Law

1. INTRODUCTION

A company by its nature provides an avenue for investment opportunities. These opportunities are actualized by persons who subscribe for the company's shares. But those subscribers (shareholders) are by contrast not always in a position to manage their investment in there capacities as such. Indeed, the individual conducts of the shareholders are not binding on, and usually not enforceable against, the company. The legal recognition of the distinction between ownership and control invariably springs up issues of accountability. Those that control and manage the affairs of the company must be accountable to, not only the owners of the company, but to others who may have dealings with the company, and exceptionally to those who look up to the company for the provision of goods and services in the community (stakeholders). Accountability is an essential arm of corporate governance. The demands of accountability increasingly channel the minds of those entrusted with management and control of the company to the expectations on them by the shareholders and stakeholders and compel them to address the right preferences in the conduct of the company's affairs. This, however, does not warrant any undue encroachment on the exercise of discretion by the managers, as such discretion which is embedded in their given talents, forms the basis for entrusting the conduct of the company's affairs on such managers.[1]

The legal separation of ownership from management requires the defining of the status of the managers. Prior to the legislative intervention, the common law had recognized the managers of the corporate enterprise as the directors.[2] Cairns LJ had observed in *Ferguson v Wilson*[3] that the company itself cannot act in its own person, for it has no person; it can only act through directors. Lord Wensleydale had similarly recognized in *Ernest v Nicholls*[4] that for the purposes of contract, the company exists only in the directors and officers acting by and according to the deed; and by the statute law the company is no more than liable than a corporation by charter for the act of one or more of its members, who are distinct persons by law.

This judicial position is now strengthened by modern company legislation. In both United Kingdom and South Africa, companies, whether public or private, are statutorily compelled to operate at all times with a prescribed minimum number of directors.[5] The statutes in both jurisdictions have similarly recognized that the directors are vested with the management powers of the company.[6] The statutes, however, did not explicitly define whom these directors are. It cannot

1 Paul L. Davies QC, Sarah Worthington and Eva Micheler *Gower and Davies Principles of Modern Company Law 9 ed* (2008) at 379.

2 Derek French, Stephen W. Mayson and Christopher L. Ryan *Mayson, French and Ryan on Company Law 32 ed* (2015) at 428.

3 (1866) LR 2 Ch App 77 at 89-90.

4 (1857) 6 HL Cas 401 at 423.

5 See s 154 of the UK Companies Act 2006 which prescribes a minimum of one and two directors for private and public companies respectively. A similar provision is contained in s 66(2)(a) of the South African Companies Act of 2008 which prescribes a minimum of one and three directors for private and public companies respectively.

6 S 66(1) SA CA 2008, Articles 3 & 4 Companies (Model Articles) Regulation 2008 (UK SI 2008/3229).

safely be assumed that every person involved in the management of the company's business is invariably a director. Moreover, judicial decisions have shown that one could be a director even without satisfying some of the statutorily prescribed eligibility test, and even when having not been appointed as such. Thus, the paper is geared at discovering whom the directors of the company are, with specific attention paid on those usually referred to by the courts as de facto directors.

2. CONSTRUING THE CONCEPT OF DIRECTOR

The term 'director' simple though it may seem, has become one of those nebulous concepts in company law. The root of the ambiguity associated with that term could be traced back to the evolutionary stages of corporate law and practice when corporations had employed different acronyms in their deed of settlement such as board of governors, governing council, or board of management and such other similar terms in referring to the controlling officers of the company. In *Re Forest of Dean Coal Mining Co*[7] Jessel MR had alluded to those indiscriminate acronyms where he observed that:

> Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners, it does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it.[8]

But a 'manager' or 'men managing a trading concern' whether for the benefit of themselves or for other persons' benefit, as referred to by Jessel MR, are not invariably directors. The responsibilities of a manager and his level of dependence or taking of instruction from others in the discharge of such responsibilities could in some cases more appropriately situate him as a servant rather than a director of a company. Mallish LJ had in an earlier decision in *Re Marseilles Extension Rly*[9] defined a director simply as a person appointed to act as one of a board and with power to bind the company when acting as a board. While issue of appointment is left for a later discussion, the concern at the moment is that a director should possess the power to bind the company when acting as a board. The inference from that definition is that the binding effect of the conduct of the person occupying the office or position of a company director lies not on agency as such, but as human element or an embodiment of the company itself. Perhaps, an excursion into the evolution of the rules of attribution of human conduct to the corporate entity in finding corporations criminally responsible would greatly assist in disserting this line of thought.

In its early stages of evolution, the very artificial nature of the corporation had posed the greatest obstacle in imposing criminal liabilities on corporations. This was hinged on the moral or blameworthy element of the concept of criminal law which is absent in the artificial entity. Williams credited Baron Thurlow with a statement reflecting corporate criminal impossibility to the effect that corporations have "no soul to be damned; no body to be kicked",[10] and "they cannot be excommunicated, for they have no souls"[11] These are reflections of the maxim of criminal law that "the deed does not make a man guilty unless his mind be guilty".[12] But this was not to endure for long as the courts began to rationalize the essence of the human element in the corporate arrangement which confers benefits on the corporation through the conduct of its human agencies. It stands to reason that if corporations could benefit from the skills of its human elements, it should also bear the burden arising from the criminal conducts of such individuals, not just on the bases that they acted for the company (which imputes vicarious liability), but that they acted as the company.[13] The English courts were however not inclined to attributing the fault of every servant or employee of the corporation on the corporation. A distinction was made between those who made company's decisions and those who executed them. In the parlance of the cases, the former are 'minds' of the corporation; the latter are merely its 'hands'.[14] This approach to corporate liability was initiated by the House of Lords, per Viscount Haldane LC in 1915 in a civil matter,[15] and was later transported by English courts in the early 1940s to the realms of criminal law.[16] This became

[7] (1878) 10 Ch D 450 at 451-452.

[8] But what is the rationale for defining a director as including a wife, husband, father, mother, son or daughter of a director, as in s 29 of Failed Banks (Recovery of Debts) and Financial Malpractices in Banks, Decree no. 18 of 1994, (a Nigerian statute promulgated by the military government) now reenacted as an Act of the National Assembly, s 23(b) contained in Cap F2 Vol 6 LFN 2004. In *ACB v Okonkwo* [1997] 1 NWLR (pt 480) 149 at 208, the Nigerian Court of Appeal, per Tobi JCA, had described the police action of holding a mother responsible for the crime committed by his son as a most uncivilised conduct and one that any person with a democratic mind should thoroughly detest and condemn. *Cf Co-op Bank Ltd v Obokhare* [1996] 18 NWLR (pt 468) 579 at 588 paras. D-F per lge JCA who stated *obiter*, that if the respondent was a failed Bank, the appellant would perhaps have been justified in going against the properties of the respondent's relations to execute judgment obtained against the respondent. This type of legislation can only be explained as an extraordinary legislation intended to address extraordinary situation and should not be seen as laying a standard to be applied in a normal situation.

[9] (1871) LR 7 Ch App 161 at 168.

[10] G Williams *Criminal Law: The General Part* 2nd ed (1961) at 856. Baron Thurlow is quoted to have said: "Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like." J Poynder *Literary Extracts* (1844) vol. 1, at 2 available at http://dewey.petra.ac.id/quo_detail_114848.html (last accessed on 20 October 2011). See also *Pearks, Gunston and Tee Ltd v Ward* [1902] 2 KB 1 per Channell J at 11 to the effect that corporation aggregate cannot be guilty of a criminal offence which requires *mens rea*.

[11] See the *Case of Sutton's Hospital* (1612) 10 Co Rep la 77 ER 973 (Eng Exch Ct). In *Rolloswin Investments Ltd v Chromolit Portugal SARL* [1970] 1 WLR 912 (HC) the court refused to invalidate a contract concluded by corporations on Sunday contrary to Sunday Observance Act 1677 (UK) on the ground that a limited company is incapable of public worship or revering to a church or exercising itself in the duties of piety and true religion, either publicly or privately, on any day of the week.

[12] "*Actus non facit reum, nisi mens sit rea*".

[13] See A Pinto Q.C. and M Evans *Corporate Criminal Liability* 2nd ed, (2008) at 39.

[14] D L MacPherson "Reforming the doctrine of attribution: a Canadian solution to British concerns" in S Tully (ed) *Research Handbook on Corporate Legal Responsibility* (2005) at 196. See *R v ICR Haulage Co Ltd* [1944] KB 551; [1944] 30 Cr App R 31 at 40, where the English Court of Appeal, Criminal Division, per Stable J, held that "whether …the criminal act of an agent, including his state of mind, intention, knowledge or belief is that of the company, … must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case." But in *Tesco Supermarkets v Nattress* [1972] AC 153 at 173, Lord Reid suggested that the nature of the charge could not be a relevant consideration and that "whether his offence was serious or venial his act was the act of the company" so long as the guilty man was identifiable with the company. This was an approval of the position adopted by Lord Denning in *H L Bolton (Engineering) Co. Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172 CA.

[15] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 at 713 where his Lordship said: "a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing mind and will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors giving to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."

[16] See *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146 at 156 where Macnaghten J at the Divisional Court in

the basis for what is in modern times referred to as the identification theory/doctrine of corporate criminal liability. In other jurisdictions, such as the United States of America, inferences have also been drawn from civil law, such as agency and vicarious liability, to criminalize corporate conducts.[17]

3. IDENTIFICATION DOCTRINE

In the quest to hold corporations criminally responsible for the conduct of its officers, the English courts stratified company's employees or servants and placed premium on those they regarded, not just as agents, but the embodiment of the company itself. These are those who are in the top echelon of the company management, who initiate the company's policies, whose conducts are inseparable from the conducts of the company itself. The fault or blameworthiness in the conduct of these officers was attributed to the company thereby filling the mental element (*mens rea*) required for conviction for the commission of crime. Lord Denning gave judicial expression to this approach in *H L Bolton (Engineering) Co. Ltd v T J Graham & Sons Ltd*[18] as follows:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or the will. Others are directors and managers who represent the mind and directing will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[19]

Subsequent decision of the House of Lords in *Tesco Supermarkets Ltd v Nattress*[20] approved Lord Denning's pronouncement[21] and further stressed that the corporation could be criminally liable where the fault emanated from those that could be referred to as the directing mind of the corporation, those whose mental element could be attributed to the corporation. Their Lordships upheld the company's appeal in that case on the ground that the branch manager of the company was not such a person whose fault could be attributed to the company. He took instructions from and was controlled by the board. He was not delegated any powers of the board and as such not a directing mind and will of the company. He was "another person" within the contemplations of the Act[22] that created the offence.

This judicial approach was religiously observed by the courts to the extent that defences were not afforded to the company in statutory offences where the 'directing mind' was actually defrauding the company as illustrated by the case of *Moore v I. Bresler Ltd*[23] where a corporation was charged with knowingly making a false return under a taxing statute. The corporation alleged that the director who filed the returns acted in fraud of the corporation and as such the corporation should not be held liable. The court, per Viscount Caldecote LCJ, held: "those sales of the company's goods were made by those persons as agents of and with the authority of the respondents, and the sale is not less made with the authority of the master because the employee means to put into his own pocket the proceeds of the sale when he receives them." His Lordship depicted those officers as the human elements of the company and whose acts must be attributed to the company where he said: "[t]hese two men were important officials of the company, and when they made statements and rendered returns, they were clearly making those statements and giving those returns as the officers of the company, the proper officers to make the returns. Their acts therefore… were the acts of the company."[24]

Generally, the more recent decisions of the English Courts reflect a significant shift from the *Tesco's case* and an adoption of a level of flexibility which gives considerable attention to the peculiar facts and surrounding circumstances of individual cases. The Privy Council adopted this new trend in *Meridian Global Funds Asia Ltd v Securities Commission*[25] where the court held that in determining whether a company had failed to comply with a New Zealand statute which required it to give notice of being a substantial holder of securities in a public company as soon as it knew or

holding the company criminally liable stated that: "It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate." Viscount Caldecote LCJ at 156 adopted the approach but without expressly referring to *Lennard's case* that " although the directors and general managers of company are its agents, they are something more. A company is incapable of acting or speaking, or even thinking except in so far as its officers have acted, spoken or thought." See also *R v ICR Haulage Ltd* [1944] KB 551 where the Court of Criminal Appeal upheld the conviction of a company for the offence of conspiracy to defraud. *Moore v I Bresler Ltd* [1944] 2 All ER 515 company was convicted of making false tax returns. Canadian courts had evolved this practice before their English counterpart, see R *v Fane Robinson Ltd* [1941] 3 DLR 409 where the company was similarly found guilty of conspiracy to defraud.

[17] See *New York Central & Hudson River Railroad v United States*, 212 US 481 (1909), *Egan v United States*, 137 F. 2d 369 (8th Cir.), cert. denied, 320 US 788 (1943). But this position was not lightly attained as the intervening period between 1915 and 1940 saw at least one case, *R v Cory Bros & Co Ltd* [1927] 1 KB 810 , in which a company was charged with manslaughter for erecting an electric fence which electrocuted a miner. Finlay J, at the Assizes, quashed the indictment and held that he was "bound by the authorities which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony or for a misdemeanor of the nature set out in the second count of this indictment". At 817. This decision was criticized by CRN Winn "The Criminal Responsibility of Corporations" (1929) 3 *Cambridge Law Journal* 398, where he argued that "the *intra vires* decisions and commands of the board of directors, are factually, and should be legally, the decisions of the corporation…. A corporation should be answerable criminally as well as civilly for the acts of its primary representatives."

[18] [1957] 1 QB 159 at 172 CA.

[19] This statement has been described as an "indulgence in some medieval anthropomorphism". See D French, S Mayson and C Ryan *Mayson , French & Ryan on Company Law* 26 ed, (2009) at 634, an image which Lord Hoffman in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 509 believes is rather a distraction from the purpose for which Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 at 713 was using the notion of directing mind and will to apply the attribution rule derived from section 502 of the Merchant Shipping Act of 1894 to the particular defendant in the case.

[20] [1972] AC 153. See also *R v P&O European Ferries* (1991) 93 Cr App R 72 at 84 where Turner J in approving the earlier position of the English courts said that "where a corporation, through the controlling mind of its agents, does an act which fulfills the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter."

[21] See Lord Reid's statement at 170 as follows: "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting *for* the company. He is acting *as* the company and his mind which directs his act is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company."

[22] See ss 11(2) and 24(1) of the UK Trade Descriptions Act 1968.

[23] [1944] KB 515 at 516 (KBD).

[24] Ibid. See also the concurring judgment of Humphrey J at 517.

[25] [1995] 2 AC 500.

ought to have known that it had become one, the knowledge of the individual who had the authority to acquire the securities for the company, regardless of whether that individual was the directing mind or will, would be attributed to the company. Lord Hoffman, while delivering the judgment of the Privy Council, stated: "[w]hose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual cannons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."[26] His Lordship, however, emphasized that this guideline does not amount to a disregard of the extant principle but only lends credence to the peculiar circumstances of the individual case where he said:

> But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has an authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it is done, should be attributed to the company.[27]

In *El Ajou v Dollar Land Holdings Plc*[28] Hoffman LJ at the Court of Appeal had paid close attention to the pronouncement made by Viscount Haldane in *Lennard's case* from where he drew the inference that "the authorities show clearly that different persons may for different purposes satisfy the requirements of being the company's directing mind and will." Rose LJ also reached a similar conclusion in the same case after a painstaking analysis of the various speeches of their Lordships in *Tesco's case*. He said: "[t]here are, it seems to me, two points implicit, if not explicit in each of these passages. First, the directors of the company are prima facie likely to be regarded as 'its directing mind and will' whereas particular circumstances may confer that status on non-directors. Secondly, a company's directing mind and will' may be found in different persons for different activities of the company."[29]

The Canadian position is encapsulated in the Supreme Court of Canada's decision in *Canadian Dredge and Duck Co. v The Queen*[30] where the court set down the conditions for the application of the identification doctrine as follows: (a) the act must be within the field of operation assigned to the directing mind; (b) must not be totally in fraud of the corporation; and (c) the company must have benefited from the act. Thus, unlike in *Moore's case*, a company could escape liability by showing that the conduct of the directing mind was actually targeted at the company and that the company did not derive any benefit even though the act was within the powers of the directing mind.

The observation of Justice Estey in that case that the "application of the identification rule in *Tesco, supra*, may not accord with realities of life in our country [Canada], however appropriate we may find to be the enunciation of the abstract principles of law there made",[31] is quite instructive. This was in recognition of the complexities of the corporate structure which may witness extensive delegation of authority, and geographical decentralization making it difficult to identify particular person(s) as the directing mind and will of the company. Thus, in Canada the court had no problem tracing the directing mind even below the top echelon of the corporate management depending on the manner of corporation's internal arrangement.[32] This principle was applied by the Canadian Supreme Court in *The Rhone v The Peter A.B. Widener*[33] with some level of unsatisfactory consequence. The facts are briefly that the defendant caused an accident in the high sea while the ship was under the control of Captain Kelch an employee of the corporate owner of the ship. The owner sought to limit its liability on the ground that the accident occurred without the corporation's "actual fault or privity" under section 647(2) of the Canada Shipping Act RSC 1970 as Captain Kelch whose negligence caused the accident was not a directing mind of the corporation in that scope of operation. The court upheld the argument. Iacobucci J made pronouncement reminiscent of the House of Lords decision in *Tesco* as follows:

> While Captain Kelch was described as part of the 'management' and a 'trouble shooter' for [the corporation] one must look behind these labels and consider the responsibilities and functions performed by Captain Kelch within the [corporate] hierarchy in the context of seafaring vessels. In this respect, it is clear from the totality of the evidence that Captain Kelch was essentially a port captain subject to the supervision and direction of Captain Lloyd…. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea. While Captain Kelch no doubt had certain decision-making authority on navigational matters of the tug Ohio and was giving important operational duties, governing

[26] Ibid at 507.
[27] Ibid at 511. The approach of the Privy Council is described as new only in the sense that it did not approve of the rigid identification principle applied by the House of Lords in *Tesco's case*, rather it reverted to the earlier cases such as *R v ICR Haulage Co. Ltd* (1944) 30 Cr App R 31 and *DPP v Kent & Sussex Contractors Ltd* [1944] 1 KB 146 and expressly approved the Divisional Court decision in *Moore v I. Bresler Ltd* [1944] 2 KB 515. It is worthy of note that Lord Hoffman had specifically referred to the decision in that case as follows: "Likewise in a case in which a company was required to make a return for Revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the *mens rea* of the servant authorised to discharge the duty to make the return should be attributable to the company…. Each is an attribution for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule." At 512.
[28] [1994] 2 All ER 685 at 706(CA).
[29] Ibid at 699.
[30] (1985) 1 SCR 662, 19 DLR 4th 314 (Ont. SCC).
[31] Ibid at 693. Bruce Welling however believes that this statement could have some force at the time it was made, but not so much in the modern times and age. The advancement in technology, he contends, has considerably shrunk the world. Centralized control is now more effective, because email allows managers at corporate headquarters to apprehend and respond to daily problems encountered by supervisors at remote work sites. See B Welling *Corporate Law in Canada The Governing Principles* 3rd ed (2006) at 169. This may not be correct in all respects, although the importance of technology in the conduct of corporate affairs in the modern age cannot be under estimated, that does not in any way undermine the increasing decentralization of authorities especially among the multinationals for effective and efficient corporate governance. The statement of his Lordship remains as relevant today as it was in 1985 when it was made.
[32] The same judge had in an earlier case of *Canadian Laboratory Supplies Ltd v Engelhard Industries of Canada Ltd* [1979] SCR 783, 97 DLR 3d 1, 6 BLR 235(Ont SCC) at DLR 24, a civil case, alluded to the nature of distribution of functions in the corporate organization as follows: "Obviously some employees must be placed in charge of buying, another of selling, another of financing, and another in charge of accounting, and so on, and each must have the authority necessary to deal responsibly with his counterpart in order trading and governmental organizations."
[33] (1993)1 SCR 497, 101 DLR 4th 188 (SCC).

> authority over the management and operation of the [corporation's] tug lay elsewhere.[34]

The bottom line to this decision is that Captain Kelch was a subordinate employee within that area of operation[35] and as such his conduct could not be attributed to the corporation. Implicit in the above decision is that it is simply not sufficient that an employee is acting within the scope of his authority, for the conduct of the employee to be attributed to the company, the employee must also be seen as the directing mind of the corporation who is not responsible to a senior officer. A person in such a position could properly be described as a director. The designation ascribed to the person by the company has no material consequence in determining his actual status.[36]

In according recognition to the flexible, if not transient, nature of the status and roles of the company director, the modern company statutes have continued to emphasise the functional roles as opposed to nomenclature in defining a director. Thus, the UK Companies Act refers to a director as including any person occupying the position of a director, by whatever name called.[37] Section 1 of the South African Companies Act[38] introduced a slight modification to that definition by adding alternate director[39] within that context. The expanding of the scope of that definition under the South African law may not have added more clarity to the meaning as the English courts interpretation of the earlier version of the UK Companies Act provision[40] had suggested that the definition is inclusive and not exhaustive. In *Re Lo-Line Electric Motors Ltd*[41] Sir Nicolas Browne-Wilkinson VC had held that "the plain intention of the Parliament … was to have regard to the conduct of a person acting as a director, whether validly appointed, invalidly appointed, or just assuming to act as director without any appointment at all." 'Having regard to the conduct of a person' enabled the court in that case to hold as a director, a person who was designated as the product manager of the company. Similarly, in *Gibson v Barton*[42] Blackburn J was convinced that the Secretary of the company to whom the entire management of the company was delegated, albeit improperly, by the board of directors, who had taken upon himself to act as sole manager, was rightly held liable under the relevant statute as the manager of the company.

It is logical that persons appointed or delegated power to act in a particular capacity should be accountable for the consequences of their conduct, or have such conduct elevated to the status of the position which those persons are intended to serve. There could, however, be occasions where no such delegations or appointments are made, yet certain persons seem to exercise powers in particular capacities, and in this context as director. The judicial response to the conduct and status of such persons forms the next line of focus of this paper.

4. DE FACTO DIRECTOR

Mallish LJ, as earlier shown, had in *Re Marseilles Extension Rly*[43] defined director simply as person 'appointed' to act as one of a board. Indeed, every director should normally be appointed or elected by the shareholders or by designated persons except perhaps the first directors who are usually named in the incorporation documents as part of the requirements for company's registration.[44] The companies' statutes in jurisdictions under consideration lay down rules for the appointment of directors. Every director duly and regularly appointed enjoy the status of a de jure director.[45] However, there could be persons in the company involved in the corporate governance but are not de jure directors. How such persons are treated are often a subject of judicial application of the existing legal principles to the facts of the particular cases.

The definition of director in the respective companies' statutes has adopted an inclusive rather than exhaustive approach to identifying those who act in that capacity. The reference to 'any person occupying the position of a director' in the respective Companies Act's definition seemingly prefers a functional approach rather than appointment in identifying the directors of a company. Thus a person could be a director of a company even when such a person has not been appointed or irregularly appointed to the position of a director, so long and only so long as that person performs or is performing the functions of a director. These category of persons are judicially referred to as de facto directors.[46] Sir Nicolas Browne-Wilkenson VC, for instance, in *Lo-Line Electric Motors Ltd*[47] had depicted a de facto director as a person who is ostensibly duly elected but who may lack some qualifications under the relevant company law, and includes persons who assume the role of directors without any pretense of legal qualification. Millet J went an extra mile in *Re Hydrodam (Corby) Ltd*[48] where he defined de facto director as:

> a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.

[34] Ibid at 212-214.
[35] Captain Kelch had described himself in evidence as "a funkie" whereas Captain Lloyd was "the operational manger [and] a vice president." Ibid at 213.
[36] This was exactly what Justice Estey meant where he said in *Canadian Dredge and Duck Co. v The Queen* (1985) 1 SCR 662 at 683: "The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation." See generally Anthony O Nwafor, "Corporate Criminal Responsibility: A Comparative Analysis" (2013) Vol 57 No 1 *Journal of African Law* 81 at 82-91.
[37] S 250 UK CA 2006.
[38] Act 71 of 2008.
[39] S 1 defines alternate director as a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company.
[40] See s 741(1) of the UK CA 1985.
[41] [1988] Ch 477 at 490.
[42] (1871) LR 7 Ch App 161 at 168.
[43] (1871)LR 7 Ch App 161 at 168.
[44] See ss 9(4)(c) and 16(6) UK CA 2006 and ss 66 and 67 SA CA 2008.
[45] See Brenda Hannigan, *Company Law 4th ed* (2016) at 156.
[46] See *Holland v The Commissioner for Her Majesty's Revenue & Customs* [2010] UKSC 51, *Primlake Ltd v Matthews Associate* [2006] EWHC 1227 (Ch), *Wetton (as liquidator of Mumtaz Properties Ltd) v Ahmed & Ors* [2011] EWCA Civ 610, *Mosier v The Queen* 2001 CanLII 829 (TCC).
[47] [1988] Ch 477 at 489.
[48] [1994] 2 BCLC 180 at 183.

The definition proffered by Millet J embodies the nature of proof required to establish that a person is a de facto director; whether it is by deficiency of qualification or by merely assuming the position of a director. The required proof is that the person 'undertook functions in relation to the company which could properly be discharged only by a director.' Whether or not the person is held out by the company cannot always be of material consequence when the facts are established. Indeed, in *Hartrell v The Queen*[49] Justice Paris had explicitly declined to accept the element of holding out as a prerequisite for establishing the existence of a de facto director status where he said:

> However, *in circumstances such as those in this case,* where a corporation operates without having been properly organized and the only director of record plays no part in running the corporation, those persons who take it upon themselves to direct the affairs of the company may be held to be *de facto* directors, whether or not they have explicitly represented themselves as directors to any third party. The essential question is whether those individuals have, in fact, taken on the role of director of the corporation.

Evidence of holding out would, however, be crucial where the company is sought to be held liable for the conduct which the de facto director seemingly executed on behalf of the company, but not so important for determining the individual's personal accountability. Holding out would not necessarily require that power be expressly given, it would suffice that the company acquiesces in the conduct of the de facto director. Whichever manner the status of de facto director is acquired, whether by deficiency of qualification, usurping of office or holding out, it does not confer any benefit on the person as the real reason for the judicial device is to ensure protection for third parties who deal with persons who act as directors or who are held out by the company as directors though lack required qualification or authority.[50]

The functions performed by company's directors are usually given by the Companies Act or the company's constitution. Section 66(1) of the South African Companies Act of 2008, for instance, provides that:

> The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

The real import of a provision such as this, is that a director must be "a person who either alone or with others has ultimate control of the management of any part of the company's business."[51] The person need not be in control of the entire business of the company. In large companies where there are various branches and departments of the company's business, it is unimaginable that one person would control the entire business. But whatever the person does must be as such that it strikes at the "nerve centres from which the activities of the company radiated."[52] The person in question must be part of the corporate governance structure of the company.[53] In *In re Richborough Furniture Ltd*[54] Timothy LIoyd QC (sitting as a deputy High Court judge) observed that:

> It seems to me that for someone to be made liable to disqualification…as a de facto director, the court would have to have clear evidence that he had been either the sole person directing the affairs of the company (or acting with others all equally lacking in a valid appointment,…or, if there were others who were true directors, that he was *acting on an equal footing* with the others in directing the affairs of the company.

Acting on equal footing' does not invariably entail that all the directors must be operating at the same wave length. The peculiarities of individual companies may not ordinarily create room for such unity of performance of function. What is important is that the directors, in the discharge of their responsibilities as such, "unlike mere employees or agents or advisers, are not accountable to a line manager or other individual."[55] In *Secretary of State v Ashby*[56] Mr Anthony Mann QC (sitting as a deputy High Court judge) explained Mr LIoyd's decision as implying that in investigating the qualities of the acts performed by the person whose status is in question, one is looking for someone who is essentially operating at the same level as the properly appointed directors, that is to say they are not in reality subordinate to them at all times.

It seems that arriving at a decision on whether a person is a de facto director of a company must be guided by the facts of individual cases.[57] While

[49] 2006 TCC 480 para 27. Emphasis that of the Judge. See also *Scott McDonald v The Queen* 2014 TCC 315 para 24 (CanLII), *Wetton (as liquidator of Mumtaz Properties Ltd) v Ahmed & Ors* [2011] EWCA Civ 610 para 30,*Gemma Ltd v Davies* [2008] BCC 812 para 40, *The Secretary of State for Business Innovation and Skills v Chohan* [2013] EWHC 680 (Ch), *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch) paras 61-81.

[50] *Wheeliker v R* 1999 CanLII 9297 paras 59-60 per Noel J, See also *Bremner v The Queen* 2007 TCC 509 (CanLII) para 18 per Rip ACJ, *Mosier v The Queen* 2001 CanLII 829 (TCC) para 29 per Bowman ACJ who held that the objection to *de facto* directors cannot, of course, be invoked by an unauthorized director himself, as for example to escape liability for payment of dividends out of capital, or for other misfeasance, or to escape a statutory liability for wages of workmen, or for failure to make government returns, or, it would seem, to claim remuneration or indemnity; for a *de facto* director is in the same position as an executor *de son tort*, being subject to all the burdens of his office without any of its benefits. And he cannot himself set up the invalidity of his election by way of objection to the making of a call or the declaration of a forfeiture in which he is interested. *In re Hydrodam (Corby) Ltd* (1994) 2 BCLC 180 at 182 Millet J observed that the essence was to impose liability for wrongful trading on those persons who were in a position to prevent damage to creditors by taking steps to protect their interests. See also *Elsworth Ethanol v Ensus* [2014] EWHC 99 (IPEC) para 31 per Hacon J.

[51] Per Arden LJ in *Smithton Ltd v Naggar* [2014] EWCA Civ 939 para 31.

[52] Per Arden LJ in *Wetton (as liquidator of Mumtaz Properties Ltd) v Ahmed & Ors* [2011] EWCA Civ 610 para 47.

[53] Ibid.

[54] [1996] 1 BCLC 507 at 524. Emphasis added. See also *Elsworth Ethanol v Ensus* [2014] EWHC 99 (IPEC) para 52, *Secretary of Stae for Business Innovation & Skills v Chohan & Ors* [2013] EWHC 680 (Ch) para 38 per Hildyard J.

[55] *The Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch) para 68 per Etherton J. In *Secretary of State for Trade and Industry v Elms* (Unreported 16 January 1997) but referred to by Etherton J in *Hollier*, Cooke J emphasized that it is not a question of equality of power but equality of ability to participate in the notional board room. "Is he somebody who is simply advising and, as it were, withdrawing having advised, or somebody who joins the other directors, de facto or de jure, in decisions which affect the future of the company?"

[56] No 1915 of 1992 (Unreported) but referred to in *Hollier* ibid para 69.

[57] See *Secretary of State v Tjolle* [1998] 1 BCLC 333 per Jacob J who observed that "it may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors… Taking all these factors into account, one asks, 'Was this individual part of the corporate governing structure', answering it as a kind of jury question….There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable

isolated conduct of a person may not be adequate for such an inference in one case,[58] it could as well be sufficient in others.

5. CORPORATE DIRECTORSHIP AND DE FACTO DIRECTOR OF SUBJECT COMPANY

The juristic nature of the corporate entity which enables it to execute functions as a natural person also entails that the company, like a natural person, could assume roles as a director of another company. This is often the case where holding companies seek to maintain control over their subsidiaries. However, in South Africa a juristic person is not permitted by law to be a director of another company.[59] But a company is allowed to appoint directors on the board of another company.[60] If a company can appoint a director on the board of another company to represent the interest of the appointing company, what is the logic in depriving that company of the right to represent itself on the board? The reverse is the case under the UK Companies Act which permits the appointment of a corporate director on the board so long as at least one of the directors of the company is a natural person.[61] There is usually the question as to the status of the natural person who is behind the operations of the corporate director in its relationship with the subject company. Such was the case in *Re Hydrodam (Corby) Ltd*[62]where the liquidator sought to hold the natural persons who were directors of the holding company liable as de facto directors of the subject subsidiary company simply because they were among the human elements through whom the corporate director discharged its functions to the subject company. Millet J in declining to accept that proposition said:

> The liquidator submitted that where a body corporate is a director of a company, whether it be a de jure, de facto or shadow director, its own directors must ipso facto be shadow directors of the company. In my judgment that simply does not follow. *Attendance at board meetings and voting,* with others, may in certain limited circumstances expose a director to personal liability to the company of which he is a director or its creditors. But it does not, *without more*, constitute him a director of any company of which his company is a director.[63]

The application of this prescription in *Holland v The Commissioners for Her Majesty's Revenue and Customs & Anor*[64] witnessed a split decision of the UK Supreme Court. A brief facts of that case to the extent that are relevant to this discussion are that Mr and Mrs Holland had set up a business structure comprising a number of companies. Each of them held 50% of the issued shares in, and were directors of, the holding company called Paycheck Services Ltd ("Paycheck Services"). Paycheck Services held 100% of the issued shares in, and Mr and Mrs Holland were appointed as directors of, two further new companies called Paycheck (Directors Services) Ltd ("Paycheck Directors") and Paycheck (Secretarial Services) Ltd ("Paycheck Secretarial"). Paycheck Directors and Paycheck Secretarial were incorporated to act respectively as the sole director and secretary of 42 trading companies ("the composite companies"), each of which had similar names distinguished only by a number. The composite companies had paid dividends, which were resolved at meetings presided over by Mr Holland apparently as representing Paycheck Directors, without making adequate provisions for corporation tax as required by law. The relevant issue was whether Mr Holland could be held liable as a de facto director of the composite companies.

Lord Hope, in the majority decision, emphasized that "[t]he words 'without more' as stated by Millet J in *Re Hydrodam* are important. They indicate that the mere fact of acting as a director of a corporate director will not be enough for that individual to become a de facto director of the subject company." His Lordship had suggested, based on the facts of *Holland's case*, that the question whether Mr Holland was acting as a de facto director of the composite companies so as to impose on him fiduciary duties in relation to those companies when the purported directors' meetings were held on his direction at which the relevant dividends were declared must be approached on the basis that Paycheck Directors and Mr Holland were in law separate persons, each with their own separate legal personality.[65] Lord Collins had in a concurring decision drawn from an extensive historical excursion into the concept of de facto director, concluded that the condition 'without more' as laid down by Millet J in *Re Hydrodam* was not satisfied as "[t]here is no material to suggest that Mr Holland was doing anything other than discharging his duties as the director of the corporate director of the composite companies."[66] Lord Collins, however, acknowledged what he described as the "significant judicial innovation" in cases such as *Re Lo-Line Electric Motors Ltd*[67] and *Re Hydrodam (Corby) Ltd.*[68] Those cases had expanded the scope of the concept of de facto director by including persons who are part of the corporate governance of the company though never appointed in that capacity, for the purposes of the application of statutory provisions relating to such matters as wrongful trading and disqualification of directors.[69] But his Lordship expressed some reluctance in further extending that line of authority "so as to impose fiduciary duties on Mr Holland in relation to the composite companies, when all of his acts can be attributed in law solely to the activities of Paycheck Directors." He considers such stance as an unjustifiable judicial encroachment into the legislative arena.[70]

Lord Walker in a dissenting opinion preferred a more pragmatic approach to this issue. He described the majority stance as "the most arid formalism".[71]

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for event over which they had no real control, either in fact or law." See also *Secretary of State for Business Innovation & Skills v Chohan & Ors* [2013] EWHC para 39 per Hildyard J.

[58] In *Daniel Beauchemin v The Queen* 2007 TCC 105 (CanLII) Bedard J held that an isolated incident of signing a document and of the appellant introducing himself to a third party as a director were not sufficient to support the conclusion that the appellant was a de facto director.

[59] S 69(7) SA CA 2008.

[60] See s 3(1)(a)(ii) of the SA CA 2008 which provides that a company is a subsidiary of another juristic person if that juristic person has the right to appoint or elect, or control the appointment or election of, directors of that company.

[61] S 155(1) UK CA 2006.

[62] [1994] 2 BCLC 180.

[63] Ibid at 184, emphasis supplied.

[64] [2010] UKSC 51 para 29.

[65] Ibid para 25.

[66] Ibid para 96.

[67] [1988] Ch 477.

[68] [1994] 2 BCLC 180.

[69] [2010] UKSC 51 para 96. Those innovations were approved by the Court of Appeal in *Re Kaytech International Plc* [1999] 2 BCLC 351.

[70] Ibid paras 51 and 96.

[71] Ibid para 115.

Drawing from the Court of Appeal decision in that case, especially Rimer LJ's description of 'something more' where he stated that "the requisite more would be satisfied merely by the active participation of the board member in the making of board decisions by the corporate director in relation to the actions of the subject company",[72] Lord Walker was persuaded that the conduct of Mr Holland who took the decision, after receiving advice from counsel, that the composite companies should continue trading, and should continue to pay dividends without reserving for higher-rate corporation tax, was sufficient to satisfy the requirement of 'something more'. Lord Walker emphasized that: "[a] de facto director is not formally invested with office, but if what he [Mr Holland] actually does amounts to taking all important decisions affecting the relevant company, and seeing that they are carried out, he is acting as a director of that company. It makes no difference that he is also acting as the only active de jure director of a corporate director of the company."[73]

In agreeing with Lord Walker, Lord Clarke stated that it is indeed artificial and wrong to hold that Mr Holland was doing no more than merely discharging his duties as a de facto director of Paycheck Directors. In his Lordship's view, Mr Holland "was in fact acting as a director of the composite companies by deciding (after taking leading counsel's advice) that the composite companies should both continue trading and continue paying dividends without reserving for higher rate corporation tax and by procuring the directors of Paycheck Directors as a director of the composite companies to pay the unlawful dividends."[74] Lord Clarke had no difficulty, as envisaged by Lord Collins, in extending fiduciary duty to Mr Holland based on the premise that if Mr Holland had in fact deliberately procured the payment of the dividends by the directors of Paycheck Directors and had the de facto power to do so, he was a de facto director. As such, he owed a fiduciary duty to the company and the procuring of the payment of the dividends was a breach of fiduciary duty and an unlawful act. He is accordingly liable to restore the dividends.[75]

The majority decision reflects a strong judicial leaning on the concept of the separate legal personality of the company as expounded by the House of Lords in *Saloman v Saloman & Co Ltd.*[76] The relationship between Mr Holland and the Paycheck companies, and what should generally be the attitude of the courts in such a case, are reflected in the pronouncement made by Lord Macnaghten in *Saloman* as follows:

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.[77]

This seems to be the preferred stance by the majority of the judges in *Holland's case*. But it is also accepted by the courts that this principle is not sacrosanct. It could be circumvented where it is necessary to ensure that justice is done,[78] and prevent an unconscionable abuse of the corporate entity.[79] The manner of the incorporation of the multiplicity of the composite companies, the shareholding and management and control of the companies are reflections of a scheme the motive of which ought to be closely scrutinized by the court. The implication of the apparent refusal by the majority at the Supreme Court to peep behind the veil and to prevent an abuse of the corporate structures was alluded to by Lord Walker where he observed that "[t]he Court's decision will, I fear, 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."[80]

The minority were strongly averse to the majority decision which apparently reflects undue reliance on *Salomon's case*. They did not consider the issues in that case as having any bearing on the present, hence Lord Clarke's conviction that Mr Holland was a de facto director does not involve the piercing of the corporate veil but simply the application of the principles identified in the modern cases to the facts of this case.[81]

The reliance on *Salomon*, as was done by the majority, was not wrong in itself, what was wrong was the failure, if not deliberate refusal, to consider the exceptions that permit the court to pierce the veil. The invisible hand of Mr Holland as a director of the corporate director of the subject company can only be seen by peeping into the veil of the corporate director as demanded by the circumstances of that case. Unless that is done, whatever was done by Mr Holland would be shielded by the veil which separates him from the Paycheck Directors.

The majority were strongly persuaded by Millet J's suggestion in *Re Hydrodam* that attendance at board meetings and voting with others would not 'without more' constitute a person a director of any company of which his company is a director. Lord Hope had emphasized in his judgment that the words 'without more' are important. They indicate that the mere fact of acting as a director of a corporate director will not be enough for that individual to become a de facto director of the subject company.[82] Lord Hope did not however suggest, and very much like Millet J, what other conducts of a director of a corporate director could constitute such a director a de facto director of the subject company.

Lord Walker in a dissenting opinion had filled that gap where, after referring to Rimer LJ's prescription on appeal that 'something more' is required, stated that "[b]eing a de facto director is a

[72] [2009] EWCA Civ 625 para 66.
[73] *Holland's case* para 115.
[74] Ibid para 142.
[75] Ibid para 139.
[76] [1897] AC 22.
[77] Ibid at 51. Lord Halbury LC said at 30-31 that: "once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are".
[78] *Re A Company* [1985] BCLC 333, *Prest v Petrodel Resources Ltd* [2013] UKSC 34, *VTB Capital Plc v Nutritek* [2013] UKSC 5, *Ex parte Gore NO and others NNO* [2013] 2 All SA 437 (WCC), *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and others* [1995] 2 All SA 543 (A). See generally Anthony O Nwafor, "Piercing the Corporate Veil: An Incursion into the Judicial Conundrum" (2015) Vol Issue 3 *Corporate Board: Role, Duties & Composition* 136.
[79] S 20(9) SA CA 2008. The English Act does not bear a similar provision but the common law decisions have similar effect and were in fact the source of the South African Companies Act provision.
[80] *Holland's case* para 101.
[81] Ibid para 140.
[82] Ibid para 29.

matter of what the individual himself does on his own initiative, not simply as part of a process of collective decision-making.[83] His Lordship proceeded to illustrate those independent initiatives of Mr Holland which constituted him a de facto director, as follows: "[h]e took the decision (after receiving the advice of leading counsel at the consultation on 18 August 2004) that composite companies should continue trading, and should continue to pay dividends without reserving for higher-rate corporation tax."[84] Armed with the realization, as stated by his Lordship, that a de facto director is not formally invested with office, but that if what he actually does amounts to taking all important decisions affecting the relevant company, and seeing that they are carried out, he is acting as a director of that company. It makes no difference that he is also acting as the only active de jure director of a corporate director of the company.[85] The application of the stated principles to the facts gave rise to an inescapable conclusion, as contained in the minority decision, that Mr Holland is a de facto director of the subject company.

It is not in doubt that Mr Holland as the only natural person holding office of the director of the Paycheck Directors (corporate director) was the initiator and executor of all the decisions of the composite companies. His conducts in that case are sufficient to satisfy the requirements of 'something more', more so when some of the actions that were seemingly taken by the subject company where patently unlawful. In *Secretary of State for Trade and Industry v Hall*[86] Evans-Lambo J had observed that the words 'without more' as stated by Millet J in *Re Hydrodam*, does not imply that a director of a corporate director can never be found to be a director of the subject company. An individual, as stated by the judge, could "through his control of a corporate director can constitute himself a de facto director of a subject company. It seems to me that whether or not he does so will depend on what that individual procures the corporate director to do."

In the case under consideration, the facts as revealed have demonstrated that the composite companies were procured to avoid the payment of corporation tax. This is an unlawful conduct which the company would not ordinarily embark upon unless it is propelled by its human organ. Mr Holland being the human organ through which the unlawful act was perpetrated ought to have been considered by the court, as did in the minority decision, as a de facto director of the composite companies.

6. CONCLUSION

Directors manage the affairs of the company, but it is not every person that is involved in the management of the affairs of the company that is a director. The inclusive nature of the statutory definition of that concept implies that the function performed by the person is of paramount importance in determining whether a person falls within the category of those referred to as directors. What is clear, however, is that to attain the status of director, a person must be operating within the top echelon of the company's administrative hierarchy. The person must, either alone or with others, exercise ultimate control of the management of any part of the company's business.[87] The person's conduct should be seen to strike at the nerve centre from which the activities of the company radiates.[88] In other words, the person must be part of the corporate governance structure of the company and should function in such a manner that his conduct binds the company as an expression of the company's will and not merely as an agent of the company.

A recourse to function in identifying a director invariably entails less emphasis on appointment. While directors should ordinarily be appointed by the shareholders of the company, or in any other manner provided by the Companies Act or the constitution of the company, the non -compliance with the prescriptions laid down by the rules would not provide a defence for the person who functions in the capacity of a director. At common law, persons who function as directors without due appointment are referred to as de facto directors. They are held fully responsible for the consequences of their conducts but without benefits thereof as the position occupied by them are not permissible by law.[89] They are referred to as de facto directors merely to afford protection to those dealing with the company without knowledge of their defective status.[90]

The recognition of the company by law as a juristic person generally implies that the company, like a natural person, could act as a director of another company. The UK Companies Act permits the appointment of corporate director to the board, so long as the company has at least one director that is a natural person.[91] The South African Companies Act does not permit the appointment of corporate director under any circumstances.[92] Declaring a juristic person ineligible to be appointed director amounts to depriving of the holding companies of one of their weapons of control over their subsidiaries. Section 3(1)(a) of the SA Companies Act could, however, act as panacea by indicating that holding companies can appoint natural persons as directors on the board of their subsidiaries.[93]

The issues arising from the split decision of the UK Supreme Court in *Holland's case* in identifying a de facto director of a subject company that has a corporate director as its only director could provide a faint justification to the position adopted by the legislature in South Africa. But that cannot bury the question as to why a person who can appoint director to the board, lacks the capacity to act by itself as such director. The application in *Holland's case*, by the majority of the Supreme Court judges, of Millet J's prescription in *Re Hydrodam* that a human director of a corporate director cannot 'without more' constitute a de facto director of the

[83] Ibid para 113.
[84] Ibid para 114.
[85] Ibid para 115.
[86] [2006] EWHC 1995 (Ch) para 30.
[87] Per Arden LJ, in *Smithton Ltd v Naggar* [2014] EWCA Civ 939 para 31.
[88] Per Arden LJ in *Wetton (as liquidator of Mumtaz Properties Ltd) v Ahmed & Ors* [2011] EWCA Civ 610 para 47.
[89] See s 157(5)(a) UK CA 2006 which provides that nothing in this section affects any liability of a person under any provision of the Companies Act if he purports to act as director.
[90] See *Mahony v East Holyford Mining Co Ltd* (1875) LR 7 HL 869 at 888 where Lord Cairns held that there having been de facto directors of the company, who were suffered and permitted by the majority of those who signed the articles of association to occupy the position of and act as directors, and the bankers having, in the full belief that these persons were directors, as they were represented to be, honoured the cheques drawn by them, the payment of these cheques is an answer to the action of the liquidator of the company.
[91] S 155(1).
[92] S 69(7).
[93] But this too bears its own legal complications when issues of conflict of interest and divided loyalty are considered.

subject company, was an extreme expression of the distinct legal personality of the company. It is an "arid formalism"[94] and "artificial"[95] as Mr Holland being the only human director of the corporate director, initiated and executed the policies and affairs of the subject company. The mere peeping into the veil would reveal the finger that pulled the trigger, especially where the structure and conducts of the composite companies were seemingly extraordinary.

Aside from the route of piercing of the corporate veil, Mr Holland's conduct cannot reasonably insulate him from the web of corporate governance of the composite companies. As the sole director of the corporate director, whatever he does in that capacity would most likely strike at the nerve centres from which the activities of the composite companies radiated. That in reality seems to be the major purpose of the entire business scheme. It is believed, however, that with the modification introduced by section 155(1) of the UK Companies Act of 2006 requiring at least one natural person as director, future decisions bordering on whether a director of corporate director is a de facto director of the subject company would be less tenuous.

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[94] Per Lord Walker at 115.
[95] Per Lord Clarke at 142.