

Disqualifying an alleged de facto director (Secretary of State for Business, Energy and Industrial Strategy v Rahman)

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Restructuring & Insolvency analysis: The Secretary of State applied for an order under section 8 of the Company Directors Disqualification Act 1986 to disqualify Mr Rahman as a director. The allegation was that Mr Rahman was a de facto director (a person who assumes the duties of a director) of a company that had employed illegal migrant workers in its restaurant business. The court held that Mr Rahman was not involved in running the business and the claim was dismissed. The judgment includes a helpful summary of the case law for the test to be applied as to what amounts to being a de facto director and the evidence required to meet that test. Written by John Dickinson, barrister, at St John's Chambers, Bristol, who represented Mr Rahman at the trial.

Secretary of State for Business, Energy and Industrial Strategy v Luthfur Rahman [\[2020\] EWHC 2213 \(Ch\)](#), [\[2020\] All ER \(D\) 32 \(Aug\)](#)

What are the practical implications of this case?

The decision indicates how the Secretary of State in investigating and presenting a claim that a person is a de facto director should follow up evidential issues to a natural conclusion, particularly if the identity of a person is in issue.

What was the background?

Mr Rahman had previously been a director of a company that ran a restaurant from premises owned by a Mr Sharof trading as Viceroy, a brand name linked to Mr Rahman. Mr Rahman gave up his interest in that business in 2012 and ceased to be a director in 2014. Mr Sharof was appointed a director of that company later than year. The business' name remained on a webpage advertisement set up for Mr Rahman under his brand name.

In June 2016 Mr Sharof set up a new company Spiceroy Restaurant Ltd, the subject of the claim. He was the sole shareholder and only appointed director. This company operated a restaurant from Mr Sharof's premises trading as Viceroy. In February 2017 Mr Sharof persuaded Mr Rahman to allow him to apply in Mr Rahman's name for an alcohol licence and to name him as the designated premises supervisor, as Mr Rahman had a personal licence and Mr Sharof did not.

On 2 June 2017 a team of five Home Office immigration officers inspected the premises looking for migrant workers without permission to work under the [Immigration, Asylum and Nationality Act 2006](#). They arrested four migrant workers. Three were asked 'who is the boss?' Only one named a 'Mr Rahman'. There were no follow up questions as to who that person was or what role that person undertook. One officer recalled the name as 'Mr Luther Rahman', though this was not in her notebook and the court rejected this evidence as being mistaken.

Mr Rahman explained in correspondence with the Secretary of State that he was nothing to do with the business and whoever had named him must be referring to a different 'Mr Rahman/Mr Luthfur Rahman' and that this was a common name. This correspondence showed a different mobile phone number for Mr Rahman to that noted by the officer. The Secretary of State did not call the number to see who answered.

At trial there was no evidence from any of the migrant workers or Mr Sharof, who had given undertakings not to act as a director.

What did the court decide?

The court held that the discrepancy over the phone number cast doubt as to who was being referred to and that the defendant was telling him the truth when he said that he had no involvement with the restaurant run by the company. The officer was mistaken as to her recollection of being given the first name 'Luthfur'.

A person with real directorial control is a de facto director. Such a person is identified by focusing on what they did in relation to the company to test if they have assumed the duties of a director. It may be relevant if they were held out to be a director. It is irrelevant that in good faith they thought they were not a director. Where an alleged de facto director is acting with an appointed director they must be shown to have been acting on an equal footing in directing the affairs of the company. Where acts may be referable to another capacity then the person is entitled to the benefit of the doubt.

The court rejected the limited identity evidence of the officers. That Mr Rahman was on the alcohol licence was explained by his personal assistance and did not show an assumption of responsibility as a director. The web advertisement did not amount to directorial control of the company. The court regarded the investigation by the Secretary of State as superficial, by not having sought evidence from the migrant workers or from Mr Sharof or to show Mr Rahman profiting from the business. Whilst there was no duty on the Secretary of State to investigate, the choice not to investigate obvious lines of inquiry will be relevant when the court comes to consider if the case is proved. At most the evidence showed something that might be investigated further. There was nothing to show Mr Rahman assuming the role of director or any corporate governance task.

Had Mr Rahman been found to have acted as alleged the court would have disqualified him as a director for five years. Mr Sharof would have had the day-to-day employment role for the illegal migrant workers. The de facto director's liability would essentially have arisen from negligence rather than a direct and deliberate breach of immigration law. This would have justified disqualification at the top end of the lowest bracket. The court commented on the serious harm from the exploitation of illegal migrant workers.

Case details

- Court: High Court, Business and Property Court at Bristol, Insolvency and Companies List (ChD)
- Judge: His Honour Judge Paul Matthews
- Date of judgment: 14 August 2020

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