

Corporate Commercial

English High Court Finds Director of Holding Company Had Been *De Facto* Director of Subsidiary Company

Introduction

Singapore laws recognise that an individual who is not formally appointed as a director of a company owes fiduciary duties to the company if he/she is considered a *de facto* director. This happens when that person undertakes the functions in relation to a company which can only be properly discharged by a director of the company. It is ultimately a question of fact whether a person is a *de facto* director of a company.

In the recent English High Court decision of *Aston Risk Management v Jones and others* [2023] EWHC 603 (Ch) ("**Aston**"), a director of a holding company was found to be a *de facto* director of its subsidiary and have the legal duties and liabilities of a director. In this instance, the *de facto* director held himself out as a director and was heavily involved in the day-to-day running of the subsidiary.

The Singapore courts have yet to have the opportunity to consider the circumstances where a director of a holding company may be a *de facto* director of its subsidiary. As the definition of "director" in the Singapore Companies Act 1967 is similar to the UK Companies Act 2006 in this regard, *Aston* provides useful guidance on this topic.

In this Update, taking reference from the principles expounded in *Aston*, we highlight the pitfalls that a director of a holding company should avoid so as not to be regarded as a *de facto* director of a subsidiary.

Key Facts

Aston involved a dispute centred around breach of director and trustee duties following the administration of Audiological Support Services Ltd ("**Subsidiary**"), a business involved in providing audiology services. The formally appointed directors of the Subsidiary were Clinton Jones and Professor Lutman.

In 2014, the Subsidiary and its owners brought in two new investors. A new holding company, Audiological Support Group Ltd ("**Holding Company**"), was created and it acquired all the shares in the Subsidiary. The directors of the Subsidiary remained Clinton Jones and Professor Lutman. The directors of the Holding Company were Clinton Jones and Lee Jones ("**Mr Jones**").

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The shareholders of the Holding Company entered into a shareholders' agreement regulating how the Holding Company and the Subsidiary would conduct their business. Broadly, the shareholders' agreement required all decisions to be taken by a majority vote of the Holding Company's board and gave Clinton Jones and Mr Jones an effective veto right over operational matters.

The claimant submitted that even though Mr Jones had not been formally appointed as a director of the Subsidiary, he had become a *de facto* director due to his actions of, among others:

- adopting a role analogous to that of a Chief Executive of the Subsidiary;
- holding himself out as the Chief Technical Officer of the Subsidiary;
- assuming the right to approve and veto payments from the Subsidiary's bank accounts;
- acting on behalf of the Subsidiary in negotiations with major clients and in human resource matters; and
- at a micro level, taking a central role in the day-to-day management and operation of the Subsidiary.

Conversely, Mr Jones submitted that any actions taken by him in relation to the Subsidiary were taken not by him as an individual but were the actions of the Holding Company's Board and were taken in accordance with the shareholders' agreement.

English High Court's Decision

The Court held that Mr Jones was a *de facto* director of the Subsidiary and owed fiduciary and other duties to the Subsidiary. The Court considered:

- Section 250 of the English Companies Act 2006, where a director is defined as "*any person occupying the position of director, by whatever name called*"; and
- The principles for determining whether an individual should be regarded as a *de facto* director from English cases, including:
 - Whether they undertook functions in the company that could only be discharged by a director of that company.
 - The extent to which they were part of the company's corporate governing structure and thereby made themselves responsible as though they were a director.
 - The test is objective and it was irrelevant whether the individual believed that they were acting as a director or what their motivations were. However, relevant factors to consider include whether the company considered the individual to be a director and held them out as such and whether third parties considered that they were a director.
 - The fact that an individual is consulted about directorial decisions or their approval does not in general make them a director as they are not making the decision.

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The Court found that Mr Jones' role in directing the Subsidiary's affairs was consistent with him being not only part of the Subsidiary's corporate governance structure, but a key and principal element of the Subsidiary's corporate governance. He had assumed the status of functions of a company director performing functions that could only properly be discharged by a director of the Subsidiary.

The Court also considered whether Mr Jones' actions could be categorised as him acting individually, or alternatively whether they should be viewed as a director of the Holding Company taking proper decisions in respect of the Subsidiary.

The Court found that Mr Jones was acting individually and highlighted that Mr Jones and Clinton Jones were not merely providing oversight of the Subsidiary. Mr Jones was acting as a director of the Subsidiary and was heavily involved in its affairs. The Court placed significance on Professor Lutman having little involvement in the decision-making process or day-to-day affairs of the Subsidiary. Mr Jones was the dominant personality who drove the decisions. Moreover, Mr Jones' role in the Subsidiary was so significant that it was not confined to clearly identified decisions, but extended to day-to-day decisions such that it was difficult to categorise as being those of the Board of the Holding Company.

Pitfalls that a Holding Company Director Should Avoid

There is no iron-clad test for determining whether an individual is a *de facto* director. Referring to the English cases, the Singapore courts had earlier laid down guidelines similar to that set out in *Aston* in determining if a person is considered a *de facto* director. Instead of pointing to specific acts as indicia of *de facto* directorship, one must look at the aggregate of the acts of that person. The Singapore courts held that the "holding out" of a person as a director *per se* is not conclusive of their status as a director or otherwise, what is important is what the individual did. For example, as illustrated in *Aston*, to what extent the individual was part of the corporate governance system of the subsidiary and whether they assumed the status and functions of a director.

Directors of holding companies should avoid individually and personally taking decisions on behalf of a subsidiary and performing functions that can only be properly discharged by a director of the subsidiary. The more "influence" that a director of a holding company has on the corporate decision-making process of its subsidiary, the higher the risk of that director being categorised as acting individually and being a *de facto* director.

Please feel free to contact our team below if you wish to discuss matters further.

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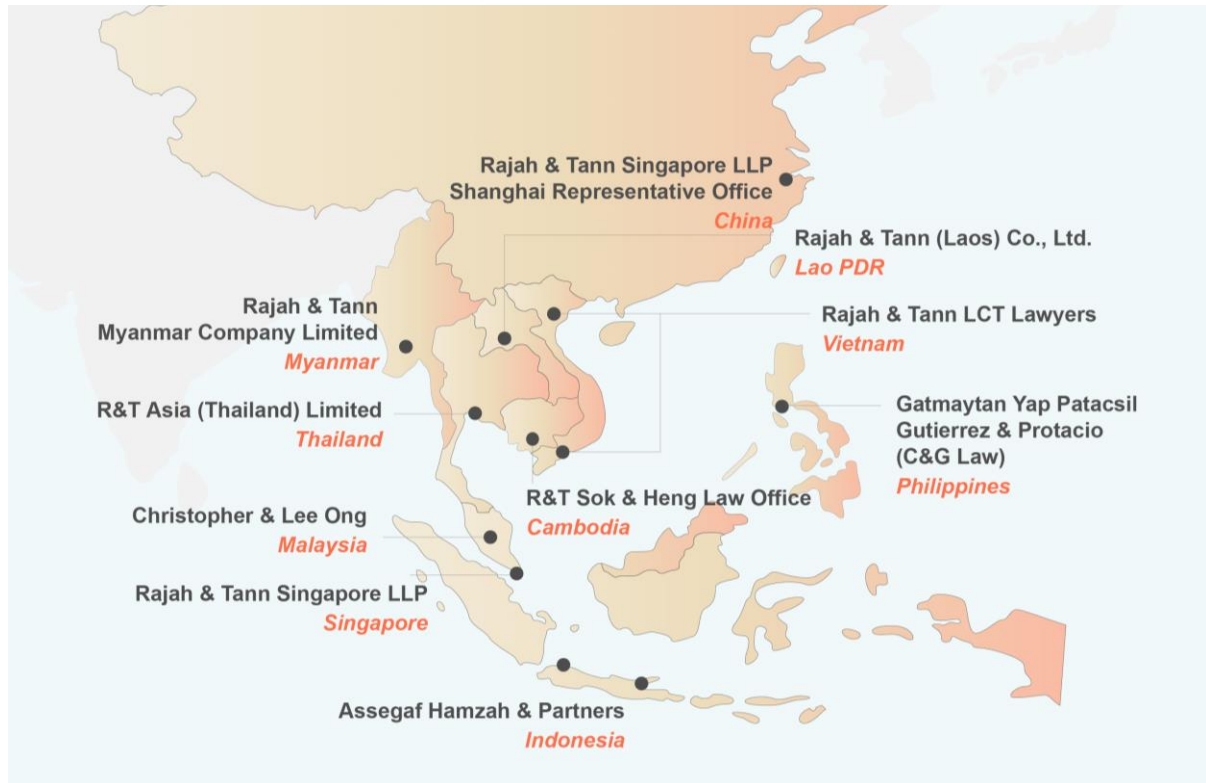
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