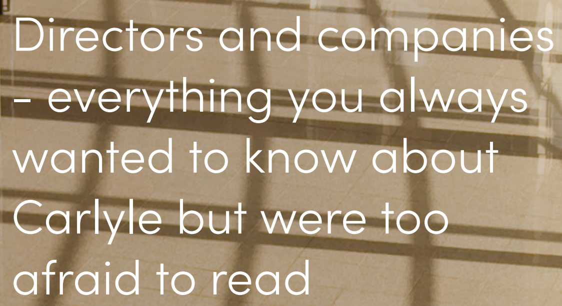

Directors and companies – everything you always wanted to know about Carlyle but were too afraid to read

CAREY OLSEN

Introduction

On 4 September 2017, Her Honour Hazel Marshall Q.C., Lieutenant Bailiff, handed down judgment in the case of *Carlyle Capital Corporation Limited (in Liquidation) and others v. Conway and others* [2017] Civil Action No. 1510, one of the most anticipated judgments in recent Guernsey jurisprudence, and the first time that a Guernsey court has memorialised certain fundamental legal principles affecting directors and the companies they serve.

Running to 529 pages, HH Marshall LB's tour de force of a judgment was reflective of the sheer enormity of the proceedings in terms of process. The case, which was commenced in July 2010, included: a statement of claim which ran to 252 pages; defences of the key protagonists and the independent directors running to 305 pages and 269 pages respectively; 107 lever arch files of evidence, including 4,872 identified documents; 16 expert witnesses; a trial schedule of 85 days (in the end reduced to 67 actual sitting days); and closing written submissions from the Plaintiffs at 1,331 pages and for the Defendants at 1,641 pages (with the judge noting that the defendants' written closing submissions were mercifully, "less closely typed" than those of the Plaintiffs).

The trial was covered by a live transcript service, with documentary evidence available through an uploaded evidence portal, and with live video-streaming of the proceedings to London, the United States of America and Australia, where parties and their ancilliary legal teams were based. Alongside this Herculean administrative undertaking, HH Marshall LB noted the general impenetrability of the subject matter to an uneducated outsider, stating that until she had taken responsibility for this case, she could have been forgiven for thinking that, "'synthetic shorts' were some kind of Lycra cycling gear".

If nothing else, the trial and the judgment demonstrate that Guernsey as a jurisdiction, and as a court of competent jurisdiction, is versatile and adaptable, capable of hosting the most (legally and administratively) complex, cross-jurisdictional, heavyweight litigation, offering excellent judges, committed court staff, certainty of civil process and outstanding administrative and technological flexibility.

"The first time that a Guernsey court has memorialised certain fundamental legal principles affecting directors and the companies they serve."

Background – the company, its business and its directors

The famous Austrian management consultant, Peter F. Druker, former Professor of Management at New York University, once said (about management and leadership) that, "Rank does not confer privilege or power. It imposes responsibility". That could be no truer than for the former directors of Carlyle Capital Corporation Limited (CCC), faced as they were with claims for circa US$2 billion arising out of their patronage of the affairs of the company during the early onset of the financial markets crisis in 2007 through to early 2008.

The company

CCC was a Guernsey incorporated closed-ended investment company founded in August 2006 by the multi-billion dollar U.S. private equity firm (and sponsor) Carlyle Group. Carlyle Group's core business to that date had been pure private equity investing, albeit that leveraged finance had always been a pillar of its business model. CCC was created as a diversification vehicle, with the aim of creating attractive, steady returns and liquidity. It would do so by investing in two asset classes:

- high quality fixed income assets, and
- riskier leveraged finance assets. Its members were to be sophisticated, qualified investors.

Its business

The former, superficially stable fixed income class included investment in residential mortgage-backed securities (RMBS), and a specific strain thereof (for those who enjoy the impenetrability of their nomenclature) called, "Agency AAA capped floater RMBS" – with the word "Agency" denoting that the securities were issued by Fannie Mae and Freddie Mac[1], i.e. issued with the strength of security offered by being supposedly guaranteed by these quasi-governmental agencies; the "AAA" tag denoting the strength of their risk-rating and perceived quality; and the "capped floaters" aspect referencing the floating, capped rate of interest payable. In effect, these were not investments in the now infamous sub-prime mortgage backed security market, but of a (then considered) better and more certain and secure investment quality.

CCC used leverage to acquire its portfolio of RMBS, i.e. it borrowed money. The use of leverage, in its most fundamental sense, enabled CCC to purchase high (or higher than if sourced through income) volumes of RMBS. As stated by Marshall LB, "Provided the costs of borrowing were lower than the return on the assets purchased with the borrowed money, [CCC] would make a profit equal to the net difference". The stark warning, however, was that, "just as such increased borrowing, or "leverage", will magnify profit being earned, it will also magnify any losses relative to invested capital, if these are suffered".

CCC was eventually leveraged at 37 times its issued share capital, owning a portfolio of RMBS valued at circa US$23billion.

The common source of such borrowing in the financial markets at the time was the use of repurchase or 'repo' financing, in this case with interest rates fixed by reference to LIBOR, and in turn lower than the capped floating rate earned on the RMBS. Whilst repo financing is considered a loan, it is in reality a breed of sale and repurchase agreement which vests title in the underlying assets in the lender as security for the lending. Repo financing may be for any term (from an overnight facility, or one year), but was most commonly utilised by CCC for 30 day terms. Its essential criteria are the vesting of title in the assets in the lender, and that they are sold to the lender at market value less a percentage, known as the 'haircut' (providing the lender with additional comfort of security in the event of enforcement). Additionally, lenders often have the benefit of standard terms entitling them to make margin calls – the requirement for funds to be deposited by the borrower in order to negate the effect of a fall in the market value of the assets so as to re-establish the loan-to-value ratio of the original lending arrangement.

Its directors

The fully constituted board of directors of CCC numbered seven people (four of whom were executive directors affiliated to Carlyle Group companies – two being non-voting, reporting and advisory directors), and three of whom were so-called independent directors. Six were individuals domiciled in the United States, who maintained expertise or specialisms in various aspects of banking and the financial markets, and one was a Guernsey resident, former trust professional with experience of administration of offshore funds.

1. Respectively, The Federal National Mortgage Association and The Federal Home Loan Mortgage Corporation.

CCC – the collapse in brief

After a private placement of shares in late 2006 and again in early 2007 (to supporting investment banks and existing Carlyle Group investors), CCC proceeded with an initial public offering and listing on NYSE Euronext, Amsterdam in late June 2007, against the background of the early signs of volatility in the sub-prime residential mortgage backed securities market, which led ultimately to the failure of Bear Sterns. As the crisis began to develop, asset devaluations led to demands for increased haircut levels and margin calls as financial institutions burned by the Bear Sterns collapse, and fearful of contagion, began to take defensive measures.

By implementing drastic processes, including the borrowing of money from Carlyle Group companies and divesting itself of significant aspects of its bank loan sector portfolio, CCC was able to stabilise and survive the turbulence in the financial markets into early 2008, notably with the directors determining to retain and preserve its portfolio of RMBS on the basis that they were high quality, Fannie Mae and Freddie Mac assured investments that ought to weather the storm and ultimately return cash to the company. However, as the crisis blossomed into a full-scale catastrophe, the repo financing market constricted. Obtaining continued affordable repo financing became less viable, and institutions plagued by uncertainty (and no doubt disbelief) braced themselves for the inevitability of the collapse in the financial markets. CCC's lenders made drastic margin calls and sought higher 'haircuts'. CCC was simply unable to continue as a going concern, and on 17 March 2008 was ordered into compulsory liquidation – on the application of its directors.

At the time, CCC's net deficiency of assets as regards creditors was quantified at US$350million - it had lost US$1.3billion in only eight months.

The Claims

On 7 July 2010, the well-regarded, seasoned and skilled liquidators of CCC issued proceedings against the seven directors and three principal Carlyle Group companies for, inter alia, breach of fiduciary duty and/or gross negligence as directors (or shadow directors in the case of the corporate entities above CCC in the group structure) and wrongful trading; against Carlyle Investment Management LLC (CIM), CCC's investment manager, for breach of contract or concurrently in common law negligence; and against all of the three corporate entities for unjust enrichment, in effect seeking a rebate of management fees.

In total, the Plaintiffs brought 187 discrete claims.

Collectively, and summarily, it was alleged that from July 2007 through to March 2008, the decisions and actions, or lack of action, by CCC's directors or quasi-directors were wrong and/or wrongful; that the directors had breached their fiduciary obligations because they were improperly motivated by the interests of the wider Carlyle Group above those of CCC, and that they had conflicting personal benefits; further, that the decisions and actions were taken negligently and were reckless; that such neglect constituted statutory misfeasance; and further still that these decisions were taken at a time when the directors knew or ought to have concluded that there was no reasonable prospect of CCC avoiding an insolvent liquidation, i.e. it constituted wrongful trading.

These types of claim are ubiquitous in the common law world, and it has been long settled in this jurisdiction that as the concept of a limited company was incorporated into Guernsey law from England, authorities from that jurisdiction are highly persuasive. One could have been forgiven at this stage, therefore, in believing that almost 120 years' worth of now settled authority would mean that the competing teams would have known the lie of the land, and the nuance of the battlefield.

Almost from the beginning, however, HH Marshall LB noted that the Plaintiffs' legal counsel's opening submission was that the Defendants' duties were, "heightened" because CCC was a listed company. This was very quickly dismissed by the judge as owing more to, "rhetoric than legal analysis", but so commences a theme in the judgment that suggests that at every opportunity attempts were made to heighten, extend, inflate or conflate what were otherwise well-established legal principles.

In describing the statement of claim, HH Marshall LB said, "The whole point of a pleading is to make the case clear for the reader, whether that be the opposite party, the judge, or anyone else with an interest. It is not, or should not be, to overwhelm the opposite party. It is the quality and not the quantity of material which counts. Including an unhelpful surfeit of detail only obfuscates the real case; if the recipient considers that he has been given inadequate detail, he can always raise [requests for further information]. Still less is it a legitimate aim to try to cow the opposition into submission or a comatose state by unnecessary and overweening repetition, the quotation of portions of correspondence, the inclusion of tendentious headings, or the insertion of a myriad of hyperbolic adverbs and inflammatory comment". At times, she considered aspects of the pleading, "trivial to the point of absurdity", or "generally excessive, often unfair and usually tediously overemphatic in their language".

It was only towards the end of the trial that, having been pressed by the judge to articulate succinctly the case against the directors, that the Plaintiffs conceded that, at its core, their case was - in summary - that CCC would not have incurred losses had the board:

- sold down it portfolio of RMBS to reduce leverage and increase liquidity;
- raised additional equity capital to reduce leverage; and/or
- conducted an early restructuring or orderly winding down; all premised on the theory that CCC would have been able to sell its RMBS at a discount of no more than 11 basis points from CCC's own market prices.

Of the 187 allegations contained in the claim, none succeeded. Not one.

The law - certain principles derived and followed

The judgment in Carlyle constitutes a rigorous and disciplined (re)statement of the established orthodoxy in the law relating to directors and the companies they serve.

Do directors of public or listed companies owe heightened duties?

No. Whether a convenience store or a conglomerate, the duties of directors are the same. It is merely the quality of the duties which will change - in the sense that with the increased level of legal, regulatory and shareholder scrutiny which attaches to a public or listed company, comes the more onerous job of fulfilling those duties.

What are the duties of directors?

It has been settled law for some time that the duties imposed on directors are owed to the company, see *Multinational Gas & Petrochemical Co. v. Multinational Gas & Petrochemical Services Limited* [1983] Ch. 258, something which HH Marshall LB confirms: "...it is common ground that the directors of a Guernsey company owe duties to the company..." (emphasis added).

These duties are, in essence, fivefold:

1. a duty to act bona fide in the best interests of the company;
2. a duty not to act for a collateral or improper purpose;
3. a duty to exercise independent judgment;
4. a duty to avoid conflicts of interest; and
5. a duty to exercise reasonable skill and care.

These duties have historically been classified as fiduciary in nature, except for the duty to exercise reasonable skill and care. This is because the duties at (1) to (4) above have as their common theme obligations of good faith, honesty and loyalty, whereas the duty to exercise reasonable skill and care relates to (mere) competence rather than disloyalty or dishonesty.

As Millett LJ. found in the seminal case of *Bristol and West Building Society v. Mothew* [1998] Ch. 1, this critical distinction has been, "bedevilled by unthinking resort to verbal formulae" (usually by lawyers too lazy to consider the difference), before succinctly summarising the distinction between fiduciary and non-fiduciary duties in his oft quoted reference to how: "A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty" (albeit it follows that he may be liable for negligence, i.e. a failure to exercise reasonable skill and care).

HH Marshall LB cited Mr. Jonathan Crow Q.C.'s judgment in *Extrasure Travel Insurance v. Scattergood* [2003] 1 BCLC 598, who put it thus: "Fiduciary duties are concerned with concepts of honesty and loyalty, not with competence".

Added to the foregoing, in circumstances of insolvency (or doubtful solvency), will be the duty of directors to have regard to, or paramount concern for, the interests of creditors. Again, often bedevilled by unthinking resort to verbal formulae, lawyers will still lazily stipulate that at times of insolvency or doubtful solvency, directors owe their duties to creditors. This is hopelessly wrong. Directors always owe their duties to the company they serve (unless they assume responsibility directly to a third party). HH Marshall LB helpfully cited the judgment of the *English Supreme Court in Bilta (UK) Limited v. Nazir (No.2)* [2016] AC 1, wherein Lords Toulson and Hodge said that, "It is well established that the fiduciary duties of a director of a company which is insolvent or bordering on insolvency differ from the duties of a company which is able to meet its liabilities, because in the case of the former the *director's duty towards the company requires him to have proper regard for the interest of its creditors and prospective creditors*" (emphasis added).

Is fulfilment of these duties judged subjectively or objectively?

Again, it has been settled law for quite some time that the core, fiduciary obligations of a director are to act in what he honestly considers to be in the interests of the company; i.e. the duty is subjective. HH Marshall LB cites Lord Greene MR. in *Re Smith and Fawcett Limited* [2014] Lloyd's Rep F C 95, to the effect that directors, "must exercise their discretion bona fide in what they consider - not what the court may consider - is in the interests of the company and not for a collateral purpose".

However, the Plaintiffs' attempted to introduce an objective test for good faith. They sought to do so because the directors of CCC had the benefit of pre-2008 legislation exoneration and indemnity clauses, and the Plaintiffs' counsel therefore needed to demonstrate bad faith in order to circumvent such clauses (another example of embellishing, or seeking to extend the law to serve their purpose).

HH Marshall LB, quite rightly, decided that the Plaintiffs' were wrong holding that: "There is no fiduciary duty to make an objectively "right" decision"; and "... a decision (whether right or wrong) reached by directors cannot be a breach of fiduciary duty if they have honestly made it in what they consider to be the interests of the company, and that therefore a claim for breach of fiduciary duty will only lie where it is shown that the directors did not honestly consider their action to be in the best interests of the company".

Hence, if a director honestly believes that he, she or it is acting in the best interests of the company, the duty has been fulfilled, even if objectively (and usually viewed with the benefit of hindsight) the act complained of was not in the best interests of the company. As HH Marshall LB put it, faced by the Plaintiffs' counsel's urging that objective considerations should apply, "If the relevant decision appears clearly and objectively not to have been in the best interests of the company, this could certainly cast doubt on a director's assertion that he genuinely believed that it was. However, in my judgment, that is as far as the relevance of an objective view of the actual merits of the decision itself can go".

The odd one out is the duty to exercise reasonable skill and care (a non-fiduciary duty) which will be assessed by both subjective and objective factors, and hence the acts or omissions are analysed against:

- that director's actual knowledge, skill and experience; and
- the knowledge, skill and experience that may be expected of someone fulfilling that director's role.

What is the Charterbridge Principle as applied to directors?

Notwithstanding the foregoing, the Plaintiff's counsel urged that there should be an objective test for good faith based on circumstances where a director completely or partially fails to consider the best interests of the company, founded on the English case of *Charterbridge Corp. Limited v. Lloyds Bank Limited* [1970] Ch 62. The case of Charterbridge pertains to the proposition that where a director fails in fact to consider the interests of the company he serves, he should not be able to rely on the subjective test of his bona fides and honesty as a defence to a claim for breach of fiduciary duty.

HH Marshall LB concluded that, in such a situation, the test which the court will apply is to examine the relevant decision objectively to see whether it was, "within the range of decisions" which a hypothetical director, acting bona fide in the apparent best interests of the company, could reasonably have made in all the circumstances. Hence, the subjective nature of the test remains, albeit with the ability to assess objectively, whether in circumstances of a complete or partial abdication of consideration of the company's best interests, the decision of a director fell within the range of decisions that could have been envisaged had he been diligent.

At the end of the day, HH Marshall LB appeared to form the view that what the Charterbridge principle showed that, "there is a requirement of both the [fiduciary] duty of good faith and the [non-fiduciary] duty of skill and care, namely that each requires that [a director] must actually turn attention to the question of what the best interests of the company are. In each case, however, [a director] is saved from liability for not actually doing so if the decision made was nonetheless within the range of decisions that a properly loyal and competent director could reasonably have made in all the circumstances".

What is 'gross negligence'?

It has become boilerplate to include in a director's indemnity and exoneration clauses the proviso as to what has become known as 'gross negligence', a confusing and arbitrary phrase. The Guernsey Court of Appeal in *Investec Trust (Guernsey) Limited v. Glenalla Properties Limited* [2015] appeared to approve of a definition to the effect that gross negligence, "meant a serious or flagrant degree of negligence, not equating with reckless or intentional fault or the like".

HH Marshall LB seemingly adhered to this formulation, and considered gross negligence to be, "extreme or egregious negligence…[f]iguratively and colloquially it is jaw-dropping negligence".

What about exercising independent judgment?

All directors have a duty to exercise independent judgment, and HH Marshall LB explored how this might include an obligation:

- not to fetter their discretion in the exercise of their powers; and
- not to abrogate their responsibilities; both essentially being the articulation of ways in which the main duty could be breached.

Fundamentally, the duty to exercise independent judgment requires that: the company is entitled to the benefit of an actual and freely arrived at decision by its directors; that the duty will be breached if a director merely does what he is told or acquiesces without question; directors must actually make a decision, and one that is their own; and, directors have an irreducible responsibility to oversee, and keep themselves sufficiently informed about, the company's affairs.

The Plaintiffs had stressed this duty in the context of the three independent directors in particular, and the fundamental need for their oversight and separate approval of determinations made by the principals (who were allegedly conflicted by virtue of their affiliation to Carlyle Group companies).

HH Marshall LB provided useful insight in respect to this duty and the possibility of delegating and or acceding to those with expertise beyond those of the particular director in question, including:

- "… a duty to exercise an independent judgement does not mean a duty to act entirely alone …";
- "… where … a director does not possess a particular expertise but is aware that one of his fellow directors does, there is nothing in this duty which obliges the first director either to make a decision without ascertaining the views of the expert director or without having regard to them, or to make himself a sufficient expert in the area that he can assess the opinions of the expert director from a position of expertise";
- "… if it is the case that more expert fellow directors propose or support a particular course of action, the non-expert director does not, without more, act in breach of his duty to exercise his own independent judgement because he is influenced by that fact"; and
- "[t]his is always provided, of course, that he has weighed that fact critically, according to his own level of skill, expertise and general intelligent common sense, in permitting such influence".

Is delegation permissible?

What was critical in establishing the extent of a power of delegation was the dividing line between the permissible efficiency of delegation, and a wholly impermissible abdication of responsibility.

Finding in favour of the defendants, HH Marshall LB noted certain principles to be extrapolated.

- it is a general principle that directors are entitled to regard information provided to them by fellow directors and management as accurate unless there are reasons to doubt it;
- a director may rely upon his co-directors to the extent that:
    a. the matter in question lay within their sphere of responsibility given the way in which the particular business is organised; and
    b. that there existed no grounds for suspicion that that reliance may be misplaced;
- a director is entitled to rely upon the advice of fellow directors and management in areas in which those other directors, or management, may be reasonably seen by the director to have greater skill, expertise or knowledge than he does himself;

- one of the duties of non-executive directors is to monitor the performance of the executive directors, but those responsibilities cannot go so far as to require the non-executive directors to overrule the specialist directors, like the finance director, in their specialist field., i.e the duty is not to ensure that the company gets everything right; and
- that a director is not obliged to supervise every aspect of his delegate's activity, nor to be responsible for day-to-day management decisions; what is reasonable in the circumstances will depend upon how the particular company's business is organised and the part that the director could reasonably have been expected to play.

How to deal with conflicts of interest?

The historic position on the no conflicts duty derives from the 1854 case of *Aberdeen Railway v. Blaikie Brothers*: "....no-one having [fiduciary] duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting or which may conflict, with the interests of those whom he is bound to protect".

Of course, Guernsey legislation has long recognised that the fact of a conflict is not determinative of liability; the point is whether the conflict was disclosed.

The Plaintiffs placed significant emphasis on this duty and its materiality because of what they called, "double employment", i.e. that there were common directors in the group of companies – as is common in such structures, not just in Guernsey but globally. The Plaintiffs claimed that certain directors were plagued by conflicts between:

- on the one hand, the corporate and reputational interests of Carlyle – which could not see a "Carlyle" branded entity fail; and also the personal financial interests of the Carlyle directors, eg. Mr. Conway for example made US$280million on a sale of interests in one Carlyle Group company not long before CCC's collapse; and
- on the other hand, the interests of CCC.

The central allegation made was that the decisions taken by the Defendants after July 2007 were not dictated by any real consideration of the best interests of CCC, but were dictated by the conflicting interests of Carlyle Group companies, the manager and certain Carlyle principals and directors.

HH Marshall LB rejected the Plaintiffs' claims on the evidence. It was common ground between the parties that the assessment of whether there is a material conflict of interest is an objective test, and that a material conflict of interest can arise either:

- between the director's duty and his personal interests (a "conflict of duty and interest"); or
- between two different principals (a "conflict of duty and duty"); and

that in a conflict of duty and duty, the director must serve each principal: "... as faithfully and loyally as if he were his only principal".

In particular, HH Marshall LB stated: "The Defendants point out, and this appears to be correct, that there is no rule in English law, at any rate, that a person may not be a director of more than one company, even if both companies are in competition". This must be right, and she noted that, "As far as I am aware it has never been suggested that the position in Guernsey law is or should be different from that in English law, and with the large part played in Guernsey's economy by trust and corporate services provision, it is reasonable that this should be so".

The critical point to note, however, is that, "... the rule is subject to [two provisos] ..., first, that the director who is in that position will have to arrange his affairs so as to enable himself to discharge his duties to both companies as loyally as if each was his only principal. ... [and second] that any such conflict may be properly avoided by the director making full disclosure of the position, and obtaining the consent of each principal ...".

In particular, it was emphasised, "that a party cannot complain of such a conflict if he was aware of it when he appointed the relevant fiduciary to his position ...".

When are directors liable to consider the interests of creditors?

The potential for personal liability for wrongful trading is often the key concern of directors of companies facing financial distress, not least because, as noted above, it is difficult to be certain when the liability arises. Not only is it hard to say precisely when the directors incur the obligation to take every step to minimise losses to creditors, it is at least as demanding to then determine what course of action will have the 'least worst' impact on the company's creditors.

Under Guernsey law, directors can incur personal liability for wrongful trading if they, "knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation", unless they took every step with a view to minimising the potential loss to a company's creditors.

In practical terms, a director is only at risk of liability for wrongful trading if he allows a company to continue to trade and incur further credit when it is insolvent and there is no reasonable prospect of avoiding an insolvent liquidation. However, bearing in mind extremely fine distinctions, continuing to trade a company whilst it is insolvent does not, by itself, render a director guilty of wrongful trading provided that there is some prospect (which is not unreasonable) of avoiding formal liquidation proceedings.

In *Re Hawkes Hill Publishing Co. Ltd (in liquidation)* [2007] All ER (D) 422, it was specifically stated that "…it would be stultifying to legitimate business enterprise if the law were to require company directors to put their companies into insolvent liquidation at the first sign of trouble". In that case, the directors were held not to have engaged in wrongful trading where they held a, "reasonable (but ultimately misplaced) hope that things would get better".

As already noted, it is well established that the fiduciary duties of a director of a company which is insolvent or bordering on insolvency differ from the duties when a company which is able to meet its liabilities, because in the case of insolvency or questionable solvency the director's duty towards the company requires him, her or it to have proper regard for the interests of its creditors and prospective creditors.

Some of the greatest problems for directors, as highlighted by numerous recent cases in England, is in establishing with precision the moment at which the interests of creditors become paramount;

HH Marshall LB provided useful guidance, stating that, "… the duty to have regard to the interests of creditors arises when it can be seen that decisions about the company's actions could prejudice the creditors' prospects of recovering their debts in a potential liquidation".

Conclusion

HH Marshall LB was required, given the pleaded case, to conduct a roving enquiry into numerous areas of interest that this note does not touch upon; however, the aim of this note is to provide you with everything you needed to know about the Carlyle judgment but were too afraid to ask (because it may be embarrassing to admit that you have not had time to read it).

At the INSOL Conference in Guernsey the week after release of the judgment, it was notable that two camps of opinion had quickly formed: first, insolvency practitioners and related professionals (being those most likely to have the onerous task of scrutinising the conduct of directors, reporting to the court thereon, and bringing proceedings where behaviour is found wanting) who decried the judgment as raising the proverbial bar too high in favour of protecting directors from claims of breach of duty; whereas, second, those who fulfil management responsibilities considered that the judgment was (in their view, rightly) protectionist of those who take a seat in this jurisdiction's plentiful supply of boardrooms.

Truth be told, and with calm reflection, both camps are wrong.

What the judgment in Carlyle has done is to memorialise, with legal rigour and analysis (and not a little humour), fundamental principles of company law as affects directors and the companies they serve. When one strips away the external hype and the bias, the judgment in Carlyle is at its heart a (re)statement of legally accepted orthodoxy, as developed over the last 120 years in our near neighbours, England and Wales, and properly and rightly applied to Guernsey companies and their directors (and service providers).

Please note that this guide is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen (Guernsey) LLP 2021.

CAREY OLSEN

Tim Corfield

Partner, Guernsey

D +44 (0)1481 732073
E tim.corfield@careyolsen.com

Tim is a partner and advocate in the dispute resolution and litigation group. He has twenty years' experience in litigation advisory and trial work with particular expertise in corporate and company law disputes, contentious corporate transactional matters, and banking and financial services litigation, including funds disputes, shareholder activism and regulatory investigations. He also has significant experience in the fields of corporate insolvency and general commercial and trusts litigation. During his career he has appeared in matters before the English High Court, the Royal Court of Guernsey and the Guernsey Court of Appeal.

Tim is ranked consistently by the independent legal directories as one of Guernsey's leading litigators, and has been described in them by clients and peers as: "the best litigator on the Island"; "terrific"; "a master of litigation with an analytical mind who can think outside the box to find sensible solutions"; "the right man for difficult heavyweight commercial litigation"; as having a "dominant and effective courtroom presence"; "excellent, a robust advocate whose advice is always sound"; "relentlessly charming, unflappable and totally dedicated to winning"; and a "team player and a delight to work with" (Legal 500, Chambers UK and Global, the International Bar Association's 'Who's Who Legal': 2008 to present).

Tim acts for major corporates, boards of directors (either in contentious or regulatory matters, but also as part of his board advisory practice, assisting boards of directors, or committees or constituents thereof, on commercially sensitive or complex transactions and investigations), investment banks, funds, private equity houses and other financial institutions, as well as investment managers, investors, trustees, office holders, businesses and individuals. His work often has an international / crossborder element.

Career

Tim read law as an undergraduate at the University of London, and as a postgraduate at the University of Bristol. Tim qualified as a Solicitor (England & Wales) in 1999 and as a Solicitor-Advocate (Higher Rights – All Courts) in 2004. He obtained his Certificat d'Etudes Juridiques Françaises et Normandes at the Université de Caen Basse-Normandie in France in December 2007 and was called to the Guernsey Bar in February 2008. He became a Partner on 1 January 2010. His memberships include the International Bar Association, the Chancery Bar Association, INSOL and the Institute of Directors.

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Jurisdictions

Bermuda

Carey Olsen Bermuda Limited
Rosebank Centre 5th Floor
11 Bermudiana Road
Pembroke HM 08
Bermuda

T +1 441 542 4500
E bermuda@careyolsen.com

British Virgin Islands

Carey Olsen (BVI) L.P.
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com

Cayman Islands

Carey Olsen
PO Box 10008
Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000
E cayman@careyolsen.com

Guernsey

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272
E guernsey@careyolsen.com

Jersey

Carey Olsen Jersey LLP
47 Esplanade
St Helier
Jersey JE1 0BD
Channel Islands

T +44 (0)1534 888900
E jerseyco@careyolsen.com

International offices

Cape Town

Carey Olsen
Protea Place
40 Dreyer Street
Claremont
Cape Town 7708
South Africa

T +27 21 286 0026
E capetown@careyolsen.com

Hong Kong

Carey Olsen Hong Kong LLP
Suites 3610-13
Jardine House
1 Connaught Place
Central
Hong Kong

T +852 3628 9000
E hongkong@careyolsen.com

London

Carey Olsen LLP
Forum St Paul's
33 Gutter Lane
London EC2V 8AS
United Kingdom

T +44 (0)20 7614 5610
E londonco@careyolsen.com

Singapore

Carey Olsen Singapore LLP
10 Collyer Quay #29-10
Ocean Financial Centre
Singapore 049315

T +65 6911 8310
E singapore@careyolsen.com

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY
CAPE TOWN HONG KONG LONDON SINGAPORE

careyolsen.com