

Briefing Note 29 November 2017

The role of the Non-Executive Director post–Carlyle

This note is for information purposes only and is not intended to be legal advice.

This is the third Briefing Note in our series arising out of the case of *Carlyle Capital Corporation Limited v Conway & Others* (“**Carlyle**”). Babbé LLP acted as lead counsel for the Defendants. All of the Plaintiffs’ 187 claims were dismissed in a judgment given by the Guernsey Royal Court in September 2017.

This note discusses certain key legal principles that were set out in the *Carlyle* judgment relating to Non-Executive Directors (“**NEDs**”) and which provide important guidance to those involved with Guernsey companies.

Introduction

The liquidators of Carlyle Capital Corporation Limited (“**CCC**”) argued that the directors should have sold a substantial part of CCC’s portfolio ahead of the liquidity crisis in March 2008 and that failure to do so caused a significant loss. They also alleged that all of the directors, including the non-executive directors, had breached various duties including their fiduciary duties and duties of skill and care. In particular there were allegations that the NEDs were almost entirely passive in their involvement in CCC’s affairs and did no more than comply with the requests of the executive directors.

The Court found that all the directors of CCC had fulfilled their duties and dismissed all of the Plaintiffs’ claims.

The case involved a detailed examination of the duties that directors owe to Guernsey companies and, amongst other things, clarifies the Guernsey courts’ view of the role of NEDs - more particularly the function of a NED, the duties of a NED and the question of a NED’s independence.

Function of a NED

The Court confirmed that NEDs are not appointed in order to second guess and re-deliberate the operational management of a company, but that the function of a NED was to bring a “*dispassionate oversight view to the board’s decisions, from a more detached perspective*” and to “*provide intelligent input, challenge and oversight*” to the board’s decisions.

The Court also helpfully confirmed that it was reasonable to appoint a non-technical director with administrative skills and experience for that purpose in an offshore company.

Duties of a NED

The Court confirmed that a company is entitled to the benefit of an actual and freely arrived at decision from all its directors. Accordingly a NED is expected to participate actively in the decision-making of the company, not merely to do what he or she is asked or told to do by others without considering the matter.

In order to participate actively in such decision-making, NEDS are therefore under a duty which the judge described as an “*irreducible minimum, to oversee and keep themselves sufficiently informed about their company’s affairs*”.

However, the duty to form an independent decision does not mean that a NED has to act entirely alone in the decision-making process. The Court acknowledged that it was neither intended nor practical that a NED should be expected to exhibit or apply a similar degree of detailed knowledge or expertise as an executive director. Accordingly a NED could seek and take into account the views of more expert directors, provided that the NED also assessed “*his own level of skill, expertise and general intelligent common sense, in permitting such influence*”.

The Question of Independence

The Plaintiffs alleged that previous acquaintances or connections between a NED and executive directors and other associated companies, should give rise to suspicion as to their ability to act independently. The Court confirmed that the issue in question is not whether a NED fitted a particular criterion or qualification for “independence” as a matter of form, but whether the individual NED had in fact fulfilled his or her duties as a director of the company (regardless of such acquaintances or connections).

Key Points to Note

The *Carlyle* judgment clarifies that:

- NEDs have an important role in providing additional and detached levels of scrutiny to a board’s decisions;
- a NED must actively participate in a company’s decision-making process;
- a NED can rely on fellow expert directors if such reliance is appropriate, but a NED is still under a duty to acquaint himself or herself with how the company’s business works; and
- in relation to determining a NED’s independence, the paramount question to consider is whether the NED has in fact fulfilled their duties as a director.

For more information on this and any legal principles applicable to directors in Guernsey, please contact our Corporate or Dispute Resolution teams.