Babbé
THE ACCENT ON EXCELLENCE

Briefing Note July 2017

High Noon For *Duel* Directors

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

During the 18th Century the Royal Court presided over a number of trials resulting from duels contested between citizens. Indeed, a stone plaque in a local park commemorates the last duel fought in the Island in 1795. A series of recent decisions of the Royal Court and the Guernsey Court of Appeal have shown that "duels" continue to take place at least in the context of two-director Guernsey companies.

In *Harlequin Chemicals Limited & Ors v Werner Urban & Ors*, the Royal Court considered a provision in a company's articles of association which stated *"The office of a director shall be….. vacated ….. if he is requested to resign by written notice signed by all his co-directors…"*.

In that case, one of the company's two directors, in order to control the board, provided a written notice to his fellow co-director requesting he resign, thereby purportedly removing that director from the board and allowing the remaining director to appoint a favoured nominee.

Applying the interpretation provisions of the company's articles and principles of contractual interpretation, Lieutenant Bailiff Marshall held that the article can only operate if there are "directors" capable of giving notice; in other words, a majority of the board. She noted that the article not only uses the plural but also stresses "all" co-directors.

Whilst she accepted that the singular term includes the plural, and vice versa so that the plural would include the singular, the word "all" is not a plural and the relevant interpretation provision was qualified to avoid inconsistencies.

The Royal Court held that one director could not expel the other by simply getting in first with a notice to resign and that it would be "extraordinary" for such an article to operate in two-director companies.

A materially identical company article was also examined by the Royal Court in *Midland Resources Holding Limited v Prodefin Trading Limited & Anor*. Whilst the Bailiff did not have the benefit of the judgment of Lieutenant Bailiff Marshall as such was not published at the time, he reached the same interpretation with reasoning corresponding closely with hers. Applying principles set down by the United Kingdom Supreme Court in *Arnold v Britton* and after construing the article objectively, the Bailiff held it would be inconceivable that two 50 per cent shareholders would have intended that if there were only two directors, one representing each shareholder, one director could remove the other thus depriving the shareholder of any representation of the board simply by "firing first".

On appeal, the Guernsey Court of Appeal affirmed

the Bailiff's interpretation and approved the decision in *Harlequin*.

The Court of Appeal rejected any alternative interpretation of the article and declared that the matter was put beyond any doubt by a consideration of commercial common sense (being one of the principles laid down in *Arnold*). The Judges of Appeal agreed with Lieutenant Bailiff Marshall's finding that it would be extraordinary that commercial parties could have been taken to agree that one director should be able to expel the other by simply getting in first with the request to resign, describing it as a "*gunshot at noon*" and "*undesirable*".

The article in question is widely used in Guernsey and indeed in other jurisdictions. Whilst duelling has been prohibited in Guernsey under various laws since at least the late 18th century, it is apparent from these recent judgments that the Guernsey courts wish to ensure that prohibition is maintained at least in the context of two-director companies.

Dispute Resolution Partner, Advocate Todd McGuffin, appeared for the successful parties in the *Harlequin* case and appeared in *Midland* on behalf of a successful respondent before the Court of Appeal.

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