****

**Directors’ Duties in Jersey: In it for the Long Haul!**

The island of Jersey, along with most other international financial centres, offers a range of services to the corporations and individual who wish to take advantage of the benefits of doing business offshore. Among the most important sectors is the provision of corporate services, typically including a package of accounting, administrative and statutory filing services. More often than not, that package might also include providing local corporate or individual directors to supervise and manage complex offshore structures. And for Jersey’s globally respected investment funds industry, the availability of a pool of talented non-executive directors can be essential to deal with compliance obligations or to give credibility to products being offered to the market.

On the face of it, 2017 may turn out to be an important legal year for the professional directorship sector of Jersey’s financial services industry. Some of the latest legal analysis may be have originated overseas and is familiar to most practitioners, but 2017 has seen one case with a particular Jersey gloss which will be relevant to professional directors in Jersey of whatever standing.

**Jersey’s Legal Framework**

The scope and nature of statutory duties owed to a company by its directors have been relatively free from litigation in Jersey. The Jersey statute: Article 74 of the Companies (Jersey) Law 1991, lacks the particularity of the English Companies Act 2006 but enacts some basic duties:

*“(1) A director, in exercising the director’s powers and discharging the director’s duties, shall –*

*(a) act honestly and in good faith with a view to the best interests of the company; and*

*(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”*

While Jersey is a customary law jurisdiction with a legal tradition derived on Norman French law, the learning of the Commonwealth Courts is highly persuasive in considering statutory provisions with a shared heritage as in the case of the Jersey Law and the UK Companies Act 2006 which have a common ancestor in the UK Companies Act 1985. With that in mind, the Jersey jurisprudence for directors leans heavily on the English authorities but develops alongside the law of Guernsey which shares a French heritage.

*Carlyle*

In this note, it is not possible to give anything close to a full analysis of HH Marshall QC’s judgment in the Guernsey case of *Carlyle Capital Corporation Limited (in Liquidation) and others v. Conway and other*,[[1]](#footnote-1) which runs to 572 pages. But despite its length, it does not appear that *Carlyle* advances any revolutionary analysis, in the face of some adventurous submissions from the Plaintiffs set out in 183 discrete claims, seeking to fix the directors of a fund which invested in *Fannie Mae* and *Freddie Mac* issued securities with liability for a wide range of acts in breach of fiduciary duties amounting to wrongful trading.

By way of clarification, the established range of a Guernsey director’s duties was found to broadly reflect the English common law position, and the nature of those duties was confirmed as being fiduciary when their common theme were good faith, honesty and loyalty, and non-fiduciary when relating to mere competence rather than disloyalty or dishonesty. An interesting aside was that the Court rejected the argument that a director of a PLC owed a heightened duty than that owed by the director of a private company, confirming that it is the office, not the vehicle, which is determinative of the duty.

In its case theory, the Plaintiff contended that a director’s obligation to act in good faith should be assessed objectively, but this was rejected with the Court stating:

“*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.*”

It would follow that, if a director under a fiduciary duty to act in good faith honestly believes that they are acting in the best interests of the company, the fiduciary duty has been satisfied, even if objectively (and usually viewed with the benefit of hindsight) the act complained of was not in the best interests of the company. A different analysis was found to apply to the obligations to use reasonable care and skill, which are still evaluated by reference to both subjective and objective factors; the individual director’s actual knowledge, skill and experience, and the knowledge, skill and experience to be expected of someone fulfilling that director’s role.

In respect of these issues at least, then the Jersey position seems relatively clear and cogent, and the English inspired status quo is undisturbed.

*The Dishonest Mr Ivey*

Guidance relevant to the treatment of the honesty or otherwise of directors has also received attention in the UK Supreme Court in 2017, but, curiously, it fell to a civil case to clarify the inconsistency between the civil and criminal tests for dishonesty by confirming that the civil test should prevail. In the newsworthy case of *Ivey v. Genting Casinos (UK) Ltd*,[[2]](#footnote-2) a professional poker player sought to enforce an obligation to pay out on a £7.7m gambling debt when he admitted that he was guilty of the questionable conduct of which the casino complained. The defence rested on whether Ivey had been dishonest and had therefore cheated contrary to section 42 of the Gambling Act 2006 (a criminal offence) which would have been a breach of an implied term of the contract between Ivey and the Casino.

Following *R. v Ghosh*,[[3]](#footnote-3) Ivey’s position was that the Court should apply a two-stage test for dishonesty: determining whether the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people, and if so whether he must have realised that ordinary honest people would so regard the behaviour. The obvious problem is that, the more warped Mr Ivey’s standards of honesty were, the less likely was a finding of dishonesty. The Court rejected this approach and the troubling second limb was rejected following *In re Barlow Clowes International Ltd (In Liquidation)*.[[4]](#footnote-4)

It would be wrong to say that *Ivey* creates a wholly objective test for dishonesty; rather, a protagonist’s subjective state of mind must be evaluated by reference to an objective assessment of honesty. On that basis, a director arguing that they mistakenly but honestly believed that their conduct was consistent with industry standards may no longer have a defence in a criminal context. Further, the extent to which other areas of a company director’s activities may be impacted is unclear, but there will inevitably be a growing list of concerns, including insurance policies that refer to dishonest conduct judged according to criminal dishonesty as well as any number of professional disciplinary procedures.

*O’Keefe v. Caner*

If the cases of *Carlyle* and *Ivey* are foreign cases, which will be relied upon in the Royal Court of Jersey by reference to a common legal heritage, the case of *O’Keefe v. Caner*[[5]](#footnote-5) is a curiosity in that a substantive but controversial point of Jersey law was determined at a hearing on preliminary issue in the English High Court.

The preliminary issue was a point on time. Limitation, or properly *prescription* in Jersey, is not codified by Jersey law. Over time there has been at least a perceived conflict between the French commentators, particularly *Pothier*, and the Royal Court in both *Re the Esteem Settlement*[[6]](#footnote-6) and *Nolan v. Minerva Trust Company Limited*[[7]](#footnote-7) as to the proper prescription period for a claim for breach of a director’s duty. Having received expert evidence from three Jersey Advocates, the High Court resolved the issue of the prescription period applicable to such a claim by fixing it at a lengthy 10 years.

A rebuttable presumption for a prescription period of 10 years has long been applied to an “*action personnelle mobilière*” (an action founded on a personal obligation), but while particular statutes had operated to clearly rebut that presumption, a fashion had developed to seek to rebut it by asserting that a distinct but “related” cause of action was “analogous”. In *O’Keefe*,the Court confirmed the analogy principle, but rejected arguments that a breach of Article 74 was analogous to a tort or a trust, both of which have separate statutory periods of 3 years, because it was a breach of a statutory duty which had a coincidental fiduciary duty.

In Jersey, the existence of an *empêchement d’agir* stops the prescription period running. An *empêchement* arises where an innocent party is legally or practically unable to act due to lack of legal capacity or practical capacity objectively assessed. This issue has been rarely litigated, but it could only operate to increase the prescription period. The Court found, on the expert evidence it had received, there was no reason to depart from the 10 year period and that the presumption had therefore not been rebutted in respect of Article 74 claims. This confirmed a prescription period in Jersey which is 4 years longer that the default period in the UK and other Commonwealth jurisdictions.

**The Future and the Past**

The global financial crisis occurred in 2008 and the rescue plans put into place to recover from that crisis were conceived and implemented in 2009 and 2010. Regardless of whether a company’s failure to change its board or the lack of the appointment of a liquidator may have given rise to an *empêchement*, the decision in *O’Keefe* means that Jersey directors or their insurers might still be liable for actions taken up to 10 years ago, but they will now be judged by reference to the clear and cogent standards of 2017, including the insight from the decisions in *Carlyle* and *Ivey*.

1. [2017] Civil Action No. 1510. [↑](#footnote-ref-1)
2. [2017] 3 WLR 1212. [↑](#footnote-ref-2)
3. [1982] QB 1053. [↑](#footnote-ref-3)
4. [2005] UKPC 37. [↑](#footnote-ref-4)
5. [2017] EWHC 1105 (Ch). [↑](#footnote-ref-5)
6. [2002] JLR 53. [↑](#footnote-ref-6)
7. [2014] JRC 078A. [↑](#footnote-ref-7)