Judgment 30/2011 **Carlyle Capital Corporation Limited, Roberts et all & Conway et al – Court of Appeal file No 435 – 15th September, 2011**

Companies (Guernsey) Law 1994, application for leave to appeal the judgment given by the Royal Court – company liquidation – decision on jurisdiction to hear dispute – Delaware or Guernsey. Appeal for leave to appeal and for the substantive appeal to be heard, referred to the plenary sitting of the Court of Appeal.

THE COURT OF APPEAL OF GUERNSEY

The 15th day of September, 2011 before The Hon Michael Jacob Beloff QC presiding, Michael Scott Jones QC and Clare Patricia Montgomery QC

1. **CARLYLE CAPITAL CORPORATION LIMITED (IN LIQUIDATION)**
2. **ALAN JOHN ROBERTS, NEIL MATHER, CHRISTOPHER MORRIS, ADRIAN JOHN DENIS RABET, solely in their capacity as Joint Liquidators of Carlyle Capital Corporation Limited (In Liquidation)**

(Applicants/Plaintiffs)

-v-

1. **WILLIAM ELIAS CONWAY JR**
2. **JAMES H HANCE JR**
3. **JOHN CRUMPTON STOMBER**
4. **MICHAEL J ZUPON**
5. **ROBERT BARCLAY ALLARDICE III**
6. **HARVEY JAY SARLES**
7. **JOHN LEONARD LOVERIDGE**
8. **CARLYLE INVESTMENT MANAGEMENT LLC**
9. **TC GROUP LLC**
10. **TCG HOLDINGS LLC**

(Respondents/Defendants)

On the application by the Applicants for leave to appeal the judgment given by the Royal Court (Ordinary Division) on the 22nd July 2011;

THE COURT, having on the 14th September 2011 heard from Advocates J M Wessels, Advocate S H Davies and Advocate G K Bell, REFERRED the appeal to the plenary court, in the terms attached.

J TORODE
Registrar of the Court of Appeal

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IN THE COURT OF APPEAL OF GUERNSEY

15th September 2011

Before: The Hon Michael Jacob Beloff QC
Michael Scott Jones QC
Clare Patricia Montgomery QC

Judges of Appeal

Between:

(1) CARLYLE CAPITAL CORPORATION LIMITED (IN LIQUIDATION) **(Applicants/Plaintiffs)**

(2) ALAN JOHN ROBERTS, NEIL MATHER, CHRISTOPHER MORRIS, ADRIAN JOHN DENIS RABET, SOLELY IN THEIR CAPACITY AS JOINT LIQUIDATORS OF CARLYLE CORPORATION LIMITED (IN LIQUIDATION)

-v-

(1) WILLIAM ELIAS CONWAY Jr **(Respondents/Defendants)**
(2) JAMES H HANCE Jr
(3) JOHN CRUMPTON STOMBER
(4) MICHAEL J ZUPON
(5) ROBERT BARCLAY ALLARDICE III
(6) HARVEY JAY SARLES
(7) JOHN LEONARD LOVERIDGE
(8) CARLYLE INVESTMENT MANAGEMENT L.L.C.
(9) TC GROUP L.L.C.
(10) TCG HOLDINGS L.L.C.

Advocate J M Wessels appeared for the Applicants
Advocate S H Davies (First to Fourth & Eighth to Tenth) &
Advocate G K Bell (Fifth to Seventh) appeared for the Respondents

Cases, Authorities & Texts referred to: -

Trant v AG [2007] JCA 073
Reichold Norway ASA v Goldman Sachs International [2000] 1 WLR 173
Glazebrook v The Housing Committee of the States of Jersey [2002] JCA 217
McNamara v Gauson a decision of Collas DB of 22 March 2010

The President

1. This is the judgment of the Court.

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2. In this matter the Plaintiffs, the Liquidators of Carlyle Capital Corporation Limited ("CCC") a company incorporated in Guernsey, allege that the former de jure, de facto and shadow directors of CCC and the former investment manager of CCC, between July 2007 and February 2008, acting in reckless breach of their fiduciary and other duties to CCC wrongfully traded so as to render CCC's insolvent liquidation inevitable. The actions and omissions complained of are said to have caused losses exceeding US$1 billion. The first to seventh defendants are the former de jure directors of CCC, four of whom were also executives of the global private equity firm known as The Carlyle Group. The eighth to tenth defendants are entities within The Carlyle Group.

3. On the 7th July 2010, Lieutenant Bailiff Talbot QC granted ex parte leave to serve the proceedings out of the jurisdiction on all of the non-resident defendants (i.e. the first to sixth and eighth to tenth). On the 22nd July 2011 DB Collas declined to set aside the order for leave to serve out of the jurisdiction on the basis that certain of the plaintiffs' statutory claims were justiciable only in Guernsey. However, DB Collas imposed a temporary stay of all the proceedings in Guernsey pending the determination of the plaintiffs' non statutory claims by the courts of Delaware, by reference in particular to a forum selection clause contained in an investment management agreement between CCC and the eighth defendant only ("the stay").

4. On the 18th August 2011, DB Collas considered the application for leave to appeal brought against the stay only and dismissed it. The plaintiffs, as is their right, (under the Court of Appeal (Guernsey) Law 1961) sought to renew their application for leave to appeal to the Bailiff, sitting as a Single Judge of the Court of Appeal. He noted that counsel for all parties agreed that, were he to refuse the grant of leave, the application would inevitably be renewed before a plenary Court of Appeal.

5. The issue which divided the parties before the Bailiff was not only whether the application for leave to appeal should or should not be granted ("a substantive issue"), but whether it should be considered in isolation (the defendants' position) or whether there should be a rolled up hearing in which the application for leave and (on the contingency that leave would be granted) the appeal itself should be dealt with at a rolled up hearing ("a procedural issue") (the plaintiffs' position) see Trant v AG [2007] JCA 073 at para 1. It is the procedural issue which the Bailiff sensibly referred to us.

6. The Plaintiffs' position is that, in order to persuade the Court to grant leave, it might be necessary to deploy full submissions of the kind which would be deployed upon a full appeal. The Defendants' for their part, submit that the issue of leave can be separated and would take less of the court's time than a full appeal.

7. We remind ourselves that the Deputy Bailiff's decision to grant a stay was both a discretionary decision and case management decision. It is now well established that a Court of Appeal should be circumspect in interfering with decisions in either category. In Reichold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 at 184, Lord Bingham, Lord Chief Justice, accepted the submission of Mr Pollock QC:

> *"The court of appeal should be very slow to interfere with procedural directions of a judge unless directions were vitiated by error of law or manifest error, neither of which were demonstrable here".*

8. There is a trend found in the mainland jurisprudence of abstention from appellate review of case management decisions save in exceptional circumstances. We consider that such jurisprudence, which has a soundly based rationale in pursuit of the overriding objective, should be followed in Guernsey. We therefore proceed on the basis that the burden which lies upon the Plaintiffs successfully to appeal the decision of the Deputy Bailiff is a heavy one. If,

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as the Defendants contend, they will clearly be unable to discharge that burden, it would be in the interests of all parties, that such be established in as expeditious a manner as possible.

9. The issue on the application for leave will be whether the Plaintiff has or has not, a "*reasonable prospect of success*" in appealing the Deputy Bailiff's decision. We prefer that formula to the one adopted by the Jersey Court of Appeal in Glazebrook v The Housing Committee of the States of Jersey [2002] JCA 217 which is whether there is a "*clear case of something having gone wrong"* – a test which might be more appropriate to final disposition of an appeal, rather than disposition of an application for leave, albeit that in many cases either will produce the same result. See McNamara v Gauson a decision of Collas DB of 22 March 2010 para 28:

> *"The wording of the first limb of the test laid down in the P D of 1999, 'a real prospect of success', is different from the test applied in Jersey, 'a clear case of something having gone wrong', but the two are similar and it is likely that in very many cases both tests will produce the same result."*

10. The Plaintiffs in their Notice of Appeal dated 8th August 2011 have set out eight separate grounds of appeal. We have at this stage to consider the quality, not the quantity of those grounds. Obviously, it is not for us in determining the procedural issue, i.e. the manner in which the application for leave should be determined, to form or express any final view on their merits. That will be for this court on a future occasion. What we need to do is to determine whether prima facie the Plaintiffs seem unlikely to show that they have a realistic prospect of success in the appeal, so inclining us to accede to the Defendants' submission as to the better way to deal with the case (i.e. an application for leave in isolation) or whether on the contrary, prima facie, the Plaintiffs seem at least likely to show they will have a sufficient realistic prospect of success in the appeal so as to encourage a rolled-up hearing.

11. We are unable to say that the Plaintiffs' grounds are so thin as to be unlikely to pass the threshold of "*reasonable prospect of success"*. In particular we can see the force of the submission that the Deputy Bailiff did not give sufficient attention to the principles underlying the grant of case management stays and that the Plaintiffs were not given an adequate opportunity to address the Deputy Bailiff on this issue. It was confirmed in the hearing before us that the issue of a case management stay arose only tangentially during the hearing before the Deputy Bailiff and it appears to us to be strongly arguable that given the centrality of the issue in the decision ultimately reached by the Deputy Bailiff it may well provide by itself a strong ground for granting leave to appeal, notwithstanding the discretionary component in the decision to grant the stay. This is particularly so given the principle that stays which may prevent a plaintiff from pursuing proceedings in his forum of choice are a rarity, see Reichold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 at 186.

12. In any event, our collective experience as advocates and judges leads us to believe that in the absence of an obvious knock-out blow, the difference between the length of time taken on an application for leave compared with the length of time taken on a substantive appeal will be less than the Defendants assert.

13. If we were to accede to the Defendants' argument it would only prove with hindsight to have been the best course if the Defendants were to be successful in resisting the application for leave to appeal. If they failed, then the merits of the appeal would fall to be determined by another Court of Appeal (possibly, even probably, not constituted by the same members who heard the application in isolation) which would be wasteful of time and cost.

14. If we accede to the Plaintiffs' argument, there is of course a risk that the Court would either refuse leave or grant leave and refuse the appeal, but at least it would be the same Court.

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Moreover, the merits of the appeal would, one way or another, be decided without any danger of further delay.

15. For those reasons we conclude that there should be a rolled up hearing as soon as possible preferably before a Court of Appeal in November when the Advocates with carriage of the argument are available. We consider that 5 days should be set aside for that hearing. We have taken into account the submissions made to us orally as well as those made in correspondence although we consider it is unfortunate that the Defendants written submissions were not made orally before us. In the normal course additional written submissions should not be made. Any advocate attending a hearing of the Court should be prepared to make all relevant submissions orally. The directions proposed in the Plaintiffs' Skeleton argument para 6 seem to us to be appropriate and we decline to adjust the timetable as suggested by the Defendants. There will however be liberty to apply should it prove impossible to arrange for a Court of Appeal to sit in November 2011.

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