THE BARBADOS BAR ASSOCIATION

WHITSUN WEEKEND LAW CONFERENCE

Hilton Barbados Resort
Needhams Point
St. Michaels
Barbados
02nd June 2017 – 04th June 2017

A DIRECTOR'S DUTY TO ACT IN THE BEST INTERESTS OF THE COMPANY – THE BARBADOS PERSPECTIVE

Ronnie Bissessar
Head of Chambers
Lawgivers
Attorneys at Law
11A Gordon Street
San Fernando
Tel: (868) 652-9370/657-7044
Email: lawyers@thelawgivers.com

A DIRECTOR'S DUTY TO ACT IN THE BEST INTERESTS OF THE COMPANY – THE BARBADOS PERSPECTIVE

Introduction

1. Madam Chair, In Barbados every officer and director must act honestly and in good faith with a view to the best interest of the company. This is the effect of section 95(1) of the Companies Act CAP 308.

2. The Companies Acts in the Commonwealth Caribbean contain similar provisions as noted by Anthony Burgess JA in his excellent text *Commonwealth Caribbean Company Law*[1] but there are subtle differences in the legislation which, when closely examined, suggests that a director's overarching duty to act *bona fide* may be interpreted differently depending on where in the Caribbean the fiduciary duties are being enforced.

3. The subtlety is not so much in what the duty is or to whom it is owed[2] but rather what are the considerations a director may take into account in determining what are the best interests of the company.

4. In Barbados by section 95(2)[3]:-

> *"(2) In determining what are the best interests of a company a director must have regard to the interests of the company's employees in general as well as to the interests of its shareholders".*

5. In determining what is in the best interest of the company, the Barbados Court of Appeal in Civil Appeal No. 17 of 2001 between Knox -v- Deane *et al* referred to section 95 (1) of the Companies Act CAP 308 and noted that in the absence of any unanimous shareholder agreement restricting the powers of directors, the directors were required to discharge their duties in accordance with the Companies Act, the Regulations, the Articles of Continuance and the By Laws of the company.

[1] at p. 231, 2013 Edn.
[2] the duty is to act in the best interest of the company and this duty is owed to the company and not to individual directors: Percival -v- Wright [1902] 2 Ch 421
[3] of the Companies Act CAP 308

6. In Knox, *supra* Their Lordships in the Court of Appeal also referred to the decision in Pelling et al -v- Pelling et al [1981] B.C.S.C. 130 D/L.R (3) 761 where Berger J underscored that a director's duty is to the company.

7. In Trinidad and Tobago, a director is required to consider the same stakeholders, as in Barbados, namely, the employees and shareholders, but his is expressly a mandatory duty as section 99(2) of the Trinidad and Tobago's Companies Act[4] uses the word *shall* whereas the permissive *may* is used in the Companies Acts in Jamaica, Antigua, Dominica, Grenada, Monsterrat, St. Lucia and St. Vincent.

8. Barbados' legislation, as far as I can determine, is the only one which uses the expression *must* which, arguably, makes the duty more imperative than permissive.

9. While the draughtsmen's use of, variously, *must*, *may* and *shall* may cause consternation to those who prefer certainty in their law, it does provide very fertile ground for Caribbean practitioners who love nothing better than to wallow in the murkiness of ambiguity.

10. The jurisprudence, however, suggests that notwithstanding the ambiguity in the statutory provisions, the Courts in the Commonwealth Caribbean have repeatedly held that the companies' and their shareholders' interests coincide on the basis that what is in the best interest of the company is the same thing as what is in its best financial interest. This is in the context that the shareholders' principal concern is to increase the capital value of his share and to enhance his dividend. In other words, both the company and the shareholder are interested in the same thing, namely, an enhanced bottom line.

11. It is not so simple however because in Smith -v- Fawcett Ltd[5] the Court underscored that what is in the best interest of the company is, at best, a subjective view but this will only apply, of course, if all the shareholders are treated equally[6]. In other words, a director's

[4] Chapter 81:01
[5] [1942] Ch 304
[6] Galloway -v- Hallé Concerts Society [1915] 2 Ch 233

fiduciary duty to act in the company's best interest is made easier if the profit motive is the sole if not principal consideration.

12. How then do we deal with decision making by directors who, as are often the case, substantial shareholders of the companies they serve? In Mills -v- Mills[7] the Australian Supreme Court held that there was no conflict of interest where directors managed to harmonise their own personal and financial interests as shareholders with the companies' interest by acting solely on the basis of the bottom line.

13. The tide may be turning however because directors in Barbados and the Commonwealth Caribbean are required to consider, in determining what is in the best interest of the company, not only the interest of shareholders but also the interest of employees.

14. It must be stated at the outset that the statutory invitation to consider the employees is a reversal of the common-law position as was noted in Parker -v- Daily News Ltd[8] and the reason is clear: generally, the bottom line interests of shareholders and the company is inconsistent with the interests of employees which are primarily job sustainability and higher wages. So, how do we reconcile these clearly apposite views?

The Stakeholder Debate

15. The answer may lie in what is referred to as the Stakeholder Debate in which the Courts have been invited to widen the categories of stakeholders which/who must be considered by directors in determining what is in the best interest of the company.

16. Indeed, in Jamaica, the widening has been achieved statutorily since by section 174(4) of its Companies Act, in addition to shareholders and employees, directors may consider *the interest of the community.* The problem with that expression, however, is that it is much too generic since the community has no legal personality so that in an Oppression or Shareholder Remedy an aggrieved shareholder may be unable to precisely explain to whom this duty is owed.

[7] [1938] 60 CLR 150
[8] [1962] Ch 927

17. In Barbados, it is possible to argue that the considerations are not primarily confined to the interests of shareholders and employees if only because the definition of *complainant* in the Oppression and Shareholder Remedies at section 225(b)[9] is wide enough to accommodate a creditor, customer, depositor, supplier and possibly even the environment since what constitutes a *proper person* for the purposes of section 225(b)(iv) is not exhaustively defined and the Court exercises a considerable discretion.

18. In this context, the Canadian Supreme Court decision in People's Department Stores Ltd (1992) Inc -v- Wise[10] may be helpful in enlarging the definition of *complainant*. There, in interpreting the Canadian Business Corporations Act 1974 (which is the model upon which Commonwealth Caribbean Companies Acts have been fashioned) it was observed:-

> *"In determining whether [directors] are acting with a view to the best interest of the corporation it may be legitimate…to consider the interest of shareholders, employees, suppliers, creditors, consumers, governments and the environment".*

It must be noted that Dr. Phillips who is presenting after me has also cited People's Department Stores Ltd. I have had the benefit of reading his Paper in *draft* and his citation is in relation to the point that the Courts should be reluctant to second guess business judgments made by unconflicted directors if they have acted prudently.

19. It is noteworthy that the Canadian Business Corporations Act has heavily influenced the companies law jurisprudence in the Commonwealth Caribbean. In Canwest International Inc. *et al* -v- Atlantic TV Limited and Anor, Williams CJ in delivering the judgment of the Barbados Court of Appeal in *obiter* comments noted that:-

> "*It is common knowledge that the Barbados Companies Act borrowed heavily from Canadian precedents…*"[11]

20. The Stakeholder Debate has been stoked in Barbados, perhaps unwittingly so, by the Corporate Governance Guidelines issued in February 2013 by the Central Bank of

[9] of the Companies Act CAP 308
[10] [2004] 3 SCR 461
[11] BB 1994 CA 27; at p.4

Barbados which reminded directors of state owned companies that in discharging their responsibilities:-

> *"… the Board should take into account the legitimate interests of shareholders, depositors and other relevant stakeholders. It should also ensure that the [company] maintain a good relationship with its regulators"*[12]

21. In widening the list of stakeholders to include depositors and regulators, it is my respectful view that the Central Bank of Barbados is on good grounds since in the most progressive shareholder models which underscore wealth creation as the principal duty of directors, the latter are invited to balance the competing interests of multiple stakeholders using their best business judgment on the basis that the ultimate decision must always be in the best interests of the company; by this model, the stakeholders are never exhaustively defined but directors, in considering the interest of specific stakeholders, should be able to defend their decision on the basis of materiality and proportionality.

C. The Enlightened Shareholders Value Principle

22. The Stakeholder Debate has already morphed into what is now called the *Enlightened Shareholders Value Principle* which, at its core, maintains that the duty of a director is to act in good faith in a manner most likely to promote the *success* of the company for the benefit of its members. This principle which was codified in section 172 of the English Companies Act 2006 is the statutory underpinning of the movement to substitute disparate, often conflicting, stakeholders' interests for a common goal of promoting the success of the company.

23. Moreover, *best interest* is no longer confined to *best financial interest* but has been widened to mean simply *success* which can also be measured in non-pecuniary terms thereby allowing directors, for instance, to defend a decision not to build a smelting plant because of long-term environmental degradation rather than be boxed into the short and medium term goals of increasing the company's profits and expanding employment.

[12] paragraph 4.0 *The Board of Directors* at p. 4

24. It may be necessary therefore to statutorily embrace the English governance trend which, for instance, requires directors to exercise independent judgment[13] but this may mean distancing ourselves from the Canadian Business Corporations Act and the Canadian jurisprudence which we have long cited in our various Oppression and Shareholder Remedies. It may be argued that the Canadian and English positions are not necessarily at odds since in both, *oppression* is driven by the same equitable principle of unconscionability.

25. The irony should not be lost on us as practitioners, however, since our unhappiness with the English Companies Act 1929 and its ancient and inflexible company principles crippled with Victorian language was what, principally, drove us into welcoming arms of the Canadians.

26. In underscoring the widening of directors' fiduciary duties, it may be that we in the Commonwealth Caribbean have been late to the party since the Cadbury Report in the UK as early as 1992 encouraged the appointment of non-executive independent directors who would bring:-

> *"…an independent judgment to bear on the issues of strategies, performance and resources including key appointments and standards of conduct".*

27. Having said that the Barbados Stock Exchange in its Corporate Governance Recommendations for listed companies have long advocated the appointment *of a cadre of independent directors* with independence being determined primarily in relation to shareholding but also on the basis that independent directors are:-

> *"…free from any material interest and any business or other relationship which could or could reasonably be perceived to interfere with the Director's ability to act with a view to the best interest of the company…"*[14].

[13] by section 173 of the Companies Act 2006 (UK)
[14] clause 3.13 (Recommendation 17)

28. The notion of director independence as being the easiest oversight route to police director's decision-making and to ensure that the decisions are in the best interest of the company is neither new nor novel. It is the overarching principle in the Corporate Governance Code developed and unveiled in November 2013 by the Caribbean Corporate Governance Institute in partnership with the Trinidad and Tobago Stock Exchange and the Trinidad and Tobago Chamber of Industry and Commerce.

29. In considering the Barbados perspective of the duty to act in the best interest of the company, it may be useful, however, for consideration to be given to widening the definition of *directors* in the Barbados Companies Act to include not only *de jure* but *de facto* directors, that is to say, directors who are not elected at general meetings but who hold themselves out as and are publicly regarded as *de jure* directors.

30. The *de facto* director is different from the Jamaican *shadow director* which includes individuals who are influential in the operation of the company but are not *de jure* directors[15] or *de facto* directors if only because the *shadow director* delights in lurking in the background as the ultimate power broker[16].

31. Burgess JA however has made the point that notwithstanding that the onerous fiduciary duties we have described are referable only to *de jure* directors, most of the Commonwealth Caribbean Companies Acts (including Barbados)[17] contain savings clauses which means that the acts of a director cannot be challenged on the basis of a defect in his appointment or qualification[18].

Conclusion

32. It is submitted that in Barbados:-

    (i) every director is required to act honestly and in good faith with a view to the best interest of the company[19];

[15] sections 194, 195 of the Jamaican Companies Act; see also the Companies Act 1985 (UK)
[16] described in Re: Hydrodam Ltd [1994] 2B CLC 180
[17] section 81 of the Companies Act CAP 308
[18] at p. 219, Commonwealth Caribbean Company Law op cit
[19] by section 95(1) of the Companies Act CAP 308

(ii) in determining what are the best interests of the company, a Barbadian director *must* have regard to the interest of shareholders and employees;

(iii) the expression *must* should be regarded as an imperative as it is juridically treated as mandatory; indeed, even the *may* in the Companies Acts of Jamaica, Dominica, Grenada, Monsterrat and St. Lucia are not juridically treated as permissive;

(iv) in the Caribbean and Barbados in particular the companies' best interest is generally regarded as meaning the companies' best financial interest or bottom line which harmonises this interest with the shareholders' desire to maximise the capital value of his share and the dividend; this is notwithstanding the injunction in Barbados and most of the territories for directors to also consider the employee's interest which, generally, is divergent from the shareholder's interest;

(v) Jamaica is the only Caribbean country which statutorily requires its directors to look beyond the shareholder and employee and introduces the community as a stakeholder;

(vi) the Jamaican model underscores the Stakeholder Debate which encourages the widening of the stakeholder categories but is not as progressive as the Enlightened Shareholder Value Principle by which directors are encouraged to embrace creditors, depositors, consumers, governments, the environment, regulators and the public as stakeholders;

(vii) the Caribbean Commonwealth companies' jurisprudence encourages the widening of the stakeholder categories and consequentially the expansion of categories of *complainants* in the various Oppression and Shareholder Remedies so that in relation to section 225(b) of the Barbados Companies Act it may be successfully argued that suppliers, creditors, consumers, the environment, regulators, the government and the general public may be proper persons as *complainants*; and

(viii) it may be useful in Barbados to consider widening the definition of directors to include *de facto* and even *shadow directors* to bring these persons in the enforcement net of Oppression and Shareholder's Remedies and to promote the appointment of independent directors to reduce the likelihood of the companies' best interests being subsumed by personal or financial vested interests and to achieve the statutory mandate of acting in the best interests of the company.

Ronnie Bissessar
Head of Chambers
Lawgivers
Attorneys at Law

01st June 2017