



**CARIBBEAN CORPORATE GOVERNANCE INSTITUTE**

**GOVERNANCE WEEK**

**DAY 3 (WEDNESDAY 29<sup>TH</sup> JUNE 2022) 3:00 P.M. – 4:30 P.M.**

**SPOTLIGHT ON DIRECTORS' DUTIES – THE JCPC DECISION IN  
JULIEN AND ORS. -V- ETEK [2018] UKPC, BRIGGS LJ (19<sup>TH</sup>  
FEBRUARY 2018)**

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## **SPOTLIGHT ON DIRECTORS' DUTIES – THE JCPC DECISION IN JULIEN AND ORS. -V- ETEK [2018] UKPC, BRIGGS LJ (19<sup>TH</sup> FEBRUARY 2018)**

1. Christopher Sieuchan in his presentation has admirably summarized the findings of the JCPC principally in relation to the limitation periods for bringing claims against delinquent directors.
2. I want to widen the discussions to discuss directors' duties not only in relation to the Etek case but also the judgment of the Hon. Madam Justice Quinlan-William in CV 2010-01352 between Clico Investment Bank -v- Louis Andre Monteil & Ors and other cases and the legislation.

### ***Statutory and Fiduciary duties of Directors***

3. All directors, whether of private limited liability companies, publicly listed companies or state-owned enterprises, are fiduciary agents and are statutorily required to act in accordance with sections 99(1), (2) and 60(b) of the Companies Act Chapter 81:01 ("the CA") which requires them to:-
  - (1) act honestly and prudently in the best interest of the company; and
  - (2) maintain oversight over the company's business and affairs.
4. A similar provision in section 95(1) of the Barbados Companies Act was described by Andrew Burgess (a former Justice of Appeal of the Barbados Court of Appeal and the author of Caribbean Commonwealth Company Law at p. 231) as a fiduciary duty to act *bona fide* and in the company's best interest which, he said, was the central plank of the fiduciary duties owed by directors to their company.
5. Burgess reminds us at p. 235 that although directors' authority to bind the company as its agents usually depends upon their acting collectively as a board, their fiduciary duties are owed by each director individually.

6. Fiduciary duties are owed not only by every director of a company, but also by every officer; *officers* (by section 4 of the CA) include a general manager, comptroller, secretary and treasurer or any other person performing the same or substantially similar functions.
7. In the case of state-owned enterprises (“*SOEs*”), directors are considered persons in *public life* and are additionally caught by the provisions of the Integrity in Public Life Act Chapter 22:01 (“*the IPLA*”) (in particular the Code of Conduct).
8. They are also caught by the Prevention of Corruption Act Chapter 11:11 and the Public Procurement and Disposal of Public Property Act No. 1 of 2015. Further, directors of SOEs may also be subject to specific legislation governing their particular SOE, for example the National Carnival Commission Act Chap 42:01, the Trinidad and Tobago Unit Trust Corporation Act Chap 83:03 and the NAMDEVCO Act Chap 63:05.

#### ***Governance in the Boardroom – the Court’s view***

9. Equally important is for directors and officers to be alive to the findings and inferences of the Court as to how the CA regulates fiduciary duties and obligations.
10. This is in the context that for most of the English-speaking Commonwealth, governance in the boardroom is not *rule-based* but *principle-based*. This means that what you can or cannot do is not written in simple terms in a legal document but requires an interpretation of principles rather than rules.
11. Having said that, the trend is now clearly in favour of *rule-based* governance as, for instance, the IPLA and its Code of Conduct which defines *ethical conduct*, so that directors and officers are more easily able to assess their governance in line with legislation and rules.
12. Recent cases underscore rule-based governance and the increasingly onerous fiduciary duties and responsibilities of directors:-

(1) in CV 2013-00212 between UTT -v- Prof Ken Julien and Ors, Kokaram J (as he then was) considered whether directors acted prudently in failing to terminate a lease and identified the issue as being whether the directors procured and acted upon expert advice and at paragraph 57 noted that:-

*“A breach of trust in itself is a violation of an equitable obligation... the remedy of which lies in equity”;*

(2) in CV 2011-03992 between ETECK -v- Kenneth Julien and Ors, Rampersad J described section 99(1) of the CA in terms that while a duty of care is not owed by a director to a shareholder, there is a fiduciary duty owed by the director to the company and *ipso facto* its shareholders [paragraphs 38-40];

(3) in an appeal of a limitation point arising from Rampersad J’s judgment in the same ETECK case, the Court of Appeal (Bereaux and Rajnauth-Lee JJA) said that *shareholders owe no duty of care to the company, directors do*; and

(4) in a further appeal of the same decision to the Privy Council, the decision of the Court of Appeal was affirmed and at para 52 the PC said, importantly:-

*“Section 14 of the Limitation Act is concerned not with the knowledge of claimants at a particular moment of time when taking some positive step, but rather with their knowledge or their means of discovering the relevant facts, exercising due diligence, within some period of time after the occurrence of the breach giving rise to a cause of action.”*

(5) In CV 2017-01415 between TN Ramnauth and Company Ltd –v- EMBDA and Ors, Aboud J (as he then was) held at para 168, that a breach of fiduciary duty can constitute an unlawful act for the purposes of a tort (such as unlawful means conspiracy), *if such a breach is proven to be in concert with other actions and injures a claimant*; and

- (6) In Civil Appeal No. P-024/2017 between CEPEP -v- Dr. Roodal Moonilal, Mendonca JA at para 48 explained that:-

*“...the board of directors are responsible for the management of the company and it is within the boards powers, duties and discretion to make a number of decisions that would impact on the business of the company.”*

13. From Clico Investment Bank supra:-

- (1) the courts treat with breaches of duties robustly and the *onus* of proof, once an issue of fraudulent corporate conduct is raised, shifts to the *impugned* director to defend his decision; this is in the context that by the time the matter comes to court, the director may have ceased being a director and *ipso facto* the minute is the only conclusive record to support or defend a director’s decision;
- (2) the indemnity insurance usually taken by a company in favour of its directors, which provides for the reimbursement of legal costs and damages in suits brought by aggrieved members, will no longer apply if the director is adjudged to be guilty of a breach of a fiduciary duty; the effect is that the director is required to personally defend his decision and retain Counsel and, if necessary, pay damages and legal costs out of his own funds;
- (3) the directors' failure to act prudently is assessed in the context of the information/material that is available to them at the time that the decision is taken and whether they should have elected to procure independent and competent expert advice and, assuming that they did, whether they should have acted upon the advice; and
- (4) the statutory and fiduciary duties owed by directors, are not owed to each other or the persons who appointed them as directors; rather, they are owed to the company as an entity.

### ***The Business Judgment Rule***

14. In determining whether a director/officer has complied with his fiduciary duties, a Court is likely to apply an objective test, that is, whether a reasonable person believes that the particular act was in the best interest of the company.
15. However, company law also recognises that the success of a business usually requires the decision-maker to take reasonable and rational risks and, therefore, risk taking is included in the objective test, so that typically, a director would have satisfied his duty of care if he:-
  - (i) took diligent steps to become informed in connection to what is being considered;
  - (ii) does not have a personal interest in the matter (or this personal interest was declared); and
  - (iii) had a rational basis to believe that the decision was in the best interest of the company.
16. This business judgment rule is reflected in the CA specifically in relation to the entitlement of directors to an indemnity from the company in relation to risky decisions; this was the case a few months ago with the NGC, and the provisions establish that a company may indemnify directors against all losses incurred by him in respect of any claims against him, by reason of being a director.
17. The sting in the tail, however, is that such an indemnity is only applicable where the director acted honestly and in good faith with the view to the best interests of the company.
18. Similarly, the business judgment rule and the standard it imposes in relation to governance, means that there was no conflict of interest and the intent of the indemnity is clear: a director is obligated to put the interest of the company ahead of his own personal interest.

## ***Conclusion***

19. As part of its governance, the board should make regular self-assessments of its role and, formally, once a year, engage an external consultant to assess its governance in light of the prevailing fiduciary obligations. It is important, however, that this process be board-driven and not just a box-ticking exercise so that it truly is a useful self-improvement tool.

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***29<sup>th</sup> June 2022***