

How the £1 billion, seven-year Carlyle case puts Guernsey on the map for funds litigation

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A judgment on what is thought to be the largest civil case in Guernsey's history handed down on 4 September by the island's Royal Court cleared Carlyle Capital Corporation, a Guernsey investment fund that went into insolvency in the wake of the financial crash in 2008, of liability over its collapse.

The Carlyle Group, Carlyle Investment Management and TCGH, successfully defended claims including that its management of a Guernsey fund was in breach of duties alleged to be owed to it that led to total investment losses in the 2008 financial crisis.

Together with The Carlyle Group companies, the Royal Court's judgment also dismissed all claims considered at trial against each of its seven executive and non-executive directors.

The case, which is valued at well over £1 billion, involved a trial that ran just short of six months, and encompassed 971 pages of pleadings, 187 pleaded breaches of duty, 48 days of cross examination of both fact and expert witnesses, and culminated in a 525-page judgment handed down by Her Honour Hazel Marshall QC, Lieutenant Bailiff, sitting alone. We understand it to be the biggest trial that took place across the Commonwealth in 2016.

The scale of the case underlines not just Guernsey's position as one of the world's largest offshore finance centres, but also as a venue capable of handling the most complex and demanding funds litigation cases. Three particular reasons stand out.

Firstly, the technical infrastructure available at the Royal Court of Guernsey is of a quality which exceeds expectations for a jurisdiction of this size. Throughout the trial, 4,872 documents were referred to. The technology available allowed the instantaneous downloading of documents so that hard copy documents were rarely needed, increasing the speed at which witnesses could be examined and the ease of locating documentation. A live transcript feed was also available for the Judge, all Advocates, instructing counsel, onshore counsel and various support staff in the Court room, as well as a live feed of the hearing which was available to members of the parties in America. Further, due to unforeseen circumstances, one expert witness was able to give live video evidence remotely. This shows that the Royal Court of Guernsey is able to deal with large trials which involve a vast amount of documentation, lengthy witness evidence and multiple parties to the action.

The second strength demonstrated by the case is the skill and expertise of the Guernsey bar, and the Guernsey judiciary. This large and complex trial was able to take place in a relatively small jurisdiction due to the breadth, depth and quality of the lawyers acting. The size and strength of the Guernsey bar allows multiple parties, which there often are in litigation involving funds disputes, to be skilfully represented. This, coupled with the expertise of the judiciary, ensures that investors, and any other parties to a funds dispute, have the confidence to invest in funds in Guernsey. Her Honour Hazel Marshall QC, Lieutenant Bailiff, sitting alone at the trial, is a pre-eminent QC and former Specialist Chancery Judge and was well-placed to hear this dispute. This therefore gives investors the comfort that if something does go wrong

with a fund, any dispute will be fairly and expertly dealt with.

Thirdly, the strength of the island's legislation relating not just to financial services but also to companies and directors makes Guernsey stand out. Guernsey's comprehensive laws on areas such as director's duties, also make the jurisdiction attractive to professionals and practitioners who are involved in the funds industry. For example, a number of the alleged pleaded breaches of duty by the liquidators of Carlyle Capital Corporation involved the duties owed by directors of a Guernsey company. The law on directors duties in Guernsey is clear, developed and fully recognisable for any professionals and insolvency practitioners familiar with the common law regime.

The facts show clearly that Guernsey is one of the world's key players in the investment funds industry - in the first quarter of 2017 (the last period for which data is available), the Guernsey Financial Services Commission published statistics showing that the net asset value of total funds under management and administration in Guernsey was £266.5 billion.

That situation has not arisen by accident – it is due to the technical infrastructure available in the island, the skills of practitioners and the quality of its regulation and legislation. In exactly the same way, the Carlyle case has demonstrated that the same factors – technical infrastructure, skills and the quality of legislation – make the island perfectly equipped to handle the most complex funds litigation cases.

Advocate Simon Davies is Ogier's Global Head of Dispute Resolution. He has been engaged on the Carlyle case for seven years, and represented The Carlyle Group, Carlyle Investment Management and TCGH at the six-month trial, at the end of which the defendants were cleared on all 187 pleaded breaches of duty, wrongful trading, breach of contract and unjust enrichment. Simon specialises in contentious trusts, commercial litigation, and insolvency.

Charlotte Henshall is an associate in Ogier's Guernsey Dispute Resolution team. She qualified as an English Solicitor at the firm, and has a wide experience in commercial litigation and contentious trusts matters.

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