‘Twas the night before trial… Carillion NED test case dropped the eve before trial

15 December 2023 Tim Johnson

October found relief for both non-executive director’s and the D&O insurance market as the Carillion non-executive director 'test case' was abandoned the day before trial.

In January 2018 the Carillion Group, operator of construction, project finance and support services business (encompassing more than 350 operating subsidiaries with parent company Carillion plc) hit the headlines following its compulsory liquidation, despite previous efforts to save the company.

The circumstances surrounding the liquidation led to multiple investigations, Select Committee inquiries and the commencement of legal proceedings by the Financial Conduct Authority, the Financial Reporting Council, the Pensions Regulator, the Official Receiver and the National Audit Office.

In January 2021 the Insolvency Service, on behalf of the Secretary of State for Business and Trade, commenced disqualification proceedings against 5 of Carillion plc’s former non-executive directors.

The trial was due to start on Monday 16 October 2023, but the Insolvency Service discontinued these proceedings on the eve of trial.

Background

The Insolvency Service brought cases against the executives on the basis of the accounts. As they faced a limitation deadline, the Insolvency Service commenced proceedings in January 2021 under s.6 of the Company Directors Disqualification Act 1986 (CDDA), against eight former directors (including non-executive directors and executives), seeking their disqualification.

The disqualification undertakings resulted in the executives agreeing not to be involved in the management of any company for varying time periods. This meant the non-executive directors were the only remaining defendants.

The most notable part of the Insolvency Service’s claim was that it alleged the non-executive directors were in breach of the 'non-executive director duty' - the duty to know the 'true' financial position of the company at all times. They determined that by not knowing, the non-executive directors were also to be held responsible for the conduct of the executive directors and should be disqualified (although this element was later dropped). They also argued that regardless of the conduct of the executives, by simply not knowing about the alleged fraud - the non-executive director duty was breached, and they were therefore not fit to be involved in management.

Significance for directors and officers (D&O)

This disqualification case was described as a 'test case' by the Insolvency Service’s Kings Counsel, as no equivalent case relating to the non-executive director duty had been brought before.

Had it succeeded, there could have been significant consequences for directors, who would have been subjected to new, arguably impossibly higher standards, which are not thought to align with the very concept of the non-executive directors role and expectations under the Companies Act 2006.

Of course, such litigation also comes at a cost. Directors may struggle without D&O insurance cover; particularly where former directors find themselves with an insolvent company that can no longer provide funds or access previously instated cover and are left to fund their own defence costs.

The case abandonment will therefore provide relief for companies, as well as the D&O insurance market.

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