Judgment 29/2011 **Carlyle Capital Corporation Limited, Roberts et al & Conway et al – (Civil Action File No. 1510) – Royal Court - 22nd July, 2011**

The Companies (Guernsey) Law 1994 – company liquidation. Plaintiffs seeking to recover considerable damages and other relief. Failure of the duties arising under and connected with an investment management agreement. Similar proceedings issued in Delaware decision of jurisdiction between Delaware and Guernsey.

IN THE ROYAL COURT OF THE ISLAND OR GUERNSEY

The 22nd day of July 2011 before Richard John Collas Esquire, Deputy Bailiff, alone

(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 CORPORATION LIMITED (IN LIQUIDATION)

(Plaintiffs)

-and-

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 L.L.C
9. TC GROUP L.L.C
10. TCG HOLDINGS L.L.C

(Defendants)

Whereas on 27, 28 and 30 June and 1 July 2011 the Deputy Bailiff considered applications dated 28th February 2011, by the non-resident Defendants to set aside an Order for leave to Serve out of the Jurisdiction and alternatively for an Order that the proceedings be stayed pending the outcome of proceedings in the Courts of Delaware an heard thereon Advocates J M Wessels and P T R Ferbrache counsel for the Plaintiffs, Advocate S H Davies counsel for the First to Fourth and Eighth to Tenth Defendants and Advocate G K Bell Advocate for the Fifth to Seventh Defendants, the Deputy Bailiff this day handed down judgment in the terms attached hereto and

1. Ruled that the existing and potential statutory claims are not of such significance to swing the decision from Delaware to Guernsey.

2. Declined to set aside the application for leave to serve out of the jurisdiction.

3. Ordered that the proceedings be stayed, on the undertaking of the Seventh Defendant to submit to the jurisdiction of Delaware, pending the outcome of the proceedings in Delaware and that The Section 106 claim and any other claims, statutory or otherwise that the court may give leave to include by way of amendment shall then be determined in Guernsey in so far as they have not been decided in Delaware.

S M D ROSS
HM Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between: **(1) CARLYLE CAPITAL CORPORATION LIMITED**

(IN LIQUIDATION)

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(10) TCG HOLDINGS L.L.C

(Defendants)

Hearing: 27, 28 and 30 June and 1 July 2011

Judgment handed down: 22 July 2011

Before: Richard John Collas Esq., Deputy Bailiff

Advocates for the Plaintiffs: **J M Wessels and P T R Ferbrache**

Advocate for the First to Fourth and Eighth to Tenth Defendants: **S H Davies**

Advocate for the Fifth to Seventh Defendants: **G K Bell**

Cases, texts & legislation referred to:

The Companies (Guernsey) Law 1994 (as amended)

Rule 1 & 8 of The Royal Court Civil Rules, 2007

Vardinoyannis v Ansol Limited (Royal Court 24th May 2002)

AK Investment CJSC v Kyrgyz Mobil Tel Limited and

Altimo Holdings and Investment Limited v Kyrgyz Mobil Tel Limited [2011] UK PC7

Spiliada Maritime Corporation v Cansulex Limited [1987] AC 460 HL(E)

Masood v Zahoor (Royal Court [9th July 2007])

Artley AG v Joint Stock Company Almazy Rossii-Sakha (English Court of Appeal unreported 8th March 1995)

ISC Technologies Limited v Guerin [1992] 2 Loyds Rep 430 at p434

Metall & Rohstoff v Donaldson Inc [1990] 1 Q.B. 3

The Insolvency Act 1986, Section 212

Revenue and Customs Commissioners v Holland [2010] 1 WLR 2793

Re Eurocrut Europe Limited (in liquidation) [2007] EWHC 1433 (Ch)

Stone & Rolls v Moore Stephens [2009] 1AC 1391

In Re Paycheck Services Ltd [2010] 1 WLR 2793

Parkinson Engineering Services Plc v Swan [2010] 1BCLC 163

Re Pantmaenog Timber Co Limited [2004] 1AC 158

Base Metal Trading Limited v Shamurin [2005] 1WLR 1157

McPherson's Law of Company Liquidation, (Second Edition, 2009)

Re Canadian Land Reclaiming and Colonizing Co (Coventry and Dixon's case) (1880) 14Ch D660

Re City Equitable Fire Insurance Code [1925] Ch 407

Spread Trustee Company Limited v Hutcheson [2011] UKPC13

The "Goldean Mariner" [1990] 2 Lloyd's Rep 215

Donohue v Armco [2002] 4LRC 478

Winnetka Trading Corporation v Bank Julius Baer & Co Limited, (Court of Appeal 15th July 2009)

The Eleftheria [1969] 1 Lloyd's Rep 237

John v Price Waterhouse and Another [2001] 2All ER (D) 123

GFSC's *Guidance on Corporate Governance in the Finance Sector in Guernsey* dated 10 December 2004

Re Westmid Packing Service Ltd [1998] 2 All ER 124

Re Barings plc (No 5) [1999] 1 BCLC 433

El Paso Natural Gas Co v Transamerican Natural Gas Co 669 A.2d 36, 39 (Del. 1995)

NML LTD v Republic of Argentina [2011] UKSC 31

Parker v Schuller (1901) 17 TLR 299

Introduction

1. The First Plaintiff, Carlyle Capital Corporation Limited ("CCC"), was incorporated as a Guernsey Company on 29th August 2006. It was promoted by Carlyle, one of the world's largest private equity firms, to invest primarily in residential mortgage backed securities ("RMBS"). By July 2007, CCC had raised capital totalling US dollars 945,000,000 (US$ 945 million), through a series of private placements and an initial public offering and it was listed on the Euronext exchange in Amsterdam. The substantive proceedings in this matter concern the events of the following eight months during which global credit markets became increasingly volatile and during which period the entire capital of CCC was lost.

2. On March 17th 2008, CCC was placed in compulsory liquidation pursuant to Section 94(a) of The Companies (Guernsey) Law 1994 (as amended), ("the 1994 Law") on the application of the directors of CCC. The Second Plaintiffs are the Liquidators of CCC ("the Liquidators").

3. CCC financed its investments through short-term repurchase agreements giving extensive leverage. Consequently, when CCC collapsed, not only was the capital lost but it is alleged that there was a substantial deficit.

4. There are ten Defendants in the proceedings. The first seven Defendants were all directors of CCC. The first four Defendants held offices and/or were employees of other companies within the Carlyle Group. The fifth to seventh directors were appointed as independent members of the board of CCC. I will refer to the two groups of directors respectively as the "Carlyle Directors" and the "Independent Directors". The eighth Defendant, Carlyle Investment Management LLC ("CIM") is a Delaware registered company appointed as the investment manager and advisor to CCC, pursuant to an investment management agreement ("IMA"), dated 20th September 2006.

5. The ninth Defendant T C Group Ltd ("TCG") (which owned 75% of CIM) and the tenth Defendant (which is the sole managing member) of TCG are collectively referred to as "Carlyle" in the Plaintiff's *cause*, except where otherwise stated. Carlyle and CIM have been described collectively by the Plaintiffs as the "Corporate Defendants". It is alleged that by virtue of their control over CCC and by their conduct, the Corporate Defendants became *de facto* or shadow directors of CCC and thereby owed the same duties to CCC as its *de jure* directors.

6. In these proceedings the Plaintiffs seek to recover damages "*in a sum to be determined at trial exceeding $1 billion dollars"*, together with other relief. The Plaintiffs characterised the nature of their action as being one essentially concerned with the internal management, control and corporate governance of CCC. The Defendants characterised it as being essentially relating to failures of the duties arising under and connected with the IMA.

7. Similar proceedings were issued in Delaware, being the jurisdiction whose laws govern the IMA and whose courts have exclusive jurisdiction over any proceedings with respect to the IMA by virtue of an exclusive jurisdiction clause in the IMA. Delaware is the place of incorporation of two of the Defendants. Protective proceedings were also issued in New York and Washington DC where the Carlyle group has offices and where certain board meetings of CCC were held.

8. The seventh Defendant, one of the Independent Directors, is a resident of Guernsey and he is the only Defendant within the jurisdiction.

9. On 7th July 2010 the Plaintiffs applied for leave to serve the proceedings out of the jurisdiction on all the other Defendants ("the non-resident Defendants") pursuant to Rule 8 of The Royal Court Civil Rules, 2007. The application was heard and granted by Lieutenant Bailiff Talbot QC on an *ex parte* basis.

10. By applications, both dated 28th February 2011, the non-resident Defendants (who are represented by Advocates Davies of Ogier except for the Independent Directors who are represented by Adv Bell of Collas Crill) have applied to set aside the Service Order and alternatively for an Order that the proceedings be stayed pending the outcome of proceedings in the Courts of Delaware. Mention has been made of the possibility of the proceedings going ahead in New York or Washington but, at the hearing before me, neither of those jurisdictions was seriously pursued and I do not need to consider them in any detail in this judgment. The argument before me centred upon the choice of jurisdiction between Delaware and Guernsey.

11. I had the benefit of a number of affidavits, lengthy and detailed skeleton arguments, as well as four days of oral hearing during which the parties' arguments were put with clarity and consummate skill by their respective counsel and I am grateful for their assistance.

The Law - The *ex parte* application for leave to serve out of the jurisdiction

12. Service out of the jurisdiction is subject to Rule 8 of The Royal Court Civil Rules, 2007. The relevant provisions of Rule 8 provide as follows:

> *"8. (1) The Court may give leave to effect service of a document out of the jurisdiction.*

> *(2) The Court shall not make an order under paragraph (1) unless satisfied (by affidavit or otherwise) that the matter to which the document relates –*
>
> *(a) is properly justiciable before the Court, and*
> *(b) is a proper one for service out of the jurisdiction"*

13. Rule 8 is unchanged from Rule 7 of The Royal Court Civil Rules, 1989, which it replaced and about which Lieutenant Newman QC said the following in Vardinoyannis v Ansol Limited (Royal Court, 24th May 2002):

> *"It appears to be common ground that the Guernsey Court operates on similar principles to those set out in order 11 [of the Rules of the Supreme Court], even if not perhaps in exactly the same way, though I am not sure whether or not that is conceded. Nobody has suggested to me that for my purposes that the principles which I should apply are any different from the order 11 principles."*

14. Counsel in the matter before me accepted that the principles governing service out of the jurisdiction of the Guernsey Court operate in a similar way to those applicable to service out of the jurisdiction of the courts of England and Wales.

15. During their oral submissions, counsel made reference to applications for leave to serve out of the jurisdiction that regularly come before the Royal Court on a Friday morning. Very typically they are supported by the briefest of affidavits, usually sworn by the Advocate presenting the application. They address the very basic requirements of Rule 8 but invariably do not provide the information that would be required by an English court in order to comply with the more detailed requirements of the CPR and its Practice Directions. Frequently, the Advocate will express his opinion that the matter is properly justiciable before the Court and a proper one for service out of the jurisdiction without explaining the detailed reasons to support that conclusion. The arguments I have heard lead to the conclusion that on routine applications, many Advocates should be producing more detailed Affidavits to enable the Royal Court to take account of all the factors that it should properly consider.

16. In rule 8, "properly*"* and "proper" are not explained and leave scope for interpretation. In my view, they require the Court to have regard to the legal principles governing service out of the jurisdiction in England. Hence, it is appropriate to have regard to the recent decision of the Privy Council on appeal from the Isle of Man, referred to by the Plaintiffs as AK Investment CJSC v Kyrgyz Mobil Tel Limited and by the non-resident Defendants as Altimo Holdings and Investment Limited v Kyrgyz Mobil Tel Limited [2011] UK PC7. The appeal involved consideration of the Manx High Court Rules which were also based upon the former RSC Ord 11. The legal principles were set out in paragraph 71 of the judgment delivered by Lord Collins:

> *"71. On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: Seaconsar Far East Ltd. v Bank*

> *Markazi Jomhouri Islami Iran [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. Carvill America Inc v Camperdown UK Ltd [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [24]. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28]. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."*

17. In the present matter, the Defendants have not directly taken issue with the merits of the claim as required under the first limb of that test. I do not understand them to have directly conceded the merits but they do not raise them as an issue. Their attack has focused on the second and third limbs of the test and I propose to do the same.

18. All counsel approach the second limb of the test as if it required the Plaintiffs to establish that there is a good arguable case that the claim falls within a "jurisdictional gateway" even though there are no specific jurisdictional gateways referred to in Rule 8. In my opinion, that is the correct way to show that a matter is "properly justiciable before the court" in accordance with Rule 8(2)(a).

19. The jurisdictional gateways relied upon by the Plaintiffs when they applied *ex parte* for leave to serve out of the jurisdiction were:

    (a) That the Defendants were necessary and proper parties to the claims brought against the eighth Defendant who had been served as of right as he is resident in the jurisdiction.

    (b) A number of the alleged breaches of duty occurred during a board meeting of CCC held in Guernsey on 26th July 2007.

    (c) The non resident Defendants are the subject of claims arising under a Guernsey statute namely Section 106 of The Companies (Guernsey) Law, 1994 (as amended).

20. The third limb of the test concerns the principle that the Court must be satisfied that Guernsey is the "appropriate forum" for the trial action which was upheld by the House of Lords in Spiliada Maritime Corporation v Cansulex Limited [1987] AC 460 HL(E) which has been

applied in Guernsey on a number of cases including in Masood v Zahoor (Royal Court), LB Southwell QC, [9th July 2007].

The Law - *Inter Partes* Application

21. At this hearing I have to consider afresh the Plaintiffs' application for leave to serve the non-resident Defendants out of the jurisdiction. It is neither an appeal against, nor a review of, the decision of LB Talbot QC made at the *ex parte* hearing. The burden lies on the Plaintiffs to prove all the issues which determine whether permission should have been granted in the first place (Artley AG v Joint Stock Company Almazy Rossii-Sakha) (English Court of Appeal unreported 8th March 1995). As Hoffman J explained in ISC Technologies Limited v Guerin [1992] 2 Loyds Rep 430 at p434:

> *"the question is therefore whether [the ex parte] order was rightly made at the time it was made". Of course the Court can receive evidence which was not before the master and subsequent events may throw light upon what should have been relevant considerations at the time. But I do not think that leave which was rightly given should be discharged simply because circumstances have changed. That would mean that different answers could be given, depending upon how long it took before the application came on to be heard. The position is quite different when the application is for a stay on the grounds of forum non conveniens. In such a case, the appropriate time to consider the matter is the date of the hearing".*

22. In the present matter, the development that has occurred after the date of the hearing of the *ex parte* application and before the date of hearing the *inter partes* application is that the Plaintiffs have advised that if the Royal Court accepts jurisdiction, the Plaintiffs will be minded to apply to amend their cause in a number of respects, including to add new causes of action based upon statutory provisions contained in the Companies Law which the Plaintiffs claim are only justiciable in this Court. I will return to the proposed amended *cause* later in this judgment but in the meantime, I will confine myself to the pleaded *cause* as it presently stands which is in the form presented to LB Talbot QC at the date of the *ex parte* application.

The First Jurisdictional Gateway – "Necessary or Proper Party"

23. The legal principles governing this head of jurisdiction were considered by the Privy Council in AK Investment at paragraph 73:

> *"73. The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts: The Brabo [1949] AC 326, 338, per Lord Porter. Piggott, Foreign Judgments and Jurisdiction (3rd ed, 1910), pt III, p 238, said: "This is perhaps the most important of the sub-rules, for it throws the net of jurisdiction over a wider area; and the principle of*

considering the nature of the cause of action which pervades the whole subject, appears here to be ignored." Consequently as Lloyd LJ said in The Goldean Mariner *[1990] 2 Lloyd's Rep 215 at 222:*

> *"I agree .... that caution must always be exercised in bringing foreign defendants within our jurisdiction under 0.11 r.1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction."*

24. The Defendants accept that the Plaintiffs can make out jurisdiction to grant leave to serve out on this ground but they describe it as being the thinnest ground imaginable. They claim that the eighth Defendant was not a key player because he was an independent director who was not involved in the day to day running of CCC's investment business. They also point out that the other nine Defendants are all domiciled in the United States. They describe it as ludicrous to make the eighth Defendant a sole pivot around which jurisdiction against all the other Defendants swings.

25. In AK Investment, the Privy Council considered the position of a Defendant who is sued for the sole purpose of bringing another Defendant into the proceedings on the grounds of being a necessary or proper party. Lord Collins said the following at paragraph 79:

> *"The better view, therefore, is the fact that D1* [the anchor defendant] *is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is "properly brought" against D1, provided that there is a viable claim against D1".*

26. In the present case, it is not suggested that the eighth Defendant was sued only for the purpose of bringing in the foreign Defendants. He is sued in his own right as one of the Directors, all of whom have been sued because of the role that they played (or failed to play) in the events that led to the collapse of CCC. There is a viable claim against the eighth Defendant, the claim is properly brought against him and in my view, he can be used as the pivot or anchor around which the other Defendants can swing.

27. With regard to the "necessary or proper party" gateway, there is one further aspect. In the words of Lloyd LJ in The "Goldean Mariner", caution must be exercised before bringing a foreign defendant before the court. In that case, the Court of Appeal were satisfied that the judge at first instance had properly applied his mind to that question. In the summary at paragraph (6) on page 216 column 1 of the report of the Court of Appeal decision, Phillips J's decision is summarised as follows:

> *"The American defendants, i.e. the 11th, 14th, and 19th, when writing this insurance could reasonably have contemplated the possibility that proceedings might be initiated in England."*

28. In my view, a similar approach is appropriate in the present case. The Carlyle Group chose to incorporate CCC in Guernsey and the Director Defendants chose to be directors of a Guernsey company. They chose to take advantage of the legal, fiscal and regulatory regimes applicable in Guernsey; prior to applying to place CCC in liquidation, the directors gave careful consideration to the forum for the liquidation. The choice of Guernsey was a deliberate, informed and considered decision on their part. All the Defendants must have contemplated that they could be the subject of litigation in Guernsey.

29. Thus, although caution must be exercised before bringing these foreign defendants before the Royal Court, in the circumstances of this case and in the light of the decisions taken by the Defendants to take advantage of this jurisdiction for their commercial purposes, they can have little cause for complaint or surprise if they find themselves before the Royal Court and I therefore do not believe I should refrain from permitting service abroad if it is otherwise justified.

The Second Jurisdictional Gateway – the Tort allegedly committed at the Guernsey board meeting

30. The events of the board meeting held in Guernsey on July 26th 2007 are pleaded at paragraphs 247 to 258 of the cause. Their significance is further explained in the second affidavit of Alan John Roberts at paragraphs 116 to 139. It is alleged that all the directors were present in the Island and held a number of meetings whilst they were here. It is alleged that they failed to appreciate that the global liquidity crisis that had begun the previous month was continuing to worsen and they failed to discuss steps which, it is alleged, should have been taken, such as the need to sell RMBS to reduce leverage, to raise additional equity capital and to increase liquidity. Instead, the focus was on paying dividends for the past quarter and future quarters and payment of fees and expenses for the benefit of the Carlyle Group.

31. The Defendants submit that the substance of the cause of action cannot have arisen in Guernsey by virtue of one board meeting. They state that as the single board meeting in Guernsey was the only one of the fifteen board meetings held during the lifetime of CCC to have taken place in this Island it should not be singled out. To that criticism, the Plaintiffs response is that the critical period for this cause of action is from June 2007 onwards, during which time only three board meetings were held. After the 26th July 2007 Guernsey meeting, there was a board meeting on 23rd August 2007 held by telephone, and a meeting on 13th November 2007 held in New York. A number of other decisions were taken by e-mail or other electronic communication but they were not formal board meetings. In other words, there is no single jurisdiction that stands out as being the location where the alleged torts were committed. The meeting in Guernsey is important because it occurred early in the critical period and because the Defendants were together for a longer length of time in Guernsey than anywhere else.

32. The Defendants also place reliance upon the fact that the alleged tort arises from failures to act rather than any act or decision committed or taken at the Guernsey board meeting, claiming that it could also be alleged that the directors failed to act in Delaware, New York, Washington or any other place in the world.

33. The Plaintiffs argued that all the Defendants and relevant parties were present in Guernsey, they should have appreciated the effects of the global economic downturn, they should have taken steps to act accordingly and there was an opportunity for them to do so whilst they were in Guernsey. As I see it, the Plaintiffs rely upon a sequence of alleged failures to act and the key question is how significant is Guernsey in that sequence of events.

34. In Metall & Rohstoff v Donaldson Inc [1990] 1 Q.B. 391 at page 437, Slade L.J. said that in respect of a tortious claim, jurisdiction may be assumed, either where the damage was sustained within the jurisdiction or the damage resulted from an act committed within the jurisdiction. The Plaintiffs did not argue that damage was suffered in Guernsey, they did not say where it was suffered but it is possible they consider it was in the United States. Instead, the Plaintiffs argued that damage suffered by the Plaintiffs arose from acts committed within the Island. In respect of that, Slade LJ said at page 437E:

> "*It would not, we think, make sense to require all the acts to have been committed within the jurisdiction, because again there might be no single jurisdiction where that would be so. But it would certainly contravene the spirit, and also we think the letter, of the rule if jurisdiction were assumed on the strength of some relatively minor or insignificant act having been committed here, perhaps fortuitously. In our view condition (c)* [damage resulting from an act committed within the jurisdiction] *requires the court to look at the tort alleged in a common sense way and ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere): if the answer is yes, leave may (but of course need not) be given."*

35. Applying a common sense test to the facts of the present action, I am not persuaded that damage has resulted from substantial and efficacious acts committed within Guernsey, as opposed to elsewhere. The occasion of the board meeting on 26th July 2007, was not the only opportunity that the Defendants had to take action. The global economic crisis that led to the margin calls and financing difficulties alleged by the Plaintiffs was not a single event, but a series of events that evolved over a period of time. At any stage in the course of the unfolding global events, the Defendants could have taken the actions which it is alleged they failed to take. Such actions could have been taken anywhere in the world or more likely in the United States where most of them were located. I therefore agree with the Defendants that the alleged failure to act whilst in Guernsey is but one small link in the chain of events, which lead ultimately to the collapse of CCC.

Jurisdictional Gateway – The Statutory Gateway

36. The 14th, 15th and 16th claims for relief pleaded in the Plaintiffs' *cause* are brought pursuant to Section 106 of The Companies (Guernsey) Law, 1994, or Section 422 of The Companies (Guernsey) Law, 2008. I understand that having given further consideration to the transitional provisions in the 2008 Law, the Plaintiffs accept that the 1994 Law (as amended) applies, although if that is wrong they would rely on the provisions of Section 422 of the 2008 Law which are identical to Section 106. The latter Section provides as follows:

"106.(1)Where in the course of the winding up of a company it appears that any person described in subsection (2)-

(a) has appropriated or otherwise misapplied any of the company's assets;
(b) has become personally liable for any of the company's debts or liabilities; or
(c) has otherwise been guilty of any misfeasance or breach of fiduciary duty in relation to the company;

the liquidator or any creditor or member of the company may apply to the Court for an order under this section.

(2) The persons mentioned in subsection (1) are-

(a) any past or present officer of the company;

(b) any other person who, directly or indirectly, is or has been in any way concerned in or has participated in the promotion, formation or management of the company.

(3) On an application under subsection (1) the Court may examine the conduct of the person concerned and may order him-

(a) to repay, restore or account for such money or such property;

(b) to contribute such sum to the company's assets;

(c) to pay interest upon such amount, at such rate and from such date,

As the Court thinks fit in respect of the default, whether by way of indemnity or compensation or otherwise."

37. The claims are brought by the Plaintiffs on the basis that each Defendant was an "officer" of CCC and/or was directly concerned with the promotion, formation or management of CCC. The definition of "officer" in Section 117(1) of the 1994 Law includes a "director". "Director" is defined as "a person occupying the position of director, by whatever name called". On the basis that it is alleged that the Corporate Defendants are *de facto* or shadow

directors, the Plaintiffs state that the Section 106 claim is brought against all the Director Defendants and all the Corporate Defendants.

38. Section 117(1) defines "the Court" as being the Royal Court sitting as an Ordinary Court. Relying on that definition, the Plaintiffs assert that the Section 106 claims can only be made in this jurisdiction and nowhere else.

39. In response, the Defendants assert that the 106 claims provide no more than an alternative procedure for the liquidators and do not create a new cause of action. They refer to them as duplicate claims and state that such claims cannot possibly be a foundation for a jurisdiction claim.

40. The Plaintiffs assert that the Section 106 claims could not be brought in the Delaware Court and I deal with that issue later on in this judgment. The Plaintiffs submit that the concept of a "duplicate" remedy is not recognised in law. Instead, the Plaintiffs assert that they are entitled to pursue concurrent remedies and that the statutory relief sought under Section 106 is concurrent with their claims for breach of fiduciary and other duties under the general law.

41. Section 106 is similar, but not identical, to Section 212 of The English Insolvency Act 1986. I was therefore referred to a number of decisions of the English Courts concerning Section 212 and its predecessors. Advocate Davies relied upon Revenue and Customs Commissioners v Holland [2010] 1 WLR 2793 and a passage in the speech of Lord Collins of Mapesbury JSC:

> *"....section 212 is a procedural provision which does not create any substantive obligations, and consequently for a person to be made liable under section 212, that person must be guilty of breach of an independent duty: In re Canadian Land Reclaiming and Colonising Co (Coventry and Dixon's case) (1880) 14 ChD 660; In re City Equitable Fire Insurance Co Ltd [1925] Ch 407."*

42. He also relied upon a decision of Blackburne J. in Re Eurocruit Europe Limited (in liquidation) [2007] EWHC 1433 (Ch) at paragraph 24, a case where the liquidator wanted to avoid the statute of limitations which barred a claim by the company against the director. Instead, the liquidator argued that the limitation period began to run for the purposes of a 212 claim from the date of commencement of the liquidation:

> *"24 In my judgment, Mr Wilson's submissions on this point do not pay sufficient regard to the significance of the fact, made clear by the authorities, that s.212 is procedural in nature. The true significance of that fact is that the section merely provides an alternative means, in terms of procedure, of enabling the company, to which the defaulting director's duty was owed, to obtain recompense from the director for his breach of duty. If the liquidator chooses to name himself as the formal claimant in lieu of the company, his claim is by application, or (as appropriate) originating application, in the liquidation rather than by a claim form under CPR. Pt 7. The procedure is not available if it is intended to make someone other than a director (or other person falling with s.212(1)) liable for the wrong to*

> *the company, for example a claim against a non-director (along with a director) for having conspired to harm the company; in such a case or where other claims not within s.212 are brought against a director, for example a straightforward claim in debt, the claim must be brought by the company. In each case, however, the claimant is in substance the company; the relief which is granted under s.212(3) is for the repayment, restoration or accounting (to the company) of the money or property of the company or for a contribution to be made "to the company's assets by way of compensation" for the wrong in question. This is so whether the claim is brought by the company or by the liquidator or, for that matter, by a creditor or a contributory. It would be extraordinary, therefore, if, finding that a claim brought by the company in liquidation against a defaulting director had been successfully non-suited on limitation grounds, the company's liquidator could, in effect, ignore that result and advance the self-same claim again but, in his own name, shorn of any risk of a successful limitation defence merely because the claim was brought within six years of the commencement of the liquidation. The reason he cannot is that there is only a single cause of action, that of the company. All that s.212 does is give to the liquidator, if he wishes, the right to bring the claim in his own name."*

43. In short, Advocate Davies submitted that the Section 106 claim adds nothing to the other claims pleaded against the Defendants.

44. Advocate Wessels sought to distinguish the Section 106 claim for relief from the other pleaded claims. First, he submitted that Section 106 confers on the Court a discretion to decide the quantum of the contribution to be paid by the wrongdoer. This was a reference to Section 106(3)(b) which is identical to Section 212(3)(b) that was described by Lord Scott in Stone & Rolls v Moore Stephens [2009] 1AC 1391 at paragraph 110 as conferring "*on the court a judgmental discretion as to the quantum of compensation that would not in an ordinary damages action be applicable"*. Similarly, in In Re Paycheck Services 3 Ltd [2010] 1 WLR 2793, Lord Hope held at paragraph 49 that the quantum of relief could be "*limited to what was required to make up the deficiency of a particular creditor*".

45. Advocate Wessels submitted that claims under Section 212 may be pursued even when the same cause of action has failed at common law on non merits based grounds following the Court of Appeal decision in Parkinson Engineering Services Plc v Swan [2010] 1BCLC 163 where the defendants to a Section 212 claim were former administrators of the company who had been released from liability under Section 20 of the Insolvency Act 1986. The Court of Appeal upheld the judge's decision that a claim could be pursued under Section 212 where the original claim could no longer be asserted by reason of the statutory release. However, Advocate Davies argued that was possible only because Section 212(4) expressly permits a liquidator to apply to the Court for leave to bring an action against an administrator after he has been released.

46. An additional line of argument that Advocate Wessels relied upon was a liquidator's duties to investigate the causes of a company's failure and the conduct of those concerned in its management, in the wider public interest of appropriate action being taken against those engaged in commercially culpable conduct. His authorities for that argument were the House of Lord's decision in Re Pantmaenog Timber Co Limited [2004] 1AC 158 and in particular paragraphs 79 and 83 in the speech of Lord Walker and paragraph 52 in the speech of Lord

Millett and the judgment of Arden LJ in Base Metal Trading Limited v Shamurin [2005] 1WLR 1157 at page 1176E. Those decisions supported the proposition that Section 212 is part of the mandatory scheme of insolvency imposed by statute. He also cited Keay, *McPherson's Law of Company Liquidation*, (Second Edition, 2009) at [16003] to support his submission that Section 106 claims are not exclusive and can be pursued concurrently with other general law and statutory claims.

47. Advocate Wessels had another argument that was unique to Guernsey. It was based upon Section 67F of The Companies (Guernsey) Law, 1994 (as amended). Section 67F(1) provides as follows:

> *"Company articles, etc,may not exclude remedies*
>
> *67F. (1) Any provision, term or condition, in whatever words, and whether contained in a company's articles or in any contract with the company or otherwise, for exempting any person from, or indemnifying him against, any liability which, pursuant to sections 67A to 67D or any other provision of this Law under which personal liability may be imposed or incurred, would otherwise attach to him shall, subject to subsections (2) and (3), be void."*

48. These amendments to the 1994 Law were inserted by The Companies (Amendment) (Guernsey) Law, 1996 which also introduced other sub-sections into section 67. Section 67A empowers the court to impose a Disqualification Order prohibiting a person from being a director or officer of a company. Section 67B headed "Fraudulent Trading" enables the court on the application of a liquidator or creditor or members of a company to order a person who appears to have carried on business with intent to defraud creditors, for any fraudulent purpose, to make a contribution to the company's assets. Section 67C contains similar provisions in respect to wrongful trading and 67D deals with proceedings in respect of fraudulent or wrongful trading. Section 67E requires HM Greffier to keep a register of Disqualification Orders made by the court.

49. In order to demonstrate that those amendments to Section 67 were unique to Guernsey and not simply adopting English legislation, Advocate Wessels drew attention to a policy letter in Billet d'Etat III of 1996, written by the States Advisory and Finance Committee. The recommendations contained in that report were adopted by the States at its meeting held on Wednesday 28th February 1996 without amendment. The resulting Projet de Loi was approved by the States at its meeting on 30th May 1996. The relevant passage in the report reads as follows:

> *"Conseiller Walters wrote to the Committee on 3 June 1995 seeking legislation to curb the behaviour of directors whose companies go into liquidation leaving unpaid debts to their creditors. Conseiller Walters' concern was that the directors of a liquidated company are alleged to be able too easily to set up a new company to carry on the same business without having satisfied their previous company's debts, particularly those to sub-contractors.*

Although there is a case for suggesting that up-to-date insolvency legislation should be considered, the Committee is mindful that that is a very large and complex subject and hence not one that can be legislated quickly. Something needs to be done in the meantime to preserve confidence in the principle of limited liability by measures to discourage its abuse, over and above section 106 of the Law. (That section already provides for remedy against delinquent officers who in the opinion of the Court have appropriated or otherwise misapplied the company's assets or been guilty of any misfeasance or breach of fiduciary duty.)

After consulting the Law Officers and the Commission, the Committee recommends the adoption of provisions on:

(a) disqualification orders. Where the Court considered that a person's conduct was such that he/she was unfit to be concerned in the management of a company it would have power to disqualify that person from being a director or other officer of a company;
(b) fraudulent trading. Where in the course of winding up a company it appeared that the company's business had been carried on with intent to defraud creditors the Court would have power to order the "knowing parties" to make contributions to the company's assets;
(c) wrongful trading. Where it appeared that a company now in insolvent liquidation had traded without reasonable prospect of avoiding such liquidation the Court would have a similar power;
(d) proceedings in respect of fraudulent or wrongful trading;
(e) keeping of a register of disqualification orders;
(f) company articles not to exclude remedies against directors as provided under the existing section 106 of the Law."

50. The States report demonstrates that the initiative for the amendments to Section 67 came from Conseiller Walters in response to behaviour that he had clearly observed. It is noteworthy that each of the new sub-paragraphs inserted into Section 67, from 67A to 67F, mirror the provisions spelled out in sub-paragraphs (a) to (f) of the report and they appear in the same order as they appear in the report.

51. Advocate Davies' main argument was that Section 106, being procedural in nature, did not "impose or incur" any liability. Hence, Section 67F does not apply to Section 106. Otherwise, he said Section 67F would have imposed sweeping and anomalous changes creating a radical departure from the approach of the English legislation which is the basic model for Guernsey Company Law.

52. He said it must be assumed to have been well understood at the time when Section 67F was enacted that Section 106 was purely procedural.

53. It seems to me that the wording of the States' report suggests that was not understood by the States. The explanation given to States' Members of Section 106 was that it provides a "remedy" against delinquent officers. If Advocate Davies' assumption is correct, I would have expected the report to have said something along the lines that "Sections 106 provides an alternative procedure to recover claims" against a delinquent officer.

54. Leaving aside what the States might have intended, I have to interpret the language of Section 67F.

55. Some assistance may be gained from the heading to Section 106 in the 1994 Law: "Remedy against delinquent officers".

56. There is absolutely no doubt that it is well established on very long standing authority that, in England, the equivalent of Section 106 is regarded as procedural. What would it mean in Guernsey if Section 106 is purely procedural? We do not have the well recognised understanding of the distinction between commencing proceedings by way of application or originating application on the one hand and by claim form under CPR, Pt 7 as explained by Peter Gibson LJ in Eurocruit.

57. In Guernsey most proceedings in the Royal Court are commenced by tabling a *Cause*. Some proceedings are commenced by an application. As far as I am aware, the Court has never sought to define when an application should be used in preference to a *Cause*. In many instances it is obvious whether to use a *Cause* or an Application but in some areas it is not and it is noticeable that some Advocates produce a *Cause* in situation where another Advocate starts with an Application. In my experience, both as an Advocate and as a judge, an Advocate is rarely criticised for choosing one procedure rather than the other because the Royal Court usually looks to the substance rather than the style of what is presented. It may assist that, being a small jurisdiction, the Royal Court is able to be more flexible with its procedure than an English court. Throughout my time at the Bar, my experience was that the Court always endeavoured to follow whatever procedure is most appropriate in the circumstances of a particular case. Even before the present Civil Rules came into force, I recall there were cases where proceedings commenced other than by way of a *Cause* were placed on the *Rôle des Causes á Plaider* and thereafter on the *Rôle des Causes en Preuve* if the respondent indicated the matter was to be defended.

58. Hence, if the only difference between a Section 106 claim and a common law claim in Guernsey was a matter of procedure, the difference would be of little or no consequence in the conduct of the matter other than that the applicant or plaintiff would be the liquidator acting in his own name under Section 106 and the company (acting through its liquidator) in any other matter.

59. I have been assisted by the reasoning of the Court of Appeal in Re Canadian Land Reclaiming and Colonizing Co (Coventry and Dixon's case) (1880) 14Ch D660. In that case the liquidators of the company had sought to use a section equivalent to our Section 106 in order to pursue persons who had acted as directors of the company even though they did not own the shareholding in the company that was an essential requirement to become eligible to hold the post of director. They were not pursued at common law because there was no evidence that their actions had caused loss to the company (other perhaps than the failure to pay for the shares they should have acquired). The Court of Appeal held that the proceedings under the

equivalent of Section 106 could not succeed because it did not impose any new obligations that did not otherwise exist in law.

60. The point was further explained by the Court of Appeal in Re City Equitable Fire Insurance Code [1925] Ch 407 where the court held that Section 215 of The Companies (Consolidation) Act, 1908 (equivalent to our Section 106) was a procedural section only and created no new or additional liability. Pollock MR said at page 507: "*That section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights……. In Cavendish Bentinck v Fenn 12 App. Cas 652, 669, Lord MacNaghten gives in a sentence or so the principle of which the other cases are illustrations. He says: "That section creates no new offence, and ……. it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity"*".

61. I am not convinced that Section 106 would be seen in Guernsey as providing a **summary** remedy. As I have already said, I believe that any proceedings instituted under that section would follow whatever procedure the Court considers most appropriate in the circumstances. If a Section 106 claim was defended I am certain it would not be dealt with summarily. With that one reservation, I respectfully adopt Pollock MR's interpretation. Section 106 creates no new offence and it gives no new rights, but it provides a remedy in respect of rights which apart from that section might have been vindicated otherwise. That interpretation is, I believe, consistent with the wording of the States Report of 1996.

62. In other words, Section 106 is more than procedural; it does provide a remedy requiring a delinquent officer to contribute to a company's assets. An order under the Section requiring a delinquent officer to pay money or to contribute to the assets of the company does, in my view, "impose" a personal liability on the delinquent officer and hence comes within Section 67F. That is the natural meaning of the words in the Law. I am reassured it is the correct interpretation because to interpret it otherwise would defeat what the States intended to be one of the purposes of the amendments proposed in the States Report of 1996.

63. I therefore agree with Advocate Wessels that the remedy sought by the Plaintiffs under Section 106 provides them with a "jurisdictional gateway" to seek leave to serve out of the jurisdiction.

64. Shortly before the commencement of the hearing before me, the Judicial Committee of the Privy Council handed down its decision in Spread Trustee Company Limited v Hutcheson [2011] UKPC13. Advocate Davies cleverly sought to bring a passage from Lord Clarke's speech to his assistance. His argument was that if the interpretation that I have given to Section 67F was what was understood at the time of the incorporation of CCC, Advocates Ozannes who were then acting for CCC would have given different advice. At paragraph 36 in his speech, Lord Clarke said that evidence of what the parties and their advisors thought to be the law could be adduced as evidence of what the law actually was.

65. That line of reasoning does not assist in the present case. Hutcheson was concerned with the customary law of Guernsey. It is obvious that what was thought to be the custom is, by its very nature, evidence of the custom of this Island. What we are concerned with in the present case is statutory interpretation. What Advocates and their clients believed to be the correct interpretation of a statute is of no relevance or assistance to the court in interpreting a statute.

Otherwise, members of the Bar could defeat the legislature by combining together to agree that a statute means something other than what it does, and was intended to, mean.

Conclusion re Jurisdictional Gateways

66. In summary, I am persuaded that two of the three jurisdictional gateways relied upon by Advocate Wessels at the *ex parte* hearing of the application for leave to serve out of the jurisdiction before LB Talbot QC are made out: the 'necessary or proper party' and the statutory gateways.

Is Guernsey clearly or distinctly the appropriate forum for the trial of the dispute?

67. I now turn to the third limb of the test set out by Lord Collins in Altimo Holdings. Advocate Davies has criticised the decision of LB Talbot QC who granted leave to serve outside the jurisdiction even though he said he was not persuaded that Guernsey would be the best forum. This is not an appeal against that decision so I do not need to decide whether the Lieutenant Bailiff decided the matter correctly or not. However, it does seem to me that he applied his mind to the correct question. The facts of the case are undoubtedly complicated and I have every sympathy with the judge who said that he was unable at that *ex parte* hearing to decide which forum would be the best for it. He was told that the Plaintiffs intended to issue protective proceedings in four different jurisdictions; their preference would be Delaware and they would seek to obtain the agreement of the parties to proceed in that jurisdiction. Faced with that situation, it seems to me that the Lieutenant Bailiff was entitled to approach the matter in the manner that he did. Otherwise, if there is an imminent date by which proceedings must be commenced, a possibility that more than one jurisdiction may be the most appropriate forum, and a risk that the Defendants may challenge the Plaintiffs' choice of jurisdiction, it seems unjust that the Plaintiffs could ultimately be deprived of the opportunity to bring proceedings because of the need to overcome a high hurdle at the *ex parte* leave stage. That is not, in my view, a correct interpretation of Rule 8, nor is it, I believe, in accordance with the House of Lords decision in Spiliada.

68. Whatever LB Talbot QC should have decided, this is a fresh application and I have to decide whether Guernsey is clearly or distinctly the appropriate forum. The main weight of the non resident Defendants' submissions have been directed at this issue. They centre upon the exclusive jurisdiction clause in the IMA and their submission that the allegations in effect amount to breaches of, or failures to perform, the obligations imposed under the IMA.

The Exclusive Jurisdiction Clause

69. The obligations of CIM under the IMA are set out in broad terms in Section 1 of the IMA:

> "[CCC] *hereby appoints* [CIM] *as its attorney–in–fact to act on its behalf pursuant to the terms of this Agreement and* [CIM] *agrees, all as more fully set forth herein, to act as the investment manager (and attorney-in-fact) to* [CCC] *with respect to the investment of* [CCC]*'s assets and certain administrative and other acts as set forth in*

the Memorandum or as otherwise agreed to by [CCC] *and* [CIM] *for the period and on the terms set forth in this Agreement"*.

70. Section 2 confers on CIM the authority to invest all of CCC's assets. Section 2(e) permits CIM to perform its obligations through its affiliates or by retaining third party sub advisors. Section 5, the longest section in the IMA provides for CIM's compensation and remuneration.

71. Section 9 is the governing law clause:

> *"This Agreement shall be governed by, and construed in accordance with, the laws of Delaware, without giving effect to the choice of law principles thereof. The federal or state courts sitting in Delaware shall have exclusive jurisdiction over any action, suit or proceeding with respect to this Agreement and each party hereto hereby irrevocably waives, to the fullest extent permitted by law, any objection that it may have, whether now or in the future, to the laying of venue in, or to the jurisdiction of, any and each of such courts for the purposes of any such suit, action, proceeding or judgment and further waives any claim that any such suit, action, proceeding or judgment has been brought in an inconvenient forum, and each party hereto hereby submits to such jurisdiction. The parties hereby agree that no punitive or consequential damages shall be awarded in any such action, suit or proceeding."*

72. The non resident Defendants have produced an affidavit from an expert, Robert Varley dated 8th April 2011 who was asked to opine upon general practice in the funds industry. He said that in his experience of the offshore investment fund business in a number of jurisdictions, the IMA is a standard industry document. In reply, the Plaintiffs produced an affidavit from Andrew Gallaway, sworn on the 13th May 2011, who stated that the sample of investment management agreements he had reviewed suggested that typically the forum selection accords with the centre of activity of the fund manager. I see no need to decide between these two experts. It would also have been relevant to the ninth claim for relief, being the application to set aside the IMA, but that is no longer being pursued. Their evidence might also have relevance to the application to seek to disqualify Mourant Ozanne from acting which is no longer being pursued. It does not assist me with the present application.

73. The leading case on the court's approach to forum clauses is Donohue v Armco [2002] 4LRC 478. Donohue was cited with approval by the Guernsey Court of Appeal in Winnetka Trading Corporation v Bank Julius Baer & Co Limited, (Court of Appeal 15th July 2009). In Donohue, Lord Bingham of Cornhill said:

> *"24. If contracting parties agree to give a particular Court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English Court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the*

contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria, [1969] 1 Lloyd's Rep. 237 at p. 242; [1970] P.94 at pp. 99-100, Mr. Justice Brandon helpfully listed some of the matters which might properly be regarded by the Court when exercising its discretion and his judgment has been repeatedly cited and applied. Mr Justice Brandon did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see Aérospatiale at p. 896. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case.)

25. Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause."

74. The passage in Brandon J's judgment in The Eleftheria referred to by Lord Bingham is as follows:

"The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to

sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

75. I am advised in an affidavit on Delaware law that courts in Delaware will normally give effect to exclusive jurisdiction clauses unless there are strong reasons to the contrary. I do not need to examine those reasons in detail to see if they are in any way different to the principles applied in Guernsey and England.

76. Advocate Davies sought to strengthen his arguments by reference to proceedings instituted by an investor in CCC, a Mr Huffington, in Massachusetts. The courts in that State refused to hear the proceedings because the Subscription Agreement governing the investors' relationship with CCC contained an exclusive jurisdiction clause similar to the one in the IMA. I do not consider it necessary to review the Huffington litigation in any detail because I have accepted that the Delaware Court will enforce the exclusive jurisdiction clause unless there is strong reason to the contrary.

77. Advocate Davies also submitted that it would be advantageous if all the litigation involving CCC is heard in the same jurisdiction. I do not know sufficient about the causes of action relied upon by Mr Huffington or any other investor to know whether that is correct. I assume they are different from the causes pursued by the present Plaintiffs. Their action will, if successful, benefit investors as well as other creditors and there seems to be little purpose in individual investors pursuing similar actions. I am not persuaded that it would be a material factor to take account of the forum in which individual investors pursue their own actions for their own, individual, benefit.

78. The onus lies with the Plaintiffs to persuade me that the case should be heard in Guernsey, notwithstanding the existence of the exclusive jurisdiction clause. The reasons put forward by the Plaintiffs can briefly be summarised as follows:

    1) The case is primarily concerned with the internal management and corporate governance of a Guernsey company, which is now the subject of Guernsey insolvency procedures. By contrast, the Defendants characterised the allegations in the claim as being essentially about breaches of the duties and obligations under the IMA.

    2) The draft *cause* shown to LB Talbot QC at the time of the *ex parte* hearing for leave to serve out of the jurisdiction, (which is the *cause* currently before the court) includes as the ninth claim for relief a plea to have set aside the IMA and hence to set aside the exclusive jurisdiction clause. Although the pleadings have not been amended, the Plaintiffs have said they are no longer pursuing that head of claim. The Plaintiffs claim that the exclusive jurisdiction clause attaches at most to just two of the remaining claims (ten and eighteen) against CIM and none of the claims against the other nine Defendants. The Defendants say it encompasses all claims against the Entity Defendants which comprise all but three of the claims in the original summons.

3) To enforce the forum clause would be contrary to Guernsey law and public policy. The Defendants say that public policy demands that an exclusive jurisdiction clause should be enforced.

4) The court has a discretion to be exercised in all the circumstances of the case which the Plaintiffs say points in favour of the proceedings continuing in Guernsey and the Defendants say points in favour of staying the Guernsey proceedings to allow the proceedings to proceed in Delaware.

79. As can be seen, the views of the parties on all these points are diametrically opposed. There is no common ground and this is the territory which was the most hotly contested at the hearing before me.

Failure of Internal Management and Supervision or Failure of Investment?

80. Advocate Wessels was forceful and unwavering in his submissions that the case primarily concerns allegations of failure of internal management and supervision, lack of corporate governance, breach of fiduciary duties etc., all of which are governed by Guernsey law because CCC was a Guernsey incorporated and regulated company. If that is the nature of the case and it is so obvious, I am surprised that the Plaintiffs initial preference explained by Advocate Wessels to LB Talbot QC at the *ex parte* hearing was to pursue the proceedings in Delaware if the Defendants would agree. Unsurprisingly, Advocate Davies accuses the Plaintiffs of blatant forum shopping. I might be more sympathetic to that accusation if the Defendants were less disingenuous in their assertion to have submitted to the jurisdiction of the Delaware courts which I describe below. However, I do find it troubling that there is an apparent inconsistency in the approach that the Plaintiffs have adopted to forum and I feel obliged to ask whether their approach has been justified or is merely opportunistic.

81. The starting point has to be consideration of the *Cause* in its current form.

82. When I first read the *Cause*, my initial impression was that its main thrust was directed at all the directors (all the de jure, de facto and shadow directors), their duties and their failure to take steps to act in the best interests of CCC when it is alleged they should have realised that the global economic crisis was worsening to the detriment of CCC and its investors. There was a catastrophic failure of the company's investments but the main allegations in the c*ause* are directed not to individual investment decisions but to matters such as the failure of the business model and failure to take strategic action to deal with the risk arising from the market volatility and global economic crisis. They are matters which are ultimately the responsibility of the board of directors of an investment fund. To what extent can responsibility be delegated to an investment manager? The Defendants suggest that all responsibility was passed to CIM under the terms of the IMA. It will be a matter for the trial court to decide where precisely to draw the line between the areas of responsibility delegated to CIM under the IMA and those areas where, either as a matter of contractual interpretation, or by Guernsey law, or by regulation, or otherwise, the board of directors could not delegate but instead retained responsibility themselves.

83. It is of course for the Plaintiffs to decide how they wish to pursue their case, not for that to be dictated to them by the Defendants. I must look at the *cause* as the Plaintiffs have pleaded it,

not as the Defendants would wish it to be. The allegations concern internal management and supervision as well as breaches of the IMA. They will all be pursued and explored in the trial of the action. In order to understand whether one party has mischaracterised the nature of the claim, I must look at the pleadings to decide which set of allegations dominates the other.

84. Whilst a superficial reading of the *cause* suggests that the majority of the allegations relate to failures of internal management supervision and corporate governance, I have to look at the substance of the case and decide whether the allegations are the product of artful pleading. In an affidavit on Delaware law, Allen M Terrell, Jr, instructed by the Defendants, said at paragraph 59 that:

> *"As the Delaware Court of Chancery has explained, "[c]ourts in Delaware and other jurisdictions have found that a forum selection clause should not be defeated by artful pleading of claims not based on the contract containing the clause if those claims grow out of the contractual relationship …. or if 'the gist' of those claims is a breach of that relationship." Ashall homes, 992 A.2d at 1252-53 & n.66."*

85. The views of the Delaware Court of Chancery are relevant because questions concerning the scope of the forum clause are to be decided in accordance with Delaware law being the governing law of the contract containing the exclusive jurisdiction clause.

86. The terms of appointment of CIM as investment manager appear to be wide. CIM was appointed as "*attorney-in-fact …. to act as the investment manager (and attorney-in-fact)"* to CCC. The precise breadth of the appointment is itself a matter of interpretation in accordance with the law of Delaware. I have no doubt that one of the issues at the trial of this action will be to understand the full extent to which investment management responsibilities were delegated to CIM and the extent of any residual responsibilities reserved to the board of CCC. The English case of John v Price Waterhouse and Another [2001] 2All ER (D) 123 confirmed that, as a matter of English law, the management of a company can be delegated to another to such an extent that the directors are left "*with nothing to do except such formal acts as only the directors personally could carry out.*" (paragraph 298).

87. Understanding the respective roles of CIM and the board in the present case requires interpretation of the scope of CIM's engagement under the IMA; the powers and duties reserved by the Board of CCC under its Articles of Association; and an understanding of the acts which can only be done by the directors of CCC as a matter of Guernsey law or regulation. The latter involves examination of statutory law and case law both in England and Guernsey, because in this area of the law, general principles of English Law generally apply in Guernsey except where they have been amended by local legislation or local policy.

88. CCC is a regulated entity and I asked counsel to advise what regulations may have been laid down by the Guernsey Financial Services Commission, if any, governing the respective duties of an investment fund and its investment manager.

89. They drew my attention to the document issued by the GFSC entitled "Guidance on Corporate Governance in the Finance Sector in Guernsey" dated 10 December 2004, the substantive part of which reads as follows:

"GUIDANCE ON CORPORATE GOVERNANCE IN THE FINANCE SECTOR IN GUERNSEY

General Responsibilities of the Board of Directors

The Board of Directors ("the Board") is responsible for the corporate governance of the organisation. Members of the Board should be proactive in recognising and understanding the risks the organisation faces in achieving its business objectives and should demonstrate effective and prudent management of those risks.

The Board should ensure that the organisation's operations are conducted reasonably and within the framework of any applicable laws, regulations, rules, guidelines and codes as well as established policies and procedures.

Risk Management

The Board and management should analyse existing and prospective business, products and services to identify and measure the types and significance of the current and potential risks to be managed and controlled, both individually and in the aggregate. The Board and management should develop and implement appropriate and prudent risk management policies and procedures and monitor their effectiveness through timely, accurate and complete information systems.

Internal Control Procedures

The Board should establish internal control procedures that are, in the Board's opinion, necessary and sufficient for the purposes of managing operational risks and conducting the organisation's business having regard to its size, nature and complexity.

Duties of Directors

The Board should ensure that collectively its members have sufficient expertise to understand and challenge the important issues in relation to the operation and control of the organisation.

> Each Director, in exercising the powers of a Director and discharging the duties as a Director, should act with honesty, integrity and in good faith with a view to the best interests of the organisation and its stakeholders.
>
> **Composition of the Board of Directors**
>
> The Board should regularly review its composition, taking into account the nature, scale and complexity of the business, and the requirements of any applicable laws, regulations, rules, guidelines and codes.
>
> **Self Assessment**
>
> The Board should regularly assess and document whether its approach to corporate governance achieves its objectives and, consequently, whether the Board itself is fulfilling its own responsibilities. The Board should review the effectiveness of its overall approach to governance and make changes where that effectiveness needs to be enhanced. In carrying out this review the Board should assess whether the organisation's control environment is appropriate and effective, taking into account the nature and scale of the business, its approach to governance, management and style of communication, organisation structure, resource availability, procedures and controls."

90. I had expected the regulations or guidance to be more specific but instead the guidance is in very general terms. That may be deliberate in order to give flexibility and to enable funds to be structured in a way that is tailored to the requirements of each fund and its investors. Where an investment fund is marketed to sophisticated investors, as was the case with CCC, one of the key attributes that a sophisticated investor is likely to be looking for is to have the benefit of the investment expertise of the investment manager. He will also look for the ability of the promoter to market the fund to a sufficient number of investors in order to attract sufficient investment to be viable as well as qualities such as the integrity and relevant skills of the directors, managers and officers associated with all aspects of the fund.

91. Investors in CCC were fully aware that CIM was the investment manager. For example, the confidential private placement memorandum dated 15th December 2006, declared on page 1 of the document in the executive summary:

> "[CCC] *will be externally managed by Carlyle Investment Management LLC ("CIM"). CIM's investment professionals, led by John Stomber, have significant experience and expertise in mortgage finance, leveraged finance, capital markets, transaction structuring and risk/portfolio management …… [CCC] expects CIM to have access to the resources and core competences of the Carlyle Group with a*

specific focus on utilising the investment knowledge of the Carlyle Group's US high yield, mezzanine debt, distress debt and European leveraged fund investment units……CIM and [CCC] have structured their relationship to ensure that their interests are closely aligned."

92. The public offering memorandum dated 19th June 2007 said in the overview at page 3:

"*We are externally managed by Carlyle Investment Management …….Carlyle employs a team of investment professionals who are responsible for managing our affairs and stretching and monitoring our investment portfolio. This team is led by John C Stomber who also serves as our chief executive officer, chief investment officer and president. Additionally, we benefit from access to the resources and core competences of other Carlyle employees who will spend time on our operations. Specifically, we can choose to invest or co-invest a portion of our capital in assets managed by Carlyle's US leveraged finance, European leveraged finance, mezzanine debt and distress debt investment units."*

93. Evidence that that is how one of the independent directors of CCC also viewed the respective responsibilities is in the affidavit of the seventh Defendant sworn 17th March 2008 in support of CCC's application to be placed in compulsory liquidation. At paragraph 14, he said the following:

"CIM Management Relationship

14. CCC is managed by CIM, a registered investment adviser under the US Investment Advisers Act of 1940, as amended, CIM implements the investment guidelines approved by CCC's Board of Directors. CIM carries out the every-day management and operations of CCC's business pursuant to an investment management agreement (the "Investment Management Agreement"). CCC does not directly employ any personnel."

94. The Plaintiffs also understand that to be the position because they pleaded the following at paragraphs 57-59 of the *cause*:

"57. CIM was the investment manager and adviser of CCC, with full discretionary investment management authority to implement the investment Guidelines of CCC and to perform the day to day management and operations of CCC's business, subject to the oversight of CCC's Board of directors. An investment management agreement dated September 20, 2006 between CCC and CIM was signed by Loveridge for CCC and Jeffrey Ferguson, Managing director and General Counsel for CIM.

> *58. CIM and TCG developed the business model for CCC which is described in Section E.1 below.*
>
> *59. In addition to its role as investment manager and adviser of CCC, CIM also provided investment management services to other affiliates within The Carlyle Group (including The Carlyle Group's Leveraged Finance Team) with similar or overlapping investment strategies."*

95. I have reviewed other references to the relationship between CCC and CIM in the pleadings. They include:

- *"Carlyle was, together with CIM, the investment manager and adviser of CCC. Carlyle had full discretionary investment management authority and responsibility for the management and operation of CCC's business."* (para 70)
- *"CCC was entirely dependent upon the judgment and experience of Carlyle and CIM's personnel. These responsibilities included responsibility for selecting, evaluating, conducting due diligence, negotiating and structuring, executing, monitoring and exiting investments and managing uninvested capital."* (para 71)
- *"Carlyle and CIM were the investment advisers and managers of CCC."* (para 76.1)
- *"Carlyle and CIM's investment professionals controlled the day to day operations of CCC."* (para 76.4)
- *"Carlyle and CIM undertook to provide to CCC what they described as their unique knowledge, understanding, operational capabilities and superior expertise within the investment management industry."* (para 76.6)
- *"At all times, CCC was dependent upon the judgment and experience of Carlyle and CIM's investment professionals."* (para 77.1)
- *"At all times, CCC relied upon the superior expertise and experience of Carlyle and CIM as its investment managers and advisers."* (para 77.2)
- *"At all times, CCC reposed special trust and confidence in the integrity and fidelity of Carlyle and CIM."* (para 77.3)

- *"Those facts, taken both individually and together, meant that Carlyle and CIM owed duties (including fiduciary duties) to CCC to act for and to give advice for the benefit of CCC and to protect and advance the interests of CCC."* (para 78)

- *"Therefore, Carlyle and CIM had the obligation to act in the best interests of CCC and to exercise reasonable care and diligence to ensure that the assets of CCC were not exposed to unacceptable risks and to ensure that decisions taken by the board of CCC were in the best interests of CCC. Carlyle's obligations were all the more acute because Carlyle and CIM effectively controlled CCC and its assets".* (para 79)

- *"Carlyle and CIM developed and formulated the business model for CCC."* (para 85)

- *"Investment Guidelines for the allocation of capital and selection of investments among the classes of assets contemplated by CCC's investment strategy were established by Carlyle and CIM and approved at the meeting of the board of directors of CCC held on October 4, 2006".* (para 90)
- The failures to mitigate the risks arising from CCC's highly geared leverage during the period April 2007 to February 2008 pleaded in paragraph 125 are pleaded as failures by Carlyle, CIM and the directors of CCC, implying that the directors were accepting the advice of CIM and Carlyle.

- Similarly, the amendments to the investment guidelines in respect of the Liquidity Cushion and the calculation of Adjusted Capital pleaded in paragraphs 127 onwards were said to have been progressively amended by CIM, Carlyle and the board of directors at CCC.

- Failures to maintain a Minimum Borrowing Capacity in order to mitigate the risk of the expiration and termination of the financing available to CCC pleaded at paragraphs 135 to 141 are also pleaded as failures of Carlyle, CIM and the board of CCC.

- In the section of the *cause* headed "Risks to CCC Begin to Emerge" commencing at paragraph 201, the allegations are that the board were receiving advice from the Defendant Stomber who, as well as being a director of CCC was chief executive of CIM.

- The allegations in E.5 beginning at paragraph 233 under the heading *"The Need for Substantial Additional Liquidity and Reduction of Leverage"* also refer to Carlyle and CIM.

- Without listing them all in detail, further allegations from subsequent passages of the *cause* make similar allegations in respect of CCC as well as CIM and Carlyle.

- Section E.15 headed *"Collapse of CCC"* begins in paragraph 393 by alleging that *"in the period from June 2007 until February 2008, Carlyle, CIM and the board of CCC had failed to take any meaningful steps to reduce CCC's leverage and restore and increase its Liquidity Cushion"*. Subsequent events pleaded in that section all appear to flow from publication of that annual report.

- The Defendants' breaches of duties are pleaded in section F beginning of paragraph 413. Section F.1 seems to be directed at all Defendants, F.2 is specifically at the CCC directors, F.3 is directed at CIM, F.4 at Carlyle.

96. In summary, this more detailed examination of the *cause* suggests a more complex case than I may have believed from my initial perusal. The alleged failings of CIM, Carlyle and the other Defendants are all linked and inter-woven.

97. Before investing, potential investors were advised that the fund would be managed by CIM with the benefit of Carlyle's specialised investment expertise. They may have been aware of the terms of the IMA, including the exclusive jurisdiction clause. They will have known that investment management was delegated by CCC to CIM with provision that affiliates within the Carlyle group would also be involved. The business model and investment guidelines for CCC were recommended by CIM and, acting on CIM's advice, were approved by the board of CCC. CIM actively managed the portfolio and when global market conditions deteriorated and the markets became volatile, CIM and Carlyle gave some advice to the board of CCC which was, broadly at least, accepted by CCC. Other action and alternative steps could have been pursued, but the decision not to do so was apparently on the advice of CIM and/or Carlyle. It was the failure to take such steps which are alleged to have caused the collapse of CCC.

98. The alleged failures of the directors of CCC are, essentially, failures to act otherwise than in accordance with the advice from CIM or to adopt policies different from, and independent of, the recommendations being received from CIM and Carlyle. As the case is pleaded, the allegations against CIM are inextricably linked with the allegations against CIM and the allegations against the other Defendants, in particular, the Director Defendants.

99. The trial court will have to unravel what CIM and Carlyle did and what they did not do that they should have done, distinguishing what was done or not done under the IMA and in breach of the IMA from what was done or not done under other common law duties or fiduciary duties owed by CIM and Carlyle to CCC. The trial court will have to determine what responsibilities rested with the directors of CCC and whether what they did or did not do in relation to what CIM and Carlyle did or did not do amount to a breach of their duties.

100. The initial business model and investment guidelines adopted by CCC were recommended by CIM and Carlyle, it is not alleged that they were fundamentally flawed at the outset. Advocate Wessels said the complaint relates to the period from July 2007 onwards. CIM and/or Carlyle had contractual obligations under the IMA to continue to manage CCC's investments and to advise the board of CCC on the steps it should be taking in light of the global and market developments. It seems to me that the starting point and a key factor in the trial court's analysis of the events that caused the collapse of CCC is going to be the steps taken, or not taken as the case may be, by CIM and Carlyle under the IMA.

101. I have changed my views as to the character and nature of the allegations pleaded and of the case that the Defendants face. I now agree with the Defendants that in substance the case is more concerned with failures of the investment advice, the investment policy, the investment guidelines and, generally, the duties of CIM under the IMA. Those issues need to be understood before considering the failures of the Directors whether they be *de jure*, *de facto* or shadow directors. In that sense, the breaches of the IMA are the primary issues and the allegations against the Directors are secondary.

102. Advocate Wessels submitted that the Guernsey law relating to the duties of directors are evolving and are uncertain. He has not persuaded me that they are materially different under Guernsey law than they are under English law. He submitted that the reputation of Guernsey as a financial centre requires high standards of corporate governance matching international standards and he quoted from reports issued by the States Department of Commerce and Employment. The Department and the GFSC have made clear the public policy in this area; the trial court will have to apply that policy to the facts of the case. If the trial is held in Delaware, it will have the benefit of expert evidence to assist it and it seems to me to be unlikely that court will apply a different public policy than the Guernsey court.

103. Advocate Wessels relied upon decisions of the English courts to show the limitations on directors' powers of delegation. "*A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but not total abrogation of responsibility"* Re Westmid Packing Service Ltd [1998] 2 All ER 124 per Lord Woolf MR. He cited the judgment of Jonathan Parker J in Re Barings plc (No 5) [1999] 1 BCLC 433 as authority for the proposition that a director has a continuing duty in relation to any function that has been discharged. Advocate Wessels also relied upon English cases to show that individual directors have individual duties as Lord Woolf said in Westmid: "*Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them*". Advocate Wessels relied upon those English decisions as being relevant in Guernsey and, in my view, he was right to do so.

104. Those arguments demonstrate, in my view, that the Guernsey Law in this area is substantially the same as in England. Any differences between Guernsey Law and English Law are likely to be as a result of statutory modifications, not judicial decision. As I have said earlier, they may also be subject to the regulations and guidance published by the Guernsey Financial Services Commission and the Commerce and Employment Department. The general guidance published by the GFSC is entirely consistent with what Lord Woolf held in Westmid. All the relevant principles are thus well documented. Evidence has been adduced to show that the Chancery Court in Delaware is experienced at applying foreign law. If the case proceeds in Delaware, the court will have the benefit of expert advice from a Guernsey Advocate and English counsel. I do not see that there are public policy considerations requiring a Guernsey court to deal with these issues that outweigh the public policy consideration that says that a contract containing an exclusive jurisdiction clause should be subject to the courts of that jurisdiction.

105. There are also the matters of whether the degree of control exercised over CCC by Carlyle and the manner in which the Carlyle Defendants' conducted themselves are such that they constituted themselves shadow or *de facto* directors as alleged in the *cause.* Advocate Wessels identifies this as another area of Guernsey Law which is uncertain and evolving. Counsel have not drawn my attention to any cases where the Guernsey courts have considered the principles that would govern whether a person has become a *de facto* or shadow director. I am aware of no such case and it may well be that there are no decided cases.

106. If it has to approach such questions afresh, the Guernsey courts' approach is likely to start with a consideration of relevant decisions in other jurisdictions, most notably but not exclusively, those of the English courts. English decisions are likely to be the most persuasive because English Companies Law is, broadly speaking, the model upon which the Guernsey statutory law is based. The next step will be to consider whether there are differences in statutory provisions between Guernsey and the foreign jurisdiction that would render the foreign decision either inapplicable or of little weight. The regulatory regime governing investment funds and other regulated entities may also provide some guidance. Any public policy considerations are likely to be reflected in the regulations. As this is a novel area of Guernsey law, it would be preferable if it were to be duly considered by the courts of this Island but I agree with Advocate Davies that as the guiding principles are established and ascertainable in other jurisdictions, it would not be an impossible exercise for a competent foreign court guided by appropriate expert advice to reach its own conclusions.

Delaware Court and the Delaware Proceedings

107. I have been given a detailed history of the litigation in Delaware, but I do not consider it necessary to summarise here the procedural steps taken in that court. It is, I believe, sufficient to say that all parties invested considerable time, effort and cost in the proceedings instituted by the Plaintiffs in the Delaware court before the Plaintiffs took a decision in December 2010 to withdraw those proceedings and concentrate on Guernsey as their preferred forum for resolving the dispute.

108. It was the Plaintiff's stated intention to seek to obtain the agreement of all parties to litigate claim in a single jurisdiction and Delaware was their first preferred choice. Negotiations broke down because the Defendants refused to express in writing that they agreed the Delaware court had subject matter jurisdiction over the claim.

109. Since then, all parties have had some difficulty in justifying their respective positions.

110. The Plaintiffs have abandoned their attempt to persuade the Defendants to accept the jurisdiction of the Delaware court. Instead, the Plaintiffs now argue that Guernsey is the only forum where all the claims can be litigated because the Delaware court has no jurisdiction over the foreign statutory claims such as the Section 106 claim.

111. For their part, the Defendants have tried to justify why they would not agree that the Delaware court has subject matter jurisdiction.

112. They point out that the Defendants did not challenge the jurisdiction of the Delaware court when they had the opportunity to do so. Advocate Davies also informed me that they do not intend to challenge jurisdiction if proceedings are reinstituted in Delaware.

113. However, Advocate Davies also said that parties to proceedings cannot confer jurisdiction on an American court by agreement where no subject matter jurisdiction exists. He relied upon the decision in El Paso Natural Gas Co v Transamerican Natural Gas Co 669 A.2d 36, 39 (Del. 1995).

114. Thus the position of the Defendants appears to be that they have not challenged the jurisdiction to date and they do not intend to challenge jurisdiction. However, they rely upon the Delaware court declining jurisdiction over the statutory claims. It is that approach of theirs which I referred to earlier in this judgment as being somewhat disingenuous.

115. On the other hand, the Plaintiffs are not free of criticism having changed their attitude to the acceptability of Delaware as the appropriate forum to hear these proceedings.

116. If I stay the Guernsey proceedings to enable the Plaintiffs to reinstitute their action in Delaware and if the Delaware proceedings are pursued to a conclusion on all the claims for relief presently pleaded other than the Section 106 claim, the Plaintiffs would have to decide whether to pursue the Section 106 claim separately in Guernsey. Whether they would want to would depend perhaps on the outcome of the Delaware proceedings.

117. If the Plaintiffs decided to continue with a Section 106 claim in Guernsey, Advocate Davies submitted there would be an issue estoppel arising in respect of the substantive issues decided by the Delaware court and the cost of further proceedings in Guernsey should not be great.

The proposed amended cause

118. So far in this judgment I have been talking about the *cause* presently before the court which is in the same form as the *cause* exhibited to LB Talbot QC at the *ex parte* hearing of the application for leave to serve out of the jurisdiction. If proceedings continue in Guernsey, the Plaintiffs have said that they propose to apply to amend the *cause*. No application to amend has been tabled before the Court. I therefore prefer to refer to it as the proposed amended *cause* rather than the amended *cause* which is how Advocate Wessels described it.

119. One of the proposed amendments includes the addition of an eleventh Defendant, State Street (Guernsey) Limited, formally known as Mourant Guernsey Limited, a Guernsey registered company which provided administration services to CCC under the terms of a Corporate Administration Agreement dated 6th October 2006. That agreement contemplated the sub delegation of certain of the administration services to CIM and contemporaneously a sub delegation agreement was entered into between CCC, Statestreet and CIM. Both agreements terminated following the placing of CCC in compulsory liquidation.

120. The Plaintiffs allege that CIM continues to hold a substantial volume of papers, documents and other property belonging to or relating to CCC which CIM allegedly has declined to produce to the liquidators. The proposed amended *cause* contains a nineteenth claim for relief, namely an order that CIM returns to State Street all papers, documents and other property belonging to or relating to CCC in its possession pursuant to the sub delegation agreement and an order that State Street deliver the same to CCC. I do not want to prejudge any application to amend the *cause*, but it does seem to me that this nineteenth claim for relief against State Street could stand alone and be pursued separately. Indeed, I would have expected the Plaintiffs to require all papers and other documents be returned to them as soon as possible in order that the Plaintiffs may have access to them in the preparation of the substantive cases against the other Defendants. Whatever may be their reason for adding it as an addition claim to the Plaintiffs proceedings, it does not, it seems to me, add any weight to the Plaintiff's arguments for proceeding with the other claims for relief in Guernsey.

121. The more significant proposed amendments in the proposed amended *cause* involve the substitution of amended sixth, seventh and eighth amended claims for relief in place of the original sixth, seventh and eighth claims. The proposed amended sixth claim is brought by the liquidators against CCC's directors for wrongful trading pursuant to Section 67C of The Companies (Guernsey) Law 1994, or Section 434 of The Companies (Guernsey) Law 2008.

122. The proposed amended seventh claim is by the liquidators against CIM for wrongful trading pursuant to the same sections, namely Sections 67C of the 1994 law and Section 434 of the 2008 law. The proposed amended eighth claim is made by the liquidators against Carlyle for wrongful trading pursuant to the same Sections, 67C of the 1994 law and Section 434 of the 2008 law.

123. The proposed amended *cause* seeks, by way of additional relief, a declaration that each of CIM and Carlyle were directors of CCC as defined by Section 67C(7) of the 1994 law or Section 434(7) of the 2008 law; a declaration that each of CCC's directors, CIM and Carlyle shall be liable to make such contribution to CCC's assets as the Royal Court thinks proper pursuant to Section 67C(1) of the 1994 law or Section 434(1) of the 2008 law; and a disqualification order in respect of each of CCC's directors, CIM and Carlyle pursuant to Section 67A(1) of the 1994 law or Section 428 of the 2008 law.

124. A preliminary issue for me to resolve is whether I should take account of the proposed amendments. One of Advocate Wessels' early submissions was that I could take account of likely amendments to the *cause*, just as it would be proper for me to take account of any defences the Defendants might invite me to consider. Unfortunately for Advocate Wessels, Advocate Davies assiduously avoided giving any indication of what defences his clients would raise. The submission is therefore of little assistance to Advocate Wessels.

125. Advocate Wessels also submitted that all the additional claims are exclusively justiciable in the Royal Court because throughout Section 67 there are references to the "Court" which is defined, as I have said above, as the Royal Court sitting as an Ordinary Court.

126. During his oral submissions, Advocate Wessels stated a number of times that I might be assisted by reading the judgment in an English case on which the Supreme Court had reserved its decision but was expected to deliver a judgment shortly. It was shortly after the oral hearing concluded that the Supreme Court handed down judgment in NML LTD v Republic of Argentina [2011] UKSC 31. Since then I have received further written submissions from Advocate Davies and from Advocate Wessels. Advocate Davies submitted it would be inappropriate for me to adopt a new legal framework after the oral hearings have concluded. Advocate Wessels said it would be appropriate to have regard to a recent decision of the highest English court, especially as he had referred to it during his oral submissions.

127. I agree that it is appropriate I should have regard to the decision. As with any other decision of an English court, it is not binding on the Royal Court but merely persuasive. How much weight to attach to a decision in another jurisdiction is always a question for the Court to consider, but it seems wrong to ignore the decision when it may be of assistance to me.

128. The main proposition Advocate Wessels extracts from the recent case is that he says the UK Supreme Court held that the rule originating in the decision of Parker v Schuller (1901) 17 TLR 299 should no longer be applied. The decision in that case was that on an *inter parties* application, a plaintiff was limited to the gateways and claims relied upon on the *ex parte* application for leave to serve out. Advocate Davies submitted that the majority held the rule in Parker, was not even engaged by the facts of the case, that the Court of Appeal was wrong to have extended the rule to apply to the facts of the case and that it was inappropriate for the Supreme Court to make any decision as to the continuing application of the rule to a situation where, as here, at the *inter parties* hearing the applicant seeks to rely on causes of action upon which he had not relied at the *ex parte* application. In reply, Advocate Wessels appeared to admit that any comments concerning Parker were obiter, but nevertheless he said the court was unanimous in deciding that the rule was no longer part of English law.

129. I am assisted by the reasoning of Lord Phillips at paragraph 75 of his judgment:

> *"Where an application is made to amend a pleading the normal approach is to grant permission where to do so will cause no prejudice to the other party that cannot be dealt with by an appropriate order for costs. This accords with the overriding objective. Where all that a refusal of permission will achieve is additional cost and delay, the case for permitting the amendment is even stronger. I can see no reason in principle why similar considerations should not apply where an application is made for permission to serve process out of the jurisdiction. It is, of course, highly desirable that care should be taken before serving process on a person who is not within the jurisdiction. But if this is done on a false basis in circumstances where there is a valid basis for subjecting him to the jurisdiction, it is not obvious why it should be mandatory for the claimant to be required to start all over again rather than that the court should have a discretion as to the order that will best serve the overriding objective."*

130. His reasoning is entirely consistent with the overriding objective which Guernsey has adopted as Rule 1 of The Royal Court Civil Rules, 2007. I see no reason why that reasoning should not be persuasive and hence followed in Guernsey.

131. Advocate Davies submitted that the proposed amended claims for relief are tactically motivated, unsustainable and will fail. He argued the basis of the wrongful trading claim, the principal new claim, is the antithesis of the current claim. It alleges there was a date by which the Directors should have realised insolvency was inevitable and put CCC into liquidation at that date.

132. I assume from those remarks that any application by the Plaintiffs for leave to amend their *cause* will be resisted by the Defendants. I did not hear much argument as to the merits of any application to amend because there was no such application pending before the Court. If I take account of the proposed amendments on the present application and am persuaded by them to dismiss the Defendants' application to set aside the order for leave to serve out of the jurisdiction and to set aside the *exceptions* it would be inherently unjust if at a later date the Court decides to refuse to grant leave to amend.

133. The Plaintiffs would argue that to ignore the proposed amendments is unjust to them. However, as they were responsible for the original *cause* and, for whatever reason, did not include these proposed additional claims for relief in their original *cause* and as they have chosen not to make any application to amend their existing *cause*, it seems to me that the balance of prejudice favours the Defendant rather than the Plaintiffs.

134. I recognise that a decision to ignore the proposed new heads of relief runs the risk that the Plaintiffs might make a fresh application for leave to serve out of the jurisdiction with a fresh *cause* but, in the circumstances, I consider that is the lesser of two evils.

135. If that approach is wrong and I should be considering the proposed amendments, I would accept them on the basis put forward by Advocate Wessels in his Skeleton Argument at paragraph 304:

> *"No new factual matters are set out in the Amended Cause as these amendments articulate causes of action and relief for which the facts have already pleaded."*

136. If the case, as presently pleaded, goes ahead in Delaware the facts and the causes of action will be proved or otherwise in that jurisdiction. Advocate Davies has acknowledged that will create an issue estoppel. The Plaintiffs could then pursue a separate action for the relief under statutory claims in Guernsey, relying upon the Delaware decision. I do not believe it would involve a lengthy hearing or be expensive.

137. It is normally highly desirable to have all heads of relief determined in the same set of proceedings in a single jurisdiction. To do so avoids conflicting decisions being reached in different courts. In the present case, wherever the proceedings take place, the trial court will have to apply Delaware law to the IMA and Guernsey law to the corporate governance, internal management and other issues governed by Guernsey law as the law of the place of incorporation of CCC. Expert evidence on questions of foreign law will have to be adduced wherever the case is heard. There is a possibility that the Delaware court may misunderstand, or wrongly apply, Guernsey law. Equally, there is a possibility the Guernsey court would misunderstand, or wrongly apply, Delaware law. Both courts are competent to deal with foreign law issues with the benefit of expert evidence.

138. If the Delaware court is the more appropriate venue for the trial on all the non-statutory heads of relief, I do not believe that the possibility of the Plaintiffs amending their claim to include the Section 67 claims together with the existing Section 106 claim justifies making Guernsey the most appropriate forum. The only benefit in having a single set of proceedings will be one of cost and that does not appear to be significant.

139. Advocate Wessels relied heavily on the proposed disqualification claim under Section 67A. In my view, it is significant that such a claim may also be brought by the Policy Council, the GFSC, HM Procureur and others. The trial of this action will, I am sure, be monitored closely by the relevant Guernsey authorities wherever it is held. There is no risk that a delinquent officer will escape disqualification proceedings solely by reason of the action going ahead in Delaware, if the authorities consider disqualification to be appropriate.

140. The proposed Section 67 claims do not therefore need to influence my decision as to forum.

Logistical considerations

141. The Defendants place great reliance upon the logistical considerations which, in their submissions, strongly favour Delaware, rather than Guernsey.

142. I accept the Plaintiffs' submissions that modern travel, modern communications, accessibility of documents and witnesses, international businessmen who travel frequently and who chose to incorporate CCC in Guernsey, logistical considerations should attract less weight than might have been the case in years past.

143. One factor put forward was that a trial in Delaware is likely to take no more than two months, whereas in Guernsey it might last for a year. The estimate of a year appears to have been based upon comments made by LB Talbot QC. I do not know when he made those comments, what information he had available to him, in what context they were made nor whether they were intended to be a serious estimate of the likely duration of the hearing. I therefore disregard his estimate, especially as none of the counsel appearing before me said they agreed with it.

144. I asked why the proceedings would be concluded more quickly in Delaware than in Guernsey and the reply was that Delaware has effective case management tools available to it. The answer appeared to ignore the fact that Guernsey now has a considerable army of case management weapons in the 2007 Rules. I was not told of anything that the Delaware court could do that Guernsey could not do. I have therefore assumed that the length of the trial will be the same whether held in Delaware or in Guernsey.

145. There is a suggestion that the case would tax the resources of the Royal Court to their limits and beyond. That is also unsustainable. It is well understood that if a long case is likely to be too disruptive to the general work of the Royal Court to enable a locally resident judge to preside, a Lieutenant Bailiff will be appointed to deal with the case. Furthermore, having increased the number of jurats to sixteen, it would be possible for a team of three jurats to sit in a civil matter for a protracted trial if required. Alternatively, there is power for a judge to sit alone as the arbiter of fact as well as law and this case might well be one where it would be appropriate for that power to be exercised. In conclusion, the Royal Court would have no difficulty in dealing with the case.

146. The Defendant suggested that the Guernsey Bar would not be able to cope because of its small size. There will be a number of parties who may require separate representation but that is not the case at present where there are two groups of Defendants represented by two counsel and I see no reason why that should not continue. It was suggested that there will be a large number of witnesses, some of whom may want local representation. If there are conflicts, it is unlikely that they would be of such a magnitude that separate firms need to be represented. It is not unusual for parties with similar interests to be represented by different Advocates from within the same firm. To date, the Bar has always been able to deal with multi-party civil cases, indeed I believe that members of the Bar relish the opportunity to participate in such cases and I am surprised that Advocate Davies is suggesting the Bar could not cope with the present matter. I do not accept his argument.

147. Affidavits were produced by Advocate Davies to compare the cost of travel if the witnesses, who are primarily based in New York or Washington, have to travel and attend court in Guernsey rather than Delaware. I do not attach much weight to that evidence, partly because they are based on the assumption of a twelve month trial which I have already rejected. Also, because as I have said, international businessmen who choose to base a part of their operations in Guernsey by incorporating an investment fund in this jurisdiction and to place it in liquidation here should not protest if they find they are facing litigation in this Island.

148. A more relevant factor, in my view, is that it is likely that evidence will have to be given by a number of third parties, including counter-parties to the repo contracts entered into by CIM on behalf of CCC. Such third parties may be required to produce documents or give live evidence or both. If they are not willing witnesses, evidence will have to be taken in the foreign jurisdiction using normal procedures through proper channels. Those are likely to be time consuming and more expensive if the trial is based in Guernsey rather than Delaware. The additional cost is a factor to consider because all the Plaintiffs' costs will, ultimately, be paid from funds otherwise available to creditors, including investors, of CCC to the extent that they are not recovered from the Defendants if the claim is successful.

149. In conclusion, I do not attach great weight to the logistical factors but nevertheless, such little weight as they deserve does favour the Delaware court rather than the Royal Court.

Fifth to Seventh Defendants

150. Advocate Bell appeared on behalf of the Fifth to the Seventh Defendants. He adopted Advocate Davies' submissions on behalf of the other Defendants, emphasizing certain aspects. I believe I have dealt with the arguments he raised during the course of my judgment. However, the position of the Seventh Defendant is different from the others. He is a Guernsey resident who was sued in Guernsey as a right. His Application is for a stay of the claim against him. He will submit to the jurisdiction of the Delaware court if I decide that jurisdiction is the most suitable forum.

Conclusion

151. Returning to the three limbed test laid down by the Privy Council in Altimo Holdings, the merits are not in issue. I am satisfied that two of the jurisdiction gateways relied upon by the Plaintiffs are available. I now have to decide whether Guernsey is clearly or distinctly the appropriate forum for the trial of the dispute. As I have indicated, there are arguments for and against both Guernsey and Delaware. If the Plaintiffs had not pleaded any claims for statutory relief, I would be persuaded that Delaware is clearly or distinctly the appropriate forum. Having carefully considered the allegations in the *cause*, I believe the importance to be attached to the exclusive jurisdiction clause in the IMA outweighs any of the factors that would point in favour of Guernsey and I am not persuaded there is a strong cause to disregard the exclusive jurisdiction clause.

152. All counsel approach the proceedings on the basis that it is preferable that all claims for relief are determined in the same set of proceedings. I have accepted that the Delaware court will not have jurisdiction over the Section 106 claim, although the Defendants will submit to the jurisdiction of that court in respect of all heads of claim. It would be unwise for me to assume that the Delaware court will ignore the limits on its jurisdiction and agree to deal with the Section 106 claim. Therefore, if the claims for relief all have to be determined in the same set of proceedings, Guernsey is not just clearly or distinctly the appropriate forum, it is the only available forum. The same applies to the proposed Section 67 claims in the proposed amended *cause* if I have to have regard to those claims which as I have explained, I do not believe is necessary. Even though all the parties accepted the desirability of proceeding in a single jurisdiction, none of them have persuaded me that it is imperative to do so. As I have endeavoured to explain, I am not persuaded that there is a real risk of conflicting legal or factual conclusions if the statutory claims are severed from the other claims for relief. Similarly, I am not persuade that any significant additional costs would be incurred if the statutory claims have to be determined in Guernsey after the other claims have been decided by the Delaware court. Sending the case to Delaware will not therefore deprive the Plaintiffs of a juridical advantage because the statutory claims will still be available in Guernsey.

153. I have reached the conclusion that the existing and potential statutory claims are not of such significance to swing the decision from Delaware to Guernsey.

154. I will not however set aside the application for leave to serve out of the jurisdiction. Instead, I will order that the proceedings be stayed, on the undertaking of the Seventh Defendant to submit to the jurisdiction of Delaware, pending the outcome of the proceedings in Delaware. The Section 106 claim and any other claims, statutory or otherwise that the court may give leave to include by way of amendment shall then be determined in Guernsey in so far as they have not been decided in Delaware.

