

Judgment 11/2012

**Carlyle Capital Corporation Limited et al v
Conway et al – Court of Appeal
- Civil File No 435
- 23rd March 2012**

Appeal of Royal Court judgment of 22 July 2011. Companies (Guernsey) Law 1994 – company liquidation – jurisdiction – appeal allowed. Leave to appeal to the Privy Council dismissed – application for stays pending leave to appeal dismissed. (see 29/2011)

IN THE COURT OF APPEAL OF GUERNSEY

The 23rd day of March, 2012 before The Hon Michael Jacob Beloff QC, presiding, James Walker McNeill QC and Sir Hugh Bennett

Between

- (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 Capital Corporation Limited (In Liquidation)

Plaintiffs/Appellants

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 LLC
- (9) TC GROUP LLC
- (10) TCG HOLDINGS LLC

Defendants/Respondents

On the Plaintiffs' application for leave to appeal the judgment given by the Royal Court (Ordinary Division) on 22 July 2011;

THE COURT, having on 30 to 31 January 2012 and 1 to 3 February 2012 heard from Advocates J M Wessels for the Plaintiffs, Advocate S H Davies for the First to Fourth and Eighth to Tenth Defendants and Advocate G K Bell for the Fifth to Seventh Defendants;

And whereas, on 23 February 2012 the Court handed down a draft reasoned judgment for the parties to correct any literal errors;

And whereas, on 5 March 2012 the Court formally handed down its Judgment ("the Forum Judgment"),
THE COURT:-

- (i) GRANTED the Plaintiffs leave to appeal the judgment of 22 July 2011;
- (ii) ALLOWED the appeal;

- (iii) DISMISSED the First to Fourth and Eighth to Tenth Defendants' cross- appeal by Respondents' Notice dated 21 September 2011;
- (iv) DISMISSED the Fifth to Seventh Defendants' cross- appeal by Respondents' Notice dated 23 September 2011;
- (v) DISMISSED the Exceptions Déclinatoire of the First to Fourth and Eighth to Tenth Defendants dated 28 February 2011;
- (vi) DISMISSED the Exceptions Déclinatoire of the Fifth to Seventh Defendants dated 28 February 2011;
- (vii) SET ASIDE the stay granted by the Deputy Bailiff on 22 July 2011;
- (viii) GRANTED the Plaintiffs leave to file an Amended Cause in the terms set out in the Proposed Amended Cause dated 13 May 2011, exhibited at Tab 165 to the Affidavit of Alan John Roberts sworn 13 May 2011;
- (ix) ORDERED that the Defendants pay the Plaintiffs' costs of and incidental to the Defendants' Exceptions Déclinatoire dated 28 February 2011 including all of the costs of the hearing before Deputy Bailiff Collas from 27 June to 1 July 2011 and all of the costs of and incidental to the appeal on the standard recoverable basis, to be taxed if not agreed; and
- (x) ORDERED that the Defendants provide an address for service and that the Amended Cause be placed on the Rôle des Causes à Plaider.

THE COURT this day ISSUED JUDGMENT in the terms attached hereto.

And whereas, UPON THE UNDERTAKING of the Plaintiffs not to contend or otherwise rely on in any way, in the courts of Guernsey or elsewhere, that the filing and service of a Defence by the Defendants (or any other subsequent steps, directions, or applications made before the courts of Guernsey or the provision of an address for service) prior to the determination of any application for special leave to appeal to the Privy Council or (if leave is granted) any appeal to the Privy Council against the Forum Judgment of the Court of Appeal constitutes a submission by the First to Sixth and Eighth to Tenth Defendants to the jurisdiction of the courts of Guernsey.

On 6 March 2012, THE COURT:

- (xi) DISMISSED the First to Fourth and Eighth to Tenth Defendants' application for leave to appeal to the Judicial Committee of the Privy Council;
- (xii) DISMISSED the Fifth to Seventh Defendants' application for leave to appeal to the Judicial Committee of the Privy Council;
- (xiii) DISMISSED the First to Fourth and Eighth to Tenth Defendants' application for a stay pending an application for leave to appeal to the Judicial Committee of the Privy Council; and
- (xiv) DISMISSED the Fifth to Seventh Defendants' application for a stay pending an application for leave to appeal to the Judicial Committee of the Privy Council.

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

Before:

**The Hon Michael Jacob Beloff QC
James Walker McNeill QC
Sir Hugh Peter Derwyn Bennett**

Judges of Appeal

Between:

**(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 CAPITAL CORPORATION LIMITED (IN LIQUIDATION)
(Applicants Plaintiffs)**

-v-

**(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.
(Respondents Defendants)**

**Decision handed down 13 February 2012
Written Judgment handed down 5 March 2012**

**Advocate J M Wessels appeared for the Appellants
Advocate S H Davies (First to Fourth & Eighth to Tenth) &
Advocate G K Bell (Fifth to Seventh) appeared for the Respondents**

The President,

1. This is a judgment of the Court.
2. Carlyle Capital Corporation Limited (in liquidation) (“CCC”) and its joint Liquidators, Messrs Roberts, Mather, Morris and Rabet (the Plaintiffs in the Cause) apply for leave to appeal and, if leave is granted, appeal that part of the order of the Deputy Bailiff dated 22 July 2011 whereby he, having refused to set aside leave to the Plaintiffs to serve the Cause out of the jurisdiction upon the Defendants 1-6 and 8-10 granted by Lieutenant Bailiff Patrick Talbot Q.C. on 7 July 2010, nevertheless ordered that the claims in the Cause be stayed pending a trial of any action against all the Defendants by the Plaintiffs in the State of Delaware in the United States of

America. The Defendants 1-7 and 8-10, if leave is granted, appeal by cross notice the Deputy Bailiff's order refusing to set aside leave to serve out of the jurisdiction granted by LB Talbot. The Plaintiffs also seek leave to amend the Cause by adding certain causes of action against the existing Defendants and to join another party to the Cause. For convenience, without prejudice to the distinct identities indicated, we shall call the disputant parties, save where otherwise necessary, the Liquidators and the Directors respectively.

3. On 13 February 2012 we gave leave to appeal and allowed the appeal. We dismissed the Directors cross-notice. We allowed the Liquidators application for leave to amend the Petition. We indicated, as we foreshadowed at the conclusion of the hearing that we would give our reasons for these several decisions later. The following are our reasons.
4. At this stage of this potentially complex and costly litigation the dispute is not about the merits of the Liquidators' claim but where adjudication of those merits should take place - the choice being between Guernsey and Delaware, the former supported by the Liquidators, the latter by the Directors. The Deputy Bailiff, as appears from his order, acceded to neither side's proposal in full. The essential question before this Court is whether his *via media* (or compromise) was flawed.
5. We must start by setting out the background taking advantage, with gratitude, of the lucid summary made by the Deputy Bailiff.
6. On 29 August 2006 CCC was incorporated in Guernsey. It was promoted by the Carlyle Group, one of the world's largest private equity firms, to invest in residential mortgage backed securities ("RMBS"). By July 2007 CCC had raised capital totalling US\$ 945 million through a series of private placements and an initial public offering. 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 the global credit markets became increasingly volatile and during which period the entire capital of CCC was lost.
7. On 17 March 2008 CCC was placed into compulsory liquidation in Guernsey pursuant to section 94(a) of The Companies (Guernsey) Law 1994, as amended ("the 1994 Law") on the application of the Directors of CCC.
8. 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, there was a substantial deficit.
9. There are ten Defendants in these 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 Defendants were appointed as independent members of the board of CCC. The eighth Defendant, Carlyle Investment Management LLC ("CIM") is a Delaware registered company and was appointed as the investment manager and advisor to CCC pursuant to an investment management agreement ("IMA") dated 20 September 2006.
10. The ninth Defendant, TC Group LLC, ("TCG"), which owned 75% of CIM, and the tenth Defendant, TCG Holdings LLC, the sole managing member of TCG, are collectively referred to as "Carlyle", except where otherwise stated. Carlyle and CIM have been described collectively by the Liquidators 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.
11. The procedural history in outline is as follows. On 7 July 2010 the Liquidators issued proceedings in four separate jurisdictions, Guernsey, Delaware, District of Columbia, and in the State of New York, all claiming in similar form damages "*in a sum to be determined at trial exceeding \$1 billion*" together with other relief. The Liquidators alleged in the Cause and

submitted before the Deputy Bailiff and before us, that the nature of the action is one essentially concerned with the internal management, control and corporate governance of CCC. The Directors submitted before the Deputy Bailiff and before us that the nature of the Liquidators' action essentially relates to the failures of the duties arising under and connected with the IMA.

12. On 7 July 2010 the Liquidators applied for leave to serve the proceedings out of the jurisdiction on all the Directors (save for the seventh Director ("Mr Loveridge") who is resident in Guernsey), pursuant to Rule 8 of The Royal Court Civil Rules, 2007. The application was heard and granted by LB Talbot on an *ex parte* basis.
13. By applications dated 28 February 2011, the non-resident Directors applied to set aside the leave granted to serve out of the jurisdiction or, alternatively, for an order that the proceedings be stayed pending the outcome of the proceedings in Delaware. The Deputy Bailiff understood that the proceedings in New York and in the District of Columbia were not being seriously pursued, and that, as he said in para 10 of his judgment "*the argument before me centred upon the choice of jurisdiction between Delaware and Guernsey*".
14. On 8 August 2011 the Liquidators sought the Deputy Bailiff's leave to appeal which on 18 August 2011 was refused. On 19 August 2011, the Liquidators sought leave to appeal from the Court of Appeal pursuant to an interlocutory direction from the Bailiff, sitting as a single member. On 15 September 2011 the application came before The Hon. Michael J. Beloff QC (President), Michael Jones QC and Clare Montgomery QC, JJA, when it was ordered that the Liquidators' application for leave to appeal, with appeal to be followed if granted, was to be heard on 30 January 2012 with a 5 day estimate. On 21 September the First to Fourth and Eighth to Tenth Defendants served a Cross Notice seeking to overturn the Deputy Bailiff's refusal to set aside the leave to serve out or alternatively to uphold the order as to the stay. On 23 September the Fifth to Seventh Defendants served a similar Cross-Notice.
15. The hearing before us accordingly took place between 30 January and 3 February 2012 frustrating the hopes of Lord Templeman in *Spiliada* that in this area "submissions will be measured in hours not days" (1987 1 AC 460 at p.465G). Advocate Wessels represented the Appellants and Advocate Davies all the Respondents except for the independent Directors who were represented by Advocate Bell. We are grateful to the advocates for submissions of high quality and to the substantial teams who provided legal and logistical support.
16. By way of prologue we deal with the application to amend. Although in correspondence prior to the hearing before him the Deputy Bailiff was invited to consider the proposed amendments on the basis that they were certain to be granted, for whatever reason, the Liquidators in fact made no formal application to amend (DB paragraphs 118 and 133). The Deputy Bailiff's approach to the proposed amendments was in consequence explicably ambivalent. He said that he would in principle ignore them by reference to considerations of the balance of prejudice (DB paragraphs 133-4) - but nonetheless did avert to them, it appears on a *de bene esse* basis, and concluded that they would not have affected his decision on forum in any event (DB paragraph 140). It seems to us preferable, now the application to amend has been made, to determine whether the claim is to proceed on the original or on an amended basis before adjudicating on the substantive matters in issue before us. There is no doubt that we have power to do so.
17. It would moreover be productive of delay and expense were we not to consider the application ourselves and to direct that it be heard by a judge of first instance. Furthermore, neither Advocates Davies nor Bell indeed submitted that it was not appropriate for us to consider the application for leave to amend. Their submissions were rather that leave to amend should be refused.
18. The Cause, as it presently stands, is against all the Directors for damages, jointly and severally, in a sum to be determined at trial exceeding \$1 billion together with interest. We summarise the bases of the various claims as follows. It is alleged at section C of the Cause that the Directors

owed CCC fiduciary duties to act in the best interests of CCC without regard to the interests of Carlyle and duties to act with skill and care in managing CCC's business affairs. So far as Carlyle and CIM are concerned, it is alleged that each owed duties, including fiduciary duties, to CCC to act in CCC's best interests; in addition each owed the same duties as shadow Directors. It is alleged between E.6 to E.14 of the Cause that breaches of the various duties began in about July 2007 and continued through to about February 2008. Each breach is said to be either reckless or grossly negligent or negligent and to have constituted wilful misconduct and been in breach of fiduciary duties and other obligations owed by all the Defendants to CCC. Para 34 of the Cause, part of Section A "Introduction", stated:-

"At every juncture, the Defendants breached their fiduciary duties and acted recklessly and/or grossly negligently, by giving priority to The Carlyle Group's interests over those of CCC. What is more, the Defendants well understood and publicly declared their intention to undertake the steps that needed to be taken to maintain CCC as a viable entity, while simultaneously and secretly deciding to do precisely the opposite of what they knew and believed was necessary to save CCC. But The Carlyle Group's relationship with CCC did not reward prudent management and reduction of risk; rather it encouraged the Defendants to continue to increase risk in volatile markets, rather than preserve CCC's capital. In a desire to reap the rewards of outsize returns, the Defendants maintained excessive leverage and low liquidity, and recklessly sent CCC into its inevitable demise. CCC was so unprotected from the known and sustained volatility of the financial markets that by mid 2007 the loss of CCC's entire capital and its collapse became the inevitable consequence."

Further, there is a claim against CIM for breach of the IMA.

19. The claims for relief are set out under 18 "Claims for Relief" in the Cause. The First to the Eighth Claims and the Eleventh to the Thirteenth Claims are for damages for misfeasance, breach of fiduciary duty, gross negligence and/or negligence as against the Defendants in their capacities as Directors and/or in the case of CIM and Carlyle as shadow Directors. The Ninth Claim, which has now been abandoned, was against CIM for a declaration to set aside the IMA. The Tenth Claim is against CIM for damages for breach of contract. The Fourteenth Claim is by the Liquidators against the Directors, pursuant to s.106 of the 1994 Law or s.422 of the Companies (Guernsey) Law 2008 ("the 2008 law"), for compensation in amounts to be determined at trial. The Fifteenth and Sixteenth Claims are again claims by the Liquidators under s. 106 etc., but against CIM and Carlyle, respectively, alleging that each were "officers" of CCC. The Seventeenth Claim is a claim against CIM and Carlyle for the return of CCC's books and records and other property, in that despite requests for the return of all CCC's books etc, some but not all books have been returned, and the failure to return all books etc amounts to obstruction of the proper investigation of CCC by the Liquidators. The Eighteenth Claim is a claim against CIM and Carlyle for unjust enrichment.
20. We summarise the proposed amendments to the Cause as follows. The Sixth to Eighth Claims are substituted for the original claims thereunder by a claim by the Liquidators against CCC's Directors for wrongful trading pursuant to s.67C of the Companies (Guernsey) Law 1994 or s.434 of the Companies (Guernsey) Law 2008, against CIM for wrongful trading under the same Laws, and against Carlyle for wrongful trading under the same Laws. Declarations are sought that both CIM and Carlyle were Directors of CCC, as defined by s.67C (7) of the 1994 Law or s.434 (7) of the 2008 Law, and that all Defendants are liable to make such contributions to CCC's assets as the Royal Court thinks proper. Further, an additional head of relief is for a disqualification order in respect of each of CCC's Directors, CIM and Carlyle pursuant to s.67A (1) of the 1994 Law or s.428 of the 2008 Law. The last proposed amendment is to add State Street (Guernsey) Ltd, a Guernsey registered company, which provided administration services to CCC under an agreement dated 6 October 2006. The proposed Nineteenth Claim is against State Street and CIM for return of books and records of CCC.

21. The test to be applied in considering the application for leave to amend is to be found in para 75 of the judgment of Lord Phillips in *NML Ltd v Republic of Argentina* [2011] UKSC 31, which the Deputy Bailiff set out at para 129 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.”

He added:

“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.”

22. As the Deputy Bailiff said at para 130 of his judgment, Lord Phillips’ reasoning is entirely consistent with the overriding objective which Guernsey has adopted in Rule 1 of the Royal Court Civil Rules, 2007, and there is no reason why that reasoning should not be persuasive and followed in Guernsey.
23. In respect of all proposed amendments the Directors submitted that leave should be denied because they were all sought for purely tactical reasons i.e. to support the Liquidators’ case on forum conveniens. It seems to us that as long as the proposed amendments were not demurrable and had an independent purpose, the mere fact that they also, if allowed, added weight to the Liquidators’ forum arguments could not be a valid basis for objection. Indeed if they had both substance and purpose, it would be very difficult, if not impossible, to find that they were advanced only for inappropriate tactical reasons. In any event we are unpersuaded that the Directors’ assault under this head had any force. The issue of proceedings in four jurisdictions, all claiming essentially the same relief, seemed to us to be no more than a conventional exercise of keeping all options open. Even if at one time the Liquidators might have been open to the notion of a Delaware forum, their later rejection of that possibility was, in our view, nothing other than the product of consideration of its full implications. There are in the copious files before us instances of both sides emphasising one matter in Delaware and another in Guernsey. We must concentrate on the objective facts.
24. In respect of the proposed amendment to plead Wrongful Trading the Directors claimed that it was demurrable. If this could be made good, it would of course be an irresistible ground for refusal of leave. We remind ourselves, however, of the dangers of refusing leave in circumstances where the area of law is developing, and it would be preferable to have facts found rather than facts hypothetical before assessing the soundness of a plea. See *X v Bedfordshire CC* 1995 2 AC 633 at p. 740-741 in a passage on striking out, in the speech of Lord Browne-Wilkinson but equally applicable, *mutatis mutandis*, to refusal of leave to amend:-

“In all these cases the defendants are seeking to strike out the claims at an early stage, before discovery has taken place and before the facts are known. It is therefore necessary to proceed on the basis that the facts alleged in the various statements of claim are true. It must be stressed that these allegations are not admitted by the defendants.

Actions can only be struck out under [R.S.C., Ord. 18, r. 19](#) where it is clear and obvious that in law the claim cannot succeed. Where the law is not settled but is in a state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts.

Much more difficult is the question whether it is appropriate to decide the question whether there is a common law duty of care in these cases. There may be cases... where it is evident that, whatever the facts, no common law duty of care can exist. But in other

cases the relevant facts are not known at this stage. For example, in considering the question whether or not a discretionary decision is justiciable, the answer will often depend on the exact nature of the decision taken and the factors relevant to it. Evidence as to those matters can only come from the defendants and is not presently before the court..... if, on the facts alleged in the statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered”.

25. The concept of wrongful trading was introduced in the constituent parts of the United Kingdom pursuant to Cork Report of 1982. The concept of fraudulent trading had required proof of dishonesty and to the criminal standard. The Committee wished to allow compensation for those who had suffered foreseeable loss as a result of unreasonable behaviour, namely the objectively unreasonable continuation of the incurring of liabilities with no reasonable prospect of meeting them: see paragraphs 1776 – 1790 of the Report. In Guernsey, section 67C of the 1994 Law (once amended) permits a declaration of liability where a director, of a company which has gone into insolvent liquidation, at some time before the commencement of winding up knew or ought to have concluded that there was no reasonable prospect of avoiding going into insolvent liquidation. The proposed amended pleading embraces this concept in the amended Sixth, Seventh and Eighth Claims and tracks exactly the statutory language. The Directors’ submission therefore has to be that the particulars said to give support to the general plea, even if established, did not support it.
26. The debate between the parties can be epitomized in this way. The Directors said that as long as insolvency could be avoided by the taking of some measures, the criterion of ‘*no reasonable prospect of avoiding insolvent liquidation*’ could not be satisfied. The Liquidators say that for so long as the Directors had set their face against such measures, they could not deploy that hypothetical possibility in order to deny the existence of a mandatory element of the offence. We need not pronounce on where the balance of arguments lies; it is sufficient to say that, at its lowest, the Liquidators’ argument is not untenable.
27. Two cases were relied on by the Directors for the contrary conclusion. On a proper reading, neither do. *In re Continental Assurance* [2001] BPIR 733, at paragraph 106, Park J merely referred to typical cases where directors have:

“closed their eyes to the reality of the company’s position, and carried on trading long after it should have been obvious to them that the company was insolvent and that there was no way out for it.”

In *In Re Marini Ltd* [2004] BCC 173 HH Judge Seymour QC, at paragraph 69 was considering a relatively ordinary trading company and the timing of the taking of radical measures. The key sentence in that paragraph

“I should have been fairly readily persuaded on the totality of the evidence that each of the respondents ought to have appreciated by the time sales up to Christmas in 1998 had not produced any improvement in the situation of the company that there was no reasonable prospect of insolvent liquidation being avoided in the absence of radical measures, but even at that stage the evidence did not indicate that insolvent liquidation was anything like inevitable.”

is both *obiter* and, on the issue under scrutiny, ambiguous.

28. Neither passage enunciates a principle and both cases were determined after a trial. It is worthy of note that the Cork Committee had in mind the inclusion of liability for those who shut their eyes to the obvious or refrained from asking obvious questions (paragraph 1788) and the test of what an honest reasonable businessman, with knowledge of all the facts, would have done

(paragraphs 1789 and 1790). There seems to us no reason in principle why the conclusion that there was no reasonable prospect of avoiding insolvent liquidation should not be available where it could be based upon the decisions which the Board itself had taken as to the way in which the company was to operate in its hour of difficulty. Assuming that a situation has developed which might be retrievable through radical measures but a Board decides on measures of a diametrically opposed nature, we are not persuaded that there is anything remarkable about a result that such conduct is wrongful. In other words, the relevant director knew or ought to have concluded that, assuming the Board did not depart from its policies, there was no reasonable prospect of avoiding going into insolvent liquidation.

29. Another proposed amendment was designed to enable the Appellants to seek disqualification of the respondent Directors. The relevant statutory provisions are to be found in Section 67A(1)(7) and Schedule 3 of the 1994 Law. Unfitness of a character sufficient to entitle a court to make such an order is to be determined by reference to, among other matters, the individual's probity, competence, solvency, soundness of judgement, diligence and previous conduct. The Directors' bold argument that the Liquidators should not be permitted to bring such a claim flies, in our view, in the face of the statutory endowment of their power to do so. The supplementary and somewhat elusive argument that there is a perceptible conflict between the Liquidators' application for Directors' disqualification and their concurrent application for compensation from the self-same Directors under s.106 of the same law is again irreconcilable with the statutory recognition that they could do either (and, if saw fit, therefore both). The final argument that other bodies with power under the self-same statute to act had not done so leads nowhere. If a basis for a director's disqualification is arguably established, a liquidator is best placed to make an application in the context of proceedings where the director's conduct is already to be adjudicated upon.
30. The Directors alleged a lack of particularity of the grounds in support of the application. Whilst there is no specified correlation of Conclusion 6 to particular parts of the preceding narrative, this is no basis for rejecting amendment as long as the general pleading contains material which could – and that is our view – support it. Any such imperfection can be cured later. So far as our experience goes, it is far from unusual for the early stages of such applications to be attended with calls for further and better particulars.
31. The proposed addition of the eleventh defendant was not seriously contested.
32. We will accordingly allow all the amendments and so clear the decks for the main (ie forum) issue before us.
33. On the main issue we have borne in mind the established tests in this jurisdiction for (i) leave to appeal **and** (ii) where a discretionary decision is involved, the limits of powers of the appellate court to interfere.
34. The general test for determining whether to grant leave to appeal is set out in *McNamara v Gauson* [2009-10] GLR 387, citing and adopting the English Practice Direction (Court of Appeal (Civil Division)) (8) of 1999. Thus (1) leave to appeal will be granted unless an appeal would have no real prospect of success; and (2) leave to appeal may also be granted in exceptional circumstances if there is an issue which, in the public interest, should be examined by the Court of Appeal, such as where a case raises questions of great public interest or questions of general policy.
35. Where the discretionary decision of a lower court is involved, the limits of the appellate court are the correction of error of principle, of the taking into account of an irrelevant matter, the failure to take into account a relevant matter or the interference with a decision plainly wrong: e.g. *The Abidin Daver* [1984] AC 398, at 420.

36. The established tests for service out of the jurisdiction are summarised in *Altimo Holdings Investments Ltd v Kyrgyz Mobile Telecom Limited* (2011) UKPC 7 para 71 (quoted by the Deputy Bailiff at paragraph 16).

“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 Barkazi Jomhuri 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 (No2)* [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.”

37. Of the three key elements the satisfaction of the first two is not now in dispute. There are serious issues to be tried (DB paragraph 17). There is a good arguable case as to the gateways. (DB paragraph 66)

38. As to the third test (ie that Guernsey is the “clearly appropriate forum”) we start by observing that, although invited to do so, the Deputy Bailiff did not set aside the Lieutenant Bailiff’s order serving the other Respondents out of the jurisdiction.

39. The test for stay of proceedings instituted within the jurisdiction on grounds of forum non conveniens (“a forum stay”) is set out in the classic case of *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC 460 which has been applied in Guernsey on a number of cases including *Masood v Zahoor* (Royal Court, LB Southwell QC, 9th July 2007) and was referred to below by the Deputy Bailiff (DB paragraphs 20 and 67). Lord Goff there stated (at p 476B – G):

“In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear’s formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the *Société du Gaz* case, 1926 S.C.(H.L.) 13, 21, per Lord Sumner; and *Anton*, *Private International Law* (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the

plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

- (c) *The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established.”*

40. The criteria that govern stay on such grounds are the converse of those set out in the forum element of leave to serve out of the jurisdiction, as noted by the editors of the Supreme Court Practice 2012 at 6.37, 16 p.252.
41. Since the power to stay proceedings is part of the general case management powers of the court, in exceptional circumstances it may be exercised where the interests of justice so require even where the case does not come within *Spiliada* principles; ie on grounds other than that another jurisdiction is forum conveniens. *Reichhold Norway v Goldman Sachs* 2000 1 WLR 173.
42. There was some debate before us as to whether the stay ordered by the Deputy Bailiff was a forum stay or a case management stay; paradoxically the Directors argued that it was a forum stay though the reluctance of an appellate court to interfere with exercise of discretion would be particularly strong in respect of a case management decision. In *Reichhold* Lord Bingham of Cornhill C.J., (at p. 186) cited with approbation the submissions of Counsel.

“He did, however, suggest that the court was well able to control its own business, and he accepted that the grant of stays such as this would be a rarity, account always being taken of the legitimate interests of plaintiffs and the requirement that there should be no prejudice to plaintiffs beyond that which the interests of justice were thought to justify.”

and added:

“stays are only granted in cases of this kind in rare and compelling circumstances.”

43. The question of classification is in this instance difficult; the stay ordered by the Deputy Bailiff may most accurately be termed a quasi-forum stay since its basis was the apparent perception of the Deputy Bailiff that for most issues Delaware but, for a residual category Guernsey, was the appropriate forum.
44. The case law in our view shows that the Court seized whether of an application for service out or an application for stay on forum grounds must identify what is the *forum conveniens* for resolution of “*the trial of the dispute*” rather than of individual issues within the dispute (see passages from *Altimo Holdings* and *Spiliada* cited above). Close scrutiny of the Deputy Bailiff’s decision persuades us that in the end, for all his careful analysis, he never confronted that key question. Two sentences which we highlight in the concluding parts of his judgment are significant.

“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 persuaded 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.*
45. In each instance the Deputy Bailiff's choice is contingent. Indeed had he concluded that Delaware was clearly the appropriate forum he should logically have set aside the order for service out, which had as its necessary premise that Guernsey was clearly the appropriate forum; but he did not. This departure from principle by itself entitles us to revisit the exercise of discretion.
46. There is a further point. The Deputy Bailiff never at any juncture considered the consequences of his order. True it is that the Directors' application for setting aside service out had as its alternative an application for a stay. But neither in their written nor in their oral submissions did any party address this as a viable option; all were content to argue for (on the appellants' side) Guernsey, or (on the respondents') Delaware as the forum for resolution of the whole dispute, and for nothing in between, as indeed is reflected in the opening sentence of paragraph 152 of his Judgment quoted above. We were taken carefully through the transcript of the hearing before him and, apart from a couple of allusive and speculative comments by the Deputy Bailiff, there was nothing at all to indicate that he had in mind the order he in fact made; and as he had invited the parties at the outset to not to deal with peripheral matters, both proceeded on the basis that it was an "either/or" case. Whether or not the Deputy Bailiff's approach constituted (unwittingly) a breach of the *audi alteram partem* rule it is unnecessary to decide. It is sufficient to note that he did not take into account a material consideration in the exercise of his discretion i.e. how his order would or could work and whether it would better deliver justice than the orders actually contended for by each side.
47. This feeds into a third point on which the Deputy Bailiff, in our respectful view, erred. Stating (correctly) that all the parties accepted the desirability of proceedings in a single jurisdiction, he continued "*none of them persuaded me that it is imperative to do so*" (DB paragraph 152). This inverts the proper approach. Presumptively all proceedings should be heard in a single jurisdiction; modern cases from *Spiliada* to *Altimo Holdings* require the court to choose which jurisdiction is *forum conveniens*. It is for a party who contends for fragmentation to contend that (exceptionally) fragmentation is imperative, rather than vice versa. So, in so far as the Directors sought to defend the Deputy Bailiff's order, the burden lay upon them to justify the split. It was not for the Liquidators who assaulted it to show why a split could not be entertained. The Deputy Bailiff relied on no authority for his statement; and we were not shown any which supports it.

48. On the premise, which we consider we have established, that it is for the above reasons at least proper for us to revisit the DBs exercise of discretion, it is useful to remind ourselves of certain matters which are indisputable.
- i. The Cause, amended as it will be pursuant to our order raises *ex concessis* triable issues.
 - ii. The Directors have not put in their defence; in consequence it is impossible as of now to know what particular issues a court, where ever it sits, will have to decide.
 - iii. The Royal Court in Guernsey has jurisdiction to consider all the claims.
 - iv. The Chancery Court of Delaware does not have jurisdiction to consider all the claims. As far as wrongful trading is concerned, the Royal Court under the 1994 Law is the only Court which has jurisdiction: see the references to the Court in the 1994 Law, sections 67C and 117(1). As far as directors disqualification is concerned a Delaware court could not exercise a regulatory function conferred only on organs or officers in another jurisdiction. In our view the same must be true by parity of reasoning of the Section 106 claim brought under a Guernsey statute. No evidence submitted by experts in Delaware law by the Directors sought to suggest otherwise or sought to contradict similar evidence submitted by the Appellants experts consistent with this proposition.
 - v. Delaware law will govern the IMA breach of contract claims only. All claims of breach of duty by the Defendants whether as Directors *de jure*, *de facto* or shadow will be governed by Guernsey law.
 - vi. The Directors were responsible for the choice of Guernsey as the place of incorporation of CCC with the perceived advantages that such choice would bring. The Carlyle Group chose to incorporate CCC in Guernsey and the Director Defendants chose to be Directors of a Guernsey company. They opted, in short, to take advantage of the legal, fiscal and regulatory regimes applicable in Guernsey; furthermore prior to applying to place CCC in liquidation, the Directors considered which forum to adopt for that procedure and again chose Guernsey. All the Directors must have contemplated at the very least that they could be the subject of litigation in Guernsey. In emphasising the alleged primacy of the choice of forum clause (which we shall consider below) they could fairly be charged with blowing hot and cold, or, to mix the metaphor, having their cake and eating it.
49. In our view factors (iii-vi) tell strongly in favour of Guernsey as the *forum conveniens*. Factors (iii) and (iv) engage the presumption against fragmentation. As to factor (v), where the principal issues are those of internal management of a corporation and correlative breach of duty, the place of incorporation will presumptively be the appropriate forum because of its ability to judge matters by its own standards of business conduct: see, for example, *Ceskoslovenska Obchodni Banka AS v Nomura International plc* 2003 I. L. Pr. 20 at paragraph 12(2) and (5).
50. It is accepted that the Delaware Court, which, we are told, treats foreign law as law, not fact, could with the assistance of experts rule on matters of Guernsey law; but it is obvious beyond a peradventure that a Guernsey Court will be able to deal more directly, and shortly and cost effectively with such issues which are freighted by considerations of legal domestic policy, potentially particular to offshore jurisdictions. As to (vi) the place of incorporation is, under conflicts rules, the presumptive place for the resolution of disputes internal to a company, whose laws govern those issues: see *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 at paragraph 128 and *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 at paragraph 67.
51. The Directors submit that the Guernsey-specific claims outwith the reach of Delaware jurisdiction should be discounted. We need not repeat what we have said about wrongful trading and directors' disqualification above. We should however emphasise that the provisions underlying those claims, and those under section 106, have a public interest dimension which gives them a particular importance. In *In re Pantmaenog Timber Co Ltd* [2004] 1 AC 158, the following views were expressed by Lords Millett and Walker of Gestingthorpe respectively:

“52. *From the earliest days of the joint stock company the liquidator has exercised functions which serve the public interest and not merely the financial interests of the creditors and contributories.....In consequence... 'the community itself has always been recognized as having an important interest in [insolvency proceedings].'*”

“77. *...winding up has...a dual purpose....The other is the investigation and the imposition of criminal or civil sanctions in respect of misconduct.....[This function] serves a wider public interest.*”

52. In respect of s106 claims the Directors say that, in fact if not in form, they add nothing to the common law claims. Of section 106 it is said by them (correctly) that it is procedural only; but it is incorrect to assert in consequence that it has no special role.

53. We understand that this case involves the only application to the courts of this jurisdiction relying upon section 106 of the 1994 Law. It made provisions which apply during the course of a winding up of a company. The section gives procedural rights to the liquidator, members and creditors. But, whilst there are references to winding up and a liquidator, these do not, of course, identify that the provisions are a special part of an insolvency code but, as the title of the Part of the Law states, ‘Provisions of General Application in Winding Up’. The Liquidators plead that this company is being wound up because of a special resolution, on the application of the Directors, after the entire capital had been lost. On taking office they stated that the company was unable to pay its debts and that there would be no distribution to shareholders. The Liquidators being officers of the Court this court is entitled to proceed upon their statements on these fundamental matters. The s. 106 claims in this litigation are being pled in the aftermath of and as part of the winding up of an insolvent company.

54. The section, as the Deputy Bailiff stated (at paragraph 41 of his judgment), is in terms similar to, but not identical with, those of s. 212 of the Insolvency Act 1986 (as amended from time to time) in force in England and Wales. This court is able to proceed, therefore, upon the basis of relevant judicial pronouncements from that other jurisdiction as to certain aspects of s.212 which are germane to the issues in this case.

55. Put shortly, those indicate that, over many decades, the provision has been interpreted as providing a summary form of remedy to the specified persons who may rely upon it, but not innovating upon the nature of the obligations, breach of which will incur the potential intervention of the courts into the running of a company prior to its winding up: see, for example, *Revenue & Customs Commissioners v Holland* [2010] 1 WLR 2793, where, at paragraph 51 Lord Hope of Craighead DPSC said:

*“Mr Knox submitted that the discretion under section 212 was wide enough to allow the court to reduce the award to nil even if it declined relief under section 727 of the 1985 Act. I agree with Rimer LJ that the discretion under section 212(3), which is essentially procedural in nature, is a discretion as to amount only once liability has been established. It is not so wide as to allow the judge, having determined that the section applies, to decline to make any order at all: see paras 108—110. The discretion which he is given by section 212(3) is as to the order that would be appropriate once liability has been established, not to grant relief against liability. It is a discretion as to how much the director should be ordered to pay, so as to do what is just in all the circumstances: see *In re Loquitur Ltd* [2003] 2 BCLC 442, para 245, per Etherton J.”*

See also Lord Collins of Mapesbury JSC at paragraph 55:

*“.....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."

56. The provisions of s106 should, therefore be viewed as both summary and discretionary. As such, and particularly remembering that the provisions apply during a winding up, the procedure which should accompany the provisions should be expeditious, and the case management very much under the direction of the court: for example as to timeframes and to the need for and modes of proof. Section 106, therefore, whilst being procedural in the sense of not establishing a new or independent liability, does establish a new discretionary remedy, available upon liquidation, to the liquidator and others.

57. It is also to be borne in mind that in *In re B Johnson* [1955] 1 Ch 634, at 647, Evershed MR stated of the then equivalent English provisions:

"Section 333, it has been many times said, is a purely procedural section. I do not in the least seek, by so stating, to lessen its significance: I mean (to restate it) that it does not create any new cause of action; it only provides a method of litigating particular claims; and, in providing a method, it is not exclusive. Prima facie (though, as will be later seen, there are difficulties in the plaintiff's way in this case), if the procedure of section 333 is not open against any person who is within the section, the claimant may proceed by ordinary action. But there is this procedural difference, which may, I think, indicate the kind of case to which it is intended to refer: whereas, in an ordinary action, it would be open to the person charged to bring in (if it were proper procedurally to do so) some third party whom that person might seek to make responsible; in a case under section 333, no such third-party procedure appears to be available."

(our underlining)

58. The present case therefore is one in which the Liquidators' reliance on s. 106 is unlikely to provide a different remedy to that which they plead at common law. But, hypothetically, had the Liquidators thought that a court might be reluctant to grant the remedy sought at common law, or had they been concerned as to delays in common law procedures, the very fact of liquidation would have permitted them access to the s. 106 remedy.

59. As a result of the implementation of s. 6 of the Companies Amendment Guernsey Law 1996, (a section given the heading 'Provisions relating to directors, fraudulent trading, etc.')

section 67F of the Companies (Guernsey) Law, 1994 (as amended) provided, among others, that Company Articles exempting persons from liability pursuant to sections 67A-D or any other provision of the Law are void. Upon an ordinary interpretation of this provision, as the Deputy Bailiff uses at paragraphs 54 to 62, it will embrace s. 106, which imposes a liability. The fact that the same liability is imposed at common law and that the section does not create a new liability does not detract from the fact that the section imposes a liability if sought by certain persons, in certain circumstances and if deemed appropriate by the court in the exercise of its discretion. Such a result is not inappropriate having regard to other considerations. First it is to be noted that neither s. 67A (Disqualification Orders) nor s. 67B (Fraudulent trading orders) require that there be an insolvency. Further, the new provisions were inserted in the general sector, Part XI: Directors, of the principal Law and not, for example in Part XVI: Compulsory Winding Up.

60. For decades legislators have been astute continuingly to monitor the operation of limited liability companies and to protect the public from abuse of the protection from some liabilities which incorporation brings. One of the protective mechanisms is that, upon winding up, the process of winding up is in the hands of an officer of the court, the liquidator. That process brings with it, therefore, an independent appraisal of the manner in which the company has been operated, by a person not bound to the commitments of the company and those with whom it has contracted. In a different context, that of a contractual agreement to arbitrate, the Court of Appeal in Singapore

expressed the following views in *Larsen Oil and Gas v Petropod* [2011] 3 SLR 414, at paragraph 48:

“When a company becomes insolvent, its assets are impressed with a statutory trust that is administered by the liquidator for the benefit of the company’s creditors (see Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd [1998] 1 SLR(R) 778). That being so, the creditors of the insolvent company are the parties with the real interest in any dispute that involves the insolvent company, since they are the ones who stand to lose or gain from any diminution or augmentation of the company’s assets. Since these creditors are not parties to the arbitration agreement between the insolvent company and its arbitral counterparties, it is very hard to justify why the liquidator (who represents the creditors) should be compelled to give up its rights to judicial remedies in favour of arbitration.”

61. Those views were expressed in the context of insolvency, which is not a qualifying factor chosen by the legislature in this jurisdiction for the operation of s. 67F, but the views appear equally applicable for a s. 106 scenario. A company would have had a claim against its Directors but does not pursue it (a) because it is controlled by its Directors and (b) because the (other) members, who might have sought a derivative action, did not do so because they were unaware of the salient circumstances giving rise to a claim. Had there been a derivative action it would have been met by the contractual defence of exemption from liability. Why, when the Directors have either chosen, or been forced by circumstances, to place the company in winding up and a liquidator has grounds for bringing a s.106 application should a court, otherwise entitled to make a discretionary order, be precluded from doing so by a pre-insolvency contract between the company and its Directors or third parties? The following points were discussed in argument.
62. The parties both referred to a passage in a policy letter from the State Advisory and Finance Committee, dated 26 January 1996, on the proposed amendments to the 1994 Law. Whilst this may have lacked the interpretative significance of more formal *travaux préparatoires*, it nonetheless indicated that some of those considering possible legislative amendments had in mind precluding the restriction on s. 106 remedies, but through the medium of what was permissible in company articles. S. 67F makes no reference to s.106, hence the present issue; but it may be worthy of some note that the terms of that section include restriction both through company articles as well as contract with the company. There appears to be no intervening statement on behalf of the promoters of the amendment. On any view therefore the letter gives no indication that the result of the ordinary interpretation is not to be relied upon.
63. It was submitted for the Directors that, by cross-reference to ss 29 and 30 (which imposed liabilities) s. 106 could not properly be interpreted as resulting in the imposing or incurring of a liability. Such a contention cannot withstand the scrutiny of s. 106. Whilst the section does not create a new cause of action, it provides a procedure which, once properly instigated and duly accepted by the court, imposes a liability in such measure as the court determines. The ultimate liability might (or might not) be the same as might have been imposed through common law procedures based upon the same facts, but whilst the basis for the accrual of the cause of action would have been the same, the liability is determined upon through and imposed by means of the statute.
64. The Directors also suggested, by reference to older English authority and to the new 2008 Guernsey Law, that the result of the ordinary interpretation would be surprising in that there would be no saving provisions in respect of a s. 106 matter. Again that submission does not withstand a proper scrutiny of s. 106. The structure of the section is that there be (under subsection 1) the basis for an application, and (under subsection 3) the possibility of an examination of conduct following which there may be a discretionary order ‘*as the Court thinks fit*’. Such a provision, in its simple and clear terms, allows for a discretionary approach which is

well capable to consider all issues as to consideration of conduct preparatory to determining upon an order.

65. Speaking of ss 212 – 214 of the Insolvency Act 1986 in *Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158, at paragraph 79, Lord Walker of Gestingthorpe said:

“Ever since the 1862 Act the court has made clear that these procedures exist for the protection of the general public, not in the interests of the creditors or shareholders of the particular company which is in liquidation. Indeed it may be contrary to the financial interests of the creditors and shareholders for these procedures to be invoked.”

The foregoing conclusion as to the proper interpretation of s. 67F is consistent with that general aim.

66. The s. 106 claims were pled at the outset of this action. Whilst, as indicated above, reliance on s. 106 is unlikely to provide a different remedy for the Liquidators to that which is pled on behalf of the company at common law, there may be procedural advantages to the Liquidators in seeking to rely on it and they are entitled to do so. The entitlement of a litigant to rely on maintaining broadly similar rights of action was recognised by Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 193H-194D. As his lordship said there, “*I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him*”. Unless a claim is manifestly without possible foundation, this court cannot exclude from contemplation the right of the Liquidators to rely upon s. 106. The Cause, as it stands unamended, sets out claims based upon allegations of misfeasance and breach of fiduciary duty which cannot be said to be without any possible prospect of success. They must be recognised, at this stage of proceedings, as proper parts of the whole case which is brought against the various defendants.
67. The Directors further submit in the alternative that the findings made by a Delaware court on matters over which they have jurisdiction will dictate (or at least may fruitfully inform) the outcome of the Guernsey specific claims. Putting it broadly, they contend that once the Delaware court has pronounced on what the Directors did or did not do, and whether by such acts or omissions they breached their duties as Directors, those findings can be relied on by the Guernsey court to determine whether they were guilty of Wrongful Trading, should pay compensation under section.106, or be disqualified.
68. This ambitious submission ignores several key factors. First unless and until the defences are served we cannot predict upon what issues the Delaware Court may be invited to pronounce. Secondly we cannot predict upon what issues the Delaware Court will in fact pronounce. It is, for example, possible that the Directors will jointly or severally seek to rely upon the standard indemnity in article 157 of the Articles of CCC, or clause 6 of IMA as a preliminary issue. Thirdly it is by no means clear that the findings of the Delaware court will satisfy the criteria of issue estoppel, which are conveniently summarised in *Spencer Bower and Handley* (4th Edn) (“*Spencer Bower*” paragraph 1.02), and endorsed by the Supreme Court in *R (Coke-Wallis) v ICAEW* [2011] UKSC 1 at para 34. Fourthly it is not inconceivable that at any rate the Liquidators might in any event be able to take advantage of an exception to issue estoppel where new evidence is discovered [*Spencer Bower*: para.8.31]. We have in mind the salutary warning of Dillon LJ in *E I du Pont de Nemours v Agnew* 1998 2 LLR 240 at p.245 where claims under product liability insurance were commenced in both England and in Illinois.

“Other issues were also canvassed. But in my judgment it is not proper for this Court to attempt to decide any of these issues at this stage. As yet there has been no final judgment of the Illinois Court, and inevitably there has been no application by the insurers to amend their pleading in the English proceedings to rely on a final Illinois judgment as an estoppel. The present application for a declaration that the insurers will not be entitled to rely on any such judgment as an estoppel is therefore necessarily premature: Re Clay, [1919] 1 Ch.66 and Re Barnato, [1949] Ch. 258. In addition the

course of the argument on this appeal, and the cases cited where the Courts have had to consider issues of cause of action estoppel or issue estoppel, all show that to decide any such issue an analysis, and possibly a very close analysis, is necessary of what the decision, which is said to have given rise to the estoppel, decided and on what grounds. But that is not possible until after the decision has been made and its grounds are known. Again, until the decision of the Illinois Court is available, and the insurers have formulated their plea of estoppel in the English proceedings, it cannot really be known what estoppels are being set up and it may be possible that there are estoppels on some issues which ought to be recognised by the English Court: e.g. an issue estoppel precluding Du Pont from disputing that on the facts of their participation in the wrongful act they are under Illinois law – whatever its relevance to the English proceedings – precluded from claiming indemnity from the insurers against the punitive damages. To make either of the declarations claimed now would, in my judgment, be premature.”

[See also to like effect Neill LJ at p.249, Stocker LJ at p.250.]

We do not accept that *Texan Management v Pacific Electric* [2009] UKPC 46, upon which the Directors relied, provides a compelling precedent to contrary effect. In that case the issue was as to ownership of shares. Once the Hong Kong Court had pronounced on ownership, the BVI register would necessarily be amended, if necessary, to reflect its findings as a purely ministerial act.

69. The Deputy Bailiff was clearly attracted by the idea that the Delaware Court would in fact, if not in form, solve any issues for the Guernsey Court. He said:

”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.”
DB Paragraph para 136.

70. It was, in this Court’s view, odd to suggest that the Directors ‘acknowledged’ (sic) that there would be issue estoppels. Rather it was for them to aver the same. The Liquidators’ certainly did not accept such estoppels would be created. This articulation of this throwaway line appears to this Court to be another consequence of the Deputy Bailiff going in a direction not signposted by any party and without the full benefit of their forensic analysis.
71. The Deputy Bailiff also grappled with a question of what the dispute was in essence all about. At the hearing before the Deputy Bailiff the Advocates for each of the parties sought to persuade the Deputy Bailiff that their “*characterisation*” of the nature of the case being advanced by the Liquidators in the Cause was the correct one. The Deputy Bailiff considered the parties’ submissions on this matter between paras 80 and 101 of his judgment. It is to be noted that he changed his mind, having initially been persuaded by Advocate Wessels’ submission but in the end agreed with Advocate Davies’ contentions – see paras 81 to 83 and 101 of DB judgment.
72. The issue before us is whether the Deputy Bailiff fell into error by considering this issue at all, or if he was entitled to do so, whether he himself mischaracterised the nature of the Cause in that he accepted the submissions of Advocate Davies in preference to those of Advocate Wessels.
73. We start by reminding ourselves of how the Deputy Bailiff considered the matter. At para 82 he said that when he first read the Cause his impression was that the main thrust was directed at all the Directors, whether *de jure* or *de facto* or shadow Directors, their duties and their alleged failures to act in CCC’s best interests. The main allegations were directed to the failure of the business model and failure to take strategic action to deal with the risk arising from market volatility and global economic crisis. It would be a matter for the trial court to decide precisely

where to draw the line between 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.

74. At para 83 the Deputy Bailiff said that, in order to understand whether one party has mischaracterised the nature of the claim, he must look at the substance of the case and decide whether the allegations were “the product of artful pleading”, a phrase taken from para 59 of the affidavit of Allen Terrell, the Directors’ expert on Delaware law. Mr Terrell stated that Delaware courts have found that a forum selection clause was not to 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 the claims is a breach of that relationship.
75. Between paras 86 and 95 the Deputy Bailiff concentrated his analysis on the terms of the appointment of CIM, which he describes as “wide”, and the extent of the delegation thereunder to CIM. He alluded to the fact that investors in CCC “were fully aware” that CIM was the investment manager, that one of the independent Directors (the Seventh Defendant) swore an affidavit to the effect that CIM implemented the investment guidelines of the board of Directors of CCC and that CIM carried out the every-day management and operations of CCC pursuant to the IMA. At para 94 the Deputy Bailiff said that looking at paras 57 to 59 of the Cause (which he set out) the Plaintiffs themselves understood the position to be that CIM was the investment manager and advisor to CCC with full discretionary investment management authority to implement the investment guidelines of CCC and to perform its day to day management and operations of its business subject to the oversight of CCC's directors, that CIM and TCG developed CCC's business model, and that in addition CIM provided investment management services to other affiliates within the Carlyle Group with similar or overlapping investment strategies. At para 95 he extracted various parts of the Cause as part of his analysis leading up to his conclusions in subsequent paragraphs.
76. At para 98 the Deputy Bailiff stated that the alleged failures of the directors of CCC were “essentially” failures to act otherwise than in accordance with the advice of CIM or to adopt policies different from those recommended by CIM and Carlyle. At para 100 he said that it seemed to him that the “starting point” and “a key factor” in the trial court’s analysis of the events that led to 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.”
77. Thus it was that the Deputy Bailiff concluded at para 101, as we have already noted, that he had changed his view as to the character and nature of the allegations pleaded and of the case the Directors had to face. He agreed with the submission on behalf of all Directors 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*”. He went on to say that “*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*”.
78. Advocate Wessels submitted to us that this exercise ought not to have been undertaken at all. No authority had been produced by Advocate Davies that an evaluation of the “nature of the case” of a plaintiff was a necessary part of the court’s reasoning in a *forum non conveniens* dispute. The Directors had conceded before the Deputy Bailiff that all the issues in the Cause were “serious issues to be tried on the merits i.e. a substantial question of fact or law, or both” – see para 71 of the judgment of Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7*. It was not accordingly appropriate to conduct a mini-trial as to what was really the nature of the case was.
79. Advocate Wessels submitted that he had specifically drawn to the attention of the Deputy Bailiff that it was not necessary for him to evaluate the nature of the case, in his written submissions in

reply below – see paras 44 and 48. Alternatively, Advocate Wessels submitted that, if *per contra* the Deputy Bailiff was entitled to consider the nature of the Liquidators’ case, he had come to the wrong conclusion at para 101. He took us painstakingly through the Cause, a very long document consisting of no less than 547 paragraphs plus sub-paragraphs. He submitted that on any analysis the various causes of action against the Directors were independent of each other, and each was conceded to be “seriously arguable” by the Directors, and thus the court must work on the assumption that they will be made good. He submitted that what was at the heart of the Liquidators’ case as pleaded in the Cause was the setting of the strategy for CCC’s investments and the guidelines in relation thereto by its Directors and/or the failure of the Directors to adjust the strategy and guidelines in the light of changing economic conditions. In the late summer or autumn of 2007 the guidelines set out by CCC as to investment policy were abandoned. He described that abandonment as the critical focus of the Liquidators’ case.

The Directors recognised what they needed to do but did the exact opposite, namely in September 2007 they announced that fundamental revisions to CCC’s business model were required and would be implemented but did the reverse. Leverage needed to be reduced and the minimum liquidity cushion raised to at least 40%. However what in fact happened, so it is alleged, is that the guidelines were suspended which included a minimum liquidity cushion of 20%, repo lines of a minimum equal to 125% of all outstanding borrowings, and a maximum of 85% of CCC’s capital be allocated to RMBS. All this, and continuing breaches of duty thereafter, were driven, so it is alleged, by a desire to give priority to the interests of Carlyle over those of CCC.

80. Advocate Davies, supported by Advocate Bell who adopted the submissions of Advocate Davies, submitted to us that the exercise undertaken by the Deputy Bailiff was a necessary part of the evaluation of a court in a *forum non conveniens* dispute, particularly so in the instant case where the IMA contained an exclusive jurisdiction clause in favour of the courts of Delaware. If the nature of the case was indeed primarily about the alleged failures of CIM under the IMA, then the IMA and hence the exclusive jurisdiction clause was central to the dispute before the Deputy Bailiff. He referred us to the case of *Berliner Verkehrsbetriebe (BVG) Anstalt Des Offentlichen Rechts v JP Morgan Chase Bank NA & anor* [2010] EWCA Civ 390, [2010] 1 CLC 628 which involved whether the English court should have jurisdiction pursuant to the parties’ contract or whether a German court should have jurisdiction pursuant to Article 22 (2) and Article 25 of Council Regulation (EC) No 44/2001, viz the Jurisdiction and Judgments Regulation.
81. Advocate Davies referred to paras 22 and 23 of the judgment of Aikens LJ to the effect that the judge (Teare J) typified the questions that had to be asked under the Articles which we summarise broadly as what was the nature of the case or what were the principle issues. Thus, Advocate Davies submitted that as the IMA brought in the exclusive jurisdiction clause, it was necessary for the court to undertake an evaluation of the nature of the Appellants’ case. The analogy between the authority of Berliner and the instant case was that, as in Berliner there was a competition between an exclusive jurisdiction clause in favour of the English courts and a regulation which favoured a German court, so in the instant case there was a competition between an exclusive jurisdiction clause favouring Delaware and claims in the Cause (and in the proposed amendments thereto) which only a Guernsey court could decide e.g. s.106 and s.67A and C. He submitted that the Deputy Bailiff was correct to conclude that the role of CIM was at the centre of the Appellants’ case and that the breach of duties of the Directors of CCC was secondary. CCC had delegated to CIM very wide discretionary management authority, in particular as to its investments. The claim against the Directors is essentially that they failed to supervise CIM or to realise that what CIM had done was in breach of duty. Thus, if CIM was not liable in the terms of the pleaded claims, it would be almost inconceivable that the *de jure* Directors of CCC would be held liable.
82. Advocate Davies submitted to us that, whether the Liquidators’ claim was characterised as one for breach of duty involving corporate governance and internal management or breach of duty arising under the IMA, the claim against CIM under the IMA was central to all the claims.

Alternatively he submitted that if the Deputy Bailiff had mischaracterised the Liquidators' case, then their case cannot override the exclusive jurisdiction clause. It outweighs everything else.

83. We are of the opinion that it was not part of a court's function to undertake the sort of exercise undertaken by the Deputy Bailiff in the instant case. No authority has been produced in support of Advocate Davies' proposition that such an exercise should be undertaken in a *forum non conveniens* dispute. In our view the case of *Berliner* is plainly distinguishable in that the relevant Articles required the court to undertake such an exercise in the circumstances of that case. Furthermore, Advocate Davies conceded, rightly in our view, that if the Liquidators had chosen to claim against only the *de jure* Directors of CCC no evaluation of the nature of the case could have been undertaken. Those claims, it has always been conceded by the Directors raise seriously arguable issues.
84. Had only the *de jure* Directors been sued, it would not have been open to the Directors to submit that the true dispute was about CIM and the IMA, and hence bring in the exclusive jurisdiction clause. It would have been left to the Directors to plead, by way of defence, that the role of CIM was paramount in the light of the allegations (i.e by the Directors' delegation of the director's duties to CIM under the IMA). Why then, we ask rhetorically, should the mere joinder of CIM alleging, *inter alia* against that entity, breaches of contract under the IMA, fundamentally alter the nature of the Liquidators pleaded case against the Directors in such a way that the IMA takes centre stage? Surely it is for the trial court, having heard the evidence and submissions, to conclude what is the true position. Accordingly we conclude that the Deputy Bailiff erred in conducting such an exercise.
85. If, however, we are wrong in concluding that the Deputy Bailiff ought not to have undertaken the exercise that he did, we nevertheless are of the opinion that he manifestly came to the wrong conclusion. We have carefully reread the Cause in the light of the submissions made to us by both Advocates, who took us through the Cause highlighting those of its parts which supported their contentions as to the nature of the Liquidators' case against the Directors. We do not consider that the Liquidators have indulged in "*artful pleading*".
86. To us the nature of the case, as pleaded in the Cause, is as follows. The first four Directors were intimately connected to Carlyle, of which CIM, TC Group and TCG Holdings were associates controlled by Carlyle. Mr Conway, it is pleaded, was joint managing director of TCG Holdings, which was the sole managing member of TC Group. He was also joint managing director of CIM, which was owned as to 75% by TC Group with power to direct and control CIM. Mr Hance was an officer of CIM. Mr Stomber was an officer of TC Group, joint managing director of TC Group, and managing director of CIM. Mr Zupon was a founding member of Carlyle and managing director of Carlyle. Each of the above were Directors of CCC. Mr Conway was a member of CCC's investment committee. Mr Hance was the non-executive chairman of CCC and a member of its investment committee. Mr Stomber was the President and Chief Executive Officer of CCC, and a member of its investment committee. Mr Zupon was a member of CCC's investment committee. There were then of course the independent Directors of CCC, namely the Fifth, Sixth and Seventh Respondents.
87. We consider that what is set out in the Introduction to the Cause, which might well have served as its conclusion, is an accurate summary of what is pleaded in detail thereafter. The Carlyle Group held all the voting shares of CCC. The Directors of CCC were as above, the first four intimately bound up with Carlyle. The Directors set the investment guidelines, details of which are set out in para 7 of the Cause. It was the Directors' responsibility to set the investment managing guidelines and to alter them in the light of changing economic conditions. That critical function was not delegated by CCC to CIM under the IMA. The maintenance of an unencumbered minimum liquidity cushion was fundamental to the management of CCC's leveraged investment portfolio. By about the second quarter of 2007 the global credit markets were deteriorating and subprime mortgages defaults were increasing. This eroded the value of RMBS and other financial assets. The Directors were aware of the escalating risks. However, so

it is pleaded, far from selling RMBS and reducing CCC's leverage, both of which, it is alleged, were in CCC's interests, more RMBS were purchased and the leverage was not reduced. The minimum liquidity cushion became inadequate. Margin calls were at risk. In September 2007 fundamental revisions were decided upon i.e leverage was to be reduced and the minimum liquidity cushion raised from 20% to 40%. It is pleaded that no steps were actually taken to implement those revisions; indeed it is pleaded that the investment guidelines were suspended. Thereafter it is pleaded that the Directors took no steps to preserve the assets of CCC but continued along the same path of a downward spiral. It seems to us that the nub of the Liquidators' case is to be found in paras 30 and 34 of the Cause, i.e. the Directors did not manage CCC's investments prudently but put the interests of Carlyle above those of CCC. All these allegations are then expanded in very considerable detail in the Cause.

88. Whilst we, of course, take into account those parts of the Cause highlighted by the Deputy Bailiff between paras 93 and 95 of his judgment, we cannot agree that looking at the Cause as a whole the core of the Liquidators case can be characterised as “*the alleged failures of the Directors of CCC are, essentially, failures to act otherwise than in accordance with the advice from CIM or adopt policies different from, and independent of, the recommendations being received from CIM and Carlyle*” (para 98). Nor, with respect, can we agree with his conclusions at paras 100 and 101. In arriving at his conclusions the Deputy Bailiff does not appear to have appreciated the part of the Cause which in essence pleads that the Directors of CCC were being advised by themselves in their capacity of being so intimately involved in Carlyle or that they allegedly breached their duties by putting the interests of Carlyle before that of CCC.
89. What the Directors were doing before the Deputy Bailiff was in essence to extract from the Cause parts which might be said to foreshadow, even support they would say, a defence in the future from the Directors (or at least of the de jure Directors of CCC), namely that they had delegated their responsibilities to CIM under the IMA. If such may be their defence, or one of them, then that is a matter for them to plead and for the trial court to decide having heard the evidence.
90. Advocate Davies, in paras 222 to 228 of his submissions before us, contended that the allegations against the Directors are at bottom primarily allegations that arise out of the services performed under the IMA by CIM, the external manager of CCC's business. Thus he contended that the authorities demonstrate that where the day to day operation of a company's business is vested in an external manager, the Directors' duties are inevitably different from a situation where the director himself is managing the business. Advocate Davies drew our attention to *John v Price Waterhouse & anor* [2001] All E.R. 123, a decision of Ferris J, which he contended was similar to the instant case. This then led to the submission that in the instant case there was a confined residual role for the Directors of supervision more than a management role.
91. The case of *John v Price Waterhouse & anor* involved a claim by Sir Elton John and various companies connected with him for damages for negligence against Price Waterhouse. A similar claim was made by the corporate claimants against Andrew Haydon. Sir Elton placed his career in the hands of an individual called John Reid and a company formed by him, John Reid Enterprises Ltd (“JREL”), of which Mr Haydon, a chartered accountant, became a director and ultimately managing director. Several management agreements were entered into between the claimants and Mr Reid and JREL. Mr Haydon was a director of two of the corporate claimants. Advocate Davies particularly relied on a passage at para 298 in the judgment of Ferris J where he said that the engagement of JREL left the Directors of the two corporate claimants with nothing to do except such formal acts as only the Directors personally could carry out. The judge found that Mr Haydon was running the companies but in his capacity as an executive of JREL. Advocate Davies submitted that that authority was analogous to the instant case.
92. It is to be noted that the decision of Ferris J was one handed down after he had heard the evidence and submissions thereon. All the claims against Mr Haydon were dismissed on the facts – see paras 270 to 300, and in particular para 300 (2). Para 298 was very much a finding of

fact. In the instant case it will be for the trial judge to decide, having heard the evidence, what was the true position.

93. Furthermore, in the instant case the capacity in which Carlyle purported to act is a very live issue, particularly, so say the Liquidators, in circumstances in which they allege that there was a conflict of interest and where it is alleged the Directors subordinated the interests of CCC to their own. As we have said, it has always been conceded by the Directors that all the allegations of breach of duty pleaded in the Cause are seriously triable issues. Accordingly, we do not consider the case of *John v Price Waterhouse & anor* to be of assistance at this stage of this litigation.
94. The result of this effort at characterisation of the claims was to uplift the importance of the forum selection clause (the “FSC”) – the jewel in the crown of the Directors’ submissions. Section 9 of the IMA provides [as quoted by the DB para 71].

“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.”

Arguments will, we recognise, arise under Delaware Law as to the extent to which this binds persons other than the parties to the IMA itself i.e. CCC and CIM.

95. The Directors directed the Deputy Bailiffs attention to *Donohue v Armco Inc* [2002] 1 Lloyd’s Rep. 425 [DB paras 73-74] where 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 recognise 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 Lloyds 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. That was the result in *Mackender v Feldia AG* [1967] 2 QB 590; *Unterweser Reederei GmbH v Zapata Off-Shore Co* ('The Chaparral') [1968] 2 Lloyd's Rep 158; *The Eleftheria*, [1969] 1 Lloyd's Rep. 237; [1970] P 94; *DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar and 13 Other Ships* ('The Sennar' (No. 2)) [1985] 1 WLR 490; *British Aerospace Plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368; *Continental Bank NA v Aeakos Compania Naviera SA and Others* [1994] 1 WLR 588; *Aggeliki Charis Compania Maritima SA v Pagnan SpA* ('The Angelic Grace') [1995] 1 Lloyd's Rep 87; and *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep. 90. A similar approach has been followed by courts in the United States, Canada, Australia and New Zealand: see, for example, *M/S Bremen v Zapata Off-Shore Co* (1972) 407 US 1; *Volkswagen Canada Inc v Auto Haus Frohlich Ltd* [1986] 1 WWR 380; *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559; and *Kidd v van Heeren* [1998] 1 NZLR 324."

96. Unfortunately the Deputy Bailiff's attention referred only to the passages about when an FSC should ordinarily be enforced and not to the paragraph where it would ordinarily not be. ie paragraph 27:

"27 The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions. These decisions are instructive. In [Evans Marshall and Co Ltd v Bertola SA and Another](#) [1973] 1 WLR 349 there was a tripartite dispute but only two of the parties were bound by a clause conferring exclusive jurisdiction on the court in Barcelona. Kerr J at first instance was impressed by the undesirability of there being two actions, one in London and the other in Barcelona (pp 363–364). The Court of Appeal took a similar view (pp 377, 385). Sachs LJ thought separate trials particularly inappropriate where a conspiracy claim was in issue (p 377). In [Aratra Potato Co Ltd v Egyptian Navigation Co \(The El Amria\)](#) [1981] 2 Lloyd's Rep 119 the primary dispute was between cargo interests and the owner of the vessel, both parties being bound by a clause in the bill of lading conferring exclusive jurisdiction on the courts of Egypt. But the cargo interests had also issued proceedings against the Mersey Docks and Harbour Co, which was not bound by the clause. The Court of Appeal upheld the judge's decision refusing a stay. In the course of his leading judgment in the Court of Appeal Brandon LJ said, at p 128: "I agree entirely with the learned Judge's view on that matter, but would go rather further than he did in the passage from his judgment quoted above. By that I mean that I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries. See as to this [Halifax Overseas Freighters Ltd v Rasno Export \(The Pine Hill\)](#) [1958] 2 Lloyd's Rep 146 and [Taunton-Collins v Cromie](#) [1964] 1 WLR 633." [Citi-March Ltd v Neptune Orient Lines Ltd](#) [1996] 1 WLR 1367 also involved third party interests and raised the possibility of inconsistent decisions. Colman J regarded separate trials in England and Singapore as not only inconvenient but also a potential source of injustice and made an order intended to achieve a composite trial in London despite a Singaporean exclusive jurisdiction clause: see at pp 1375–1376. [Mahavir Minerals Ltd v Cho Yang Shipping Co Ltd \(The M C Pearl\)](#) [1997] 1 Lloyd's Rep 566 again involved third parties and raised the possibility

of inconsistent findings. Despite a clause conferring exclusive jurisdiction on the courts of Seoul, Rix J refused to stay proceedings in England. He regarded the case as on all fours with Citi-March (see p 575) and at p 569 observed: “It seems to me that so far the plaintiffs have shown strong cause why the jurisdiction clause should not be enforced. This is indeed a paradigm case for the concentration of all the relevant parties’ disputes in a single jurisdiction. If in such a case a host of different jurisdiction clauses were to be observed, the casualty at the root of the action would become virtually untriable. The action would fragment and reduplicate, at vast cost ...” A similar approach is discernible in [Bouygues Offshore SA v Caspian Shipping Co \[1998\] 2 Lloyd’s Rep 461](#), in which the disputes involved four parties only two of whom were bound by an English exclusive jurisdiction clause. Although the effect of the clause was described by Evans LJ as “near-conclusive” (p 467), an injunction to restrain proceedings in South Africa was refused. In paragraph 27 of his judgment (at p 466) Evans LJ said: “In my judgment, two questions arise, one a matter of principle. First, should the Court, when deciding whether or not to enforce the exclusive jurisdiction clause by means of an injunction which prevents Bouygues from continuing with its proceedings against Ultisol in South Africa, take into account the effects of such an injunction on persons who are not parties or entitled to enforce the contract containing the jurisdiction clause, Portnet and Caspian here, but who are both necessary and proper parties to the litigation wherever it is held? In my judgment, the clear answer to this question is ‘yes’. Mr Justice Clarke did so in his judgment and the contrary has not been argued before us. The relevance of the potential effects on third parties has been recognised in other authorities ...” Sir John Knox also held that proceedings should be allowed to continue in South Africa because, among other reasons (see p 470), “this is the only way in which to minimize, if not avoid altogether, the risk of inconsistent decisions in different jurisdictions.”

The present is an example, in our view, of the type of cases where a FSC will not be enforced because the grounds of claim are outside it. It is notable that the Directors’ expert quoted by the Deputy Bailiff at para 84 said that Courts in Delaware will not allow forum selection clauses to 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”

For reasons we have already discussed, in this case the Liquidators’ claims are not based on contract: nor do they grow out of the contractual relationship, nor is the gist of those claims a breach of that relationship.

- 97 The Directors advanced sundry logistical considerations which the DB helpfully summarised paras 141-149. (See generally Dicey, Morris, Collins: *The Conflict of Laws*: 16 ed p.476)
- 98 For the most part the DB was unimpressed by them. He recognized that modern communications and modes of travel meant that international businessmen were or should be both available and able to litigate without difficult in a variety of fora and could not sensibly complain if the forum chosen was the place where they had incorporated a company, whose fate lay at the heart of the litigation (paras 142 and 147). He discounted any notion that a Delaware trial would take significantly less time than one in Guernsey (para 143). He accepted that Guernsey’s case management tools were as effective as those in Delaware (para 144). He rejected the notion that the Royal Court in Guernsey lacked the resources to cater for protracted trials (para 145); or that the Guernsey bar was too small to cope with substantial multi party commercial litigation (para 146). These are precisely the kind of matters involving fact sensitive evaluation in which an Appellate body would, *ceteris paribus*, not embark upon reconsideration of the rational assessment of the first instance tribunal even if it might itself have weighted them differently.

- 99 The same arguments under this heading were redeployed before us, although we are in the present case free, indeed obliged, to reconsider all matters relevant to the disposal of the appeal for reasons deployed above. We both can and do endorse the DB’s conclusions as summarised above. In particular we can vouch from our collective experience as Appellate judges in this jurisdiction for all he has said about the capacity of the domestic Courts and local profession to cope with substantial commercial litigation with an international dimension, a growing phenomenon, reflective of Guernsey’s importance as a financial centre.
- 100 Why then did the DB finally conclude that the logistical factors to which he rightly attributed, consistently with the jurisprudence, little weight favoured Delaware (para 149)? It was the consequence of his view that third parties might have to give evidence, and that the process of obtaining the same, if the witnesses were unwilling to come to Guernsey might be “*time consuming and more expensive*” than if the trial took place in Delaware (para 148) (indeed before us this proposition was amplified into a submission that third parties might be joined in the proceedings).
- 101 We have three observations. The first is that the number and identity of such involuntary witnesses is at present unknown; (and Advocate Wessels assured us that the Liquidators themselves had no present intention to join further parties). The second is that, as the DB himself recognized, the procedures for taking evidence in foreign jurisdiction are indeed “*normal*”; the point has little more force than those referring to the incidents of litigation with an international dimension that he had already rejected (DB paras 142 and 147). Thirdly a submission deployed before us, if not before the DB, that each potential witness would need his own local lawyer as guardian of his interests, reflected a practice, which may exist elsewhere but which we would not wish to encourage as a transplant in this jurisdiction.
- 102 There was an *in terrorem* and a speculative element about some of the Directors’ submissions under this rubric, elegantly presented though they were, and we are not persuaded to allow them to tilt the balance away from Guernsey.
- 103 The main points, as we see it, which favour this jurisdiction for disposal of these proceedings are those set out in paras 48 and 49 above, coupled with the need where possible to avoid fragmentation between jurisdictions; see, among a host of citations, *Donohue* cit sup para 36 where Lord Bingham said:
- 36 *In my opinion, and subject to an important qualification, the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of Mr Donohue.*
- The qualification in that case is not present in this [protection against liability under the RICO claims] and so the presumptive position is that fragmentation should be avoided (see Lord Scott at para 75).
- 104 While it is possible that the anti suit injunction, the subject of a forthcoming appeal, might be lifted and that the Delaware Court might then enjoin prosecution of some part of Guernsey proceedings, so as to create at any rate the possibility of fragmentation, we cannot allow this series of contingencies to divert our attention from the status quo.
- 105 The Deputy Bailiff himself rightly acknowledged the high desirability of having all heads of relief determined in the same set of proceedings in a single jurisdiction (DB para 137). We would put it even higher. Unless split hearings are required, they should be rejected as a *modus operandi*.

106 Advocate Wessels indulged in a final forensic flourish:

“Our basic position is: why should the entire trial of this action be split when it can take place in Guernsey? What good reason has been put forward for that? Why should these liquidators not be entitled to pursue their statutory insolvency claims in Guernsey? Why should they be delayed in doing that? What good reason is there for that? Why should they not be entitled to proceed with their claims first in Guernsey because those are the claims which contain the valuable exclusions of the indemnities? Why should anybody think it’s a good idea to delay the prima facie stronger claims in favour of the prima facie weak claims?”

What arguments have the defendants been able to marshal to persuade you that this is not a case that triggers the internal management corporate governance principles that I’ve discussed? Why is it not a case about what the governance of this case has done? Why should this court not determine as a matter of its own law what the duties of directors are, what the duties of shadow and de facto directors are and in accordance with this jurisdiction’s public policy work out whether those directors and these defendants are liable?

On what basis have the defendants been able to counter the notion that lack of fragmentation is a good argument for breaking through and allowing this case to take place in one jurisdiction? What have they demonstrated, sir, to suggest that all the other cases that have gone that way – those principles shouldn’t be applied in this case? And the deputy bailiff, having concluded that this jurisdiction was the only place in which all the actions against all the defendants could take place, why shouldn’t the action proceed in this court? Why should the liquidators, as officers of this court, be put to the risk of substantial additional cost, delay and uncertainty of further satellite litigation for a split trial rather than being permitted to pursue all the claims in this jurisdiction in the manner that they have determined to be most efficient rather than allow the defendants to micromanage their case for them?”

We cannot discern any compelling answer to this congerie of points.

107 Accordingly, we grant leave to amend the Cause as sought. We give leave to the Appellants to appeal and allow the appeal. We dismiss the Cross-Notices. We set aside the stay granted by the Deputy Bailiff.

108 We add only a coda. If there are circumstances in which a judge considers that a point on which he may wish to decide the case has not been fully argued, he should invite the parties to address the point in writing or orally as he sees fit. If in circumstances where a draft judgment is handed down it appears to advocates to rest on an unargued point, they should before the Judge becomes functus seek an opportunity to address it.