Judgment 20/2012

Carlyle Capital Corporation Limited et al and Conway et al
Court of Appeal
Civil File No. 440
2nd May 2012

Court of Appeal – Application for leave to appeal to the Judicial Committee of the Privy Council the decision of the Court of Appeal of 30 March 2012. Application refused.

THE COURT OF APPEAL OF GUERNSEY

The 2nd day of May, 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

In the matter of the Application by the Eighth to Tenth Defendants'/Respondents' on 26 April 2012 for leave to appeal to the Judicial Committee of the Privy Council the decision of the Court of Appeal on 30 March 2012;

And whereas by Order on the 27 April 2012 the Court of Appeal REFUSED the Application by the Eighth to Tenth Defendants'/Respondents';

The COURT this day gave its reasons for the said decision in the following terms;

> *"we considered carefully the written submissions of the Carlyle defendants in support of their application for leave to appeal our decision to the Privy Council. We concluded, however, that we were applying established legal principles to particular facts, and that it was therefore not appropriate for us to give leave."*

T Backhouse
Deputy Registrar of the Court of Appeal

THE COURT OF APPEAL OF GUERNSEY

The 27 day of April, 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/Respondents

-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/Appellants

On the Eighth to Tenth Defendants'/Appellants' appeal against the judgments given by the Royal Court (Ordinary Division) on 17 November and 2 December 2011, seeking an Order *inter alia* that:

> "*The appeal be allowed and both the ex parte order of Judge Finch dated 7 October 2011 and the judgments of Judge Finch dated 17 November and 2 December 2011 (together "the Orders") be set aside or in the alternative varied*"

And whereas, on 2 December 2011 the Eighth to Tenth Defendants/Appellants were granted leave to appeal the judgments given by the Royal Court (Ordinary Division) on 17 November and 2 December 2011, and the costs of (i) the Appellants' application for leave to appeal and (ii) the parties' submissions to Judge Finch in connection with the form the order dated 2 December 2011 were reserved;

THE COURT, having on 5 and 6 March 2012 heard from Advocate S H Davies for the Eighth to Tenth Defendants/Appellants and Advocate J M Wessels for the Plaintiffs/Respondents;

And whereas, on 24 April 2012 the Court handed down a draft reasoned judgment for the parties to correct any literal errors;

And whereas, on 26 April 2012 the Eighth to Tenth Defendants/Respondents requested by letter leave to appeal to the Judicial Committee of the Privy Council;

And whereas, on 27 April 2012 the Court formally handed down its Judgment, THE COURT:-

(i) DISMISSED the appeal;

(ii) AFFIRMED the Order dated 7 October 2011;

(iii) DISMISSED the Eighth to Tenth Defendants' application for leave to appeal to the Judicial Committee of the Privy Council;

(iv) ORDERED that the Eighth to Tenth Defendants pay the Plaintiffs' costs of and incidental to the appeal including all of the costs of the hearing on 5 and 6 March 2012 on the standard recoverable basis, to be taxed if not agreed; and

(v) ORDERED that the Eighth to Tenth Defendants pay the Plaintiffs' costs of and incidental to (i) their application for leave to appeal to Judge Finch and (ii) the submissions to Judge Finch in connection with the form of order dated 2 December 2012.

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

T Backhouse
Deputy Registrar of the Court of Appeal

Approved Judgment
27 April 2012

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CIVIL APPEAL NO 440

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)

Plaintiffs/Respondents

-and-

(1) WILLIAM ELIAS CONWAY Jr

(2) JAMES H HANCE Jr

(3) JOHN CRUMPTON STOMBER

(4) MICHAEL J ZUPON

(5) ROBERT BARCLAY ALLARDICE III

(6) HARVEY JAY SARLES

(7) JOHN LEONARD LOVERIDGE

(8) CARLYLE INVESTMENT MANAGEMENT L.L.C.
(9) TC GROUP L.L.C.

(10) TCG HOLDINGS L.L.C.

Defendants/Appellants
(Eighth to Tenth Defendants)

Decision handed down 30 March 2012
Written Judgment handed down 27 April 2012

Advocate J M Wessels represents the Plaintiffs/Respondents
Advocate S H Davies represents the Eighth to Tenth Defendants/Appellants

Authorities and Texts referred to: -

Hadmor v Hamilton Productions [1983] 1 AC 191 at 220A-221A
Laugee v Laugee [1990 JLR 236]
Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] 1 AC 871 ("Aerospatiale") at 892A-897A
Donohue v Armco Inc [2002] 1 Lloyd's Rep 425 at 431
Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace*")* [1995] 1 Lloyd's Rep 87 at 96
Turner v Grovit [2002] 1 WLR 107 at paragraph 23
OT Africa Line Ltd v Magic Sportswear Corp & Ors [2005] EWCA Civ 710 (CA)
Star Reefers Pool Inc v JFC Group Co Ltd [2012] EWCA Civ 14
Seismic Shipping Inc & Anor v Total E&P UK Plc (The "Western Regent") [2005] 2 Lloyd's Rep 359 (CA)
Glencore International AG v Exter Shipping Co Ltd [2002] EWCA (Civ) 524
Evans Marshall and Co Ltd v Bertola SA and Another [1973] 1 WLR 349
Aratra Potato Co Ltd v Egyptian Navigation Co (The "El Amria") [1981] 2 Lloyd's Rep 119
Citi-March Ltd v Neptune Orient Lines Ltd [1996] 1 WLR 1367 at 1375-6
Mahavir Minerals Ltd v Cho Yang Shipping Co Ltd ("the MC Pearl") [1997] 1 Lloyd's Rep 566 at 569 and 575
Bouygues v Offshore SA v Caspian Shipping Co [1998] 2 Lloyd's Rep 461 at 470
Samengo-Turner v J & H Marsh & McLennan (Services) Ltd [2007] 2 CLC 104 (CA)
Qantas Airways Ltd v Rolls-Royce Plc [2010] FCA 1481
Laker Airways Ltd v Sabena, Belgian World Airlines (1984) 731 F. 2d 909 (D.C. Cir 1984)
Masri v Consolidated Contractors International (UK) Ltd & Ors (No.3) [2009] 2 WLR 669
Incitec Ltd v Alkimos Shipping Corporation and Another [2004] FCA 698
The Court of Appeal Guernsey Law 1961
Forum Shopping and Venue in Transnational Litigation 2003 OUP ("Bell")
The Anti-Suit Injunction 2008 OUP ("Raphael")
Companies (Guernsey) Law, 1994 (as amended)

JUDGMENT

BELOFF JA;

1. This is the judgment of the Court in an appeal by the eighth, ninth and tenth Defendants against an order of Judge Finch dated 2 December 2011 ("the Finch Decision").

2. The circumstances which generated the litigation, the backcloth to the Finch Decision, we take from our judgment in Civil Appeal No.435 handed down on 5 March 2012 to which we add the chronology of and relating to the litigation in the State of Delaware.

3. On 29 August 2006 the first plaintiff, Carlyle Capital Corporation Limited ("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.

4. 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.

5. The substantive proceedings in this matter arise out of 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.

6. 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.

7. 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.

8. On 7 July 2010 the Liquidators (who for present purposes should be treated as CCC) issued proceedings in four separate jurisdictions, Guernsey, Delaware, Washington D.C., and 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 allege in the Cause in this jurisdiction that the nature of the action is one essentially concerned with the internal management, control and corporate governance of CCC. The Defendants, it appears, are likely to argue that the nature of the Liquidators' action essentially relates to the failures of the duties arising under and connected with an investment management agreement ("IMA") dated 20 September 2006 between CCC and the Eighth Defendant.

9. There are ten Defendants in these proceedings. The first seven were all Directors of CCC. The first four held offices and/or were employees of other companies within the Carlyle Group. The fifth to seventh Defendants were appointed as independent Directors. The eighth Defendant, Carlyle Investment Management LLC is a Delaware registered company and was appointed as the investment manager and advisor to CCC pursuant to the IMA.

10. The ninth Defendant, TC Group LLC, owned 75% of CIM, and the tenth Defendant, TCG Holdings LLC, was the sole managing member of TCG. The eighth, ninth and tenth Defendants refer to themselves as "the Carlyle Defendants" and we shall do likewise. It is alleged that, by virtue of their control over CCC and by their conduct, the Carlyle 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.

12. On 7 July 2010 the Liquidators applied for leave to serve proceedings out of the jurisdiction on all the Defendants (save for the seventh Defendant, 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 Lieutenant Bailiff Talbot on an *ex parte* basis.

13. On 16 December 2010 the Liquidators withdrew their proceedings in the Delaware Chancery Court.

14. On 29 December 2010 the Carlyle Defendants instituted proceedings by way of Verified Complaint in the Delaware Chancery Court ("the Complaint") against the Liquidators for an injunction ordering the Liquidators not to pursue any litigation with respect to the IMA in any jurisdiction other than Delaware, for damages, and for a declaration that the exclusive jurisdiction clause (the "EJC") in the IMA is a valid, binding and enforceable contractual agreement.

15. The EJC itself is set out in Clause 9 of the IMA and reads:

> "*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.*"

16. The Complaint alleged, in broad terms, that the Liquidators were in breach of the IMA, in particular the EJC, in bringing proceedings in Guernsey, the State of New York, and the District of Columbia. The Complaint made no distinction between the common law and equitable claims on the one hand and the statutory claims on the other in the Liquidators' proceedings in Guernsey. Indeed para 52 of the Complaint alleged that "*any future litigation*" by the Liquidators in Guernsey (and elsewhere, other than Delaware) would cause the Carlyle Defendants irreparable harm. On its face the injunction sought in the Complaint was wide enough to cover all existing and any future causes of action, whether pursuant to statute or otherwise, in Guernsey.

17. On 7 January 2011 the Liquidators transferred the Carlyle Defendants' Complaint proceedings (which we call "the anti-suit proceedings") to the Delaware Federal Court seeking to rely on US statutory provisions.

18. On 21 January 2011 the Carlyle Defendants applied to transfer the anti-suit proceedings back to the Delaware Chancery Court.

19. On 10 February 2011, at a hearing in front of LB Talbot in Guernsey, Advocate Wessels for the Liquidators told the court that the anti-suit proceedings in Delaware and the Guernsey proceedings would take their course, move at their own pace, and thus that neither case would affect the other. Advocate Davies for the Carlyle Defendants, while careful to say before us that he was not alleging that the Carlyle Defendants were deliberately lured into abstaining from accelerating their interim applications in Delaware by such statements made on behalf of the Liquidators in Guernsey (and also in Delaware), nonetheless asserted that in point of fact such statements caused the Carlyle Defendants to accept a more relaxed briefing schedule and to be content with a later hearing date in Delaware for their claim for interim relief than might otherwise have been the case.

20. On 16 February 2011 the Carlyle Defendants requested the Delaware Federal Court to grant emergency relief i.e. to resolve their expedited motion to remit the anti-suit proceedings to the Delaware Chancery Court so as to permit them to seek preliminary injunctive relief against the Liquidators forbidding them to pursue proceedings in Guernsey.

21. On 25 February 2011 the Liquidators filed their Reply Brief in Delaware and, at page 2 note 6 under "Introduction", drew attention to remarks made by the Royal Court on 10 February, 2011 (when it set a five day hearing of the Carlyle Defendants' application to set aside leave to serve out of the jurisdiction for 6 June 2011) that applying the principles of international comity it did not wish to put any pressure, in terms of timing, on the Delaware court and expressed the hope that the US courts would approach the matter in an equally deliberative manner to make sure that the issues between the parties were fairly and properly heard.

22. On 28 February 2011 all the Defendants filed in Guernsey *Exceptions Déclinatoire* to set aside the leave to serve out of the jurisdiction granted by LB Talbot or, alternatively, for an order that the proceedings be stayed pending the outcome of proceedings in Delaware.

23. On the same date the Carlyle Defendants filed for preliminary injunctive relief in the Delaware Federal Court, to which, on 24 March 2011, the Liquidators responded to the motion for preliminary injunctive relief, with the Carlyle Defendants then filing their Reply Brief on 4 April 2011.

24. On 13 May 2011 Mr Roberts, one of the liquidators, swore his second affidavit in relation to the *Exceptions Déclinatoire*, and exhibited the proposed Amended Cause, details of which can be found in para 20 of our judgment in Civil Appeal No. 435, and in respect of which we gave leave to amend – see para 32 thereof.

25. On 23 May 2011 the Defendants applied for an adjournment of the hearing fixed for 6 June 2011, which the Liquidators opposed.

26. On 2 June the Deputy Bailiff adjourned the hearing and ordered it to commence on 27 June 2011. The hearing duly took place between 27 June 2011 and 1 July 2011. 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*".

27. On 22 July 2011 the Deputy Bailiff declined to set aside service out of the jurisdiction but granted a stay of the proceedings in Guernsey on the basis that the Liquidators should litigate their non-statutory claims in Delaware and only thereafter their statutory claims in Guernsey.

28. On 4 August 2011 the Delaware Federal Court transferred the anti-suit proceedings back to the Delaware Chancery Court and denied both the Carlyle Defendants' Motion for Preliminary Injunctive Relief and the Liquidators' Motion to dismiss or stay the proceedings as "*moot*".

29. On 8 August 2011 the Liquidators sought the Deputy Bailiff's leave to appeal which, on 18 August 2011, he refused.

30. On 17 August 2011 the Carlyle Defendants filed a motion in the Delaware Chancery Court for Preliminary Injunctive Relief. At para 13 thereof it is stated *inter alia*: -

> "*On 8 August 2011, the Liquidators sought leave to appeal the decision of the Royal Court of Guernsey to the Guernsey Court of Appeal. The Liquidators accordingly continue their efforts to avoid this Court and continue to violate the IMA's forum selection clause. In papers filed in this action prior to remand, the Liquidators indicated that they anticipate their appeal will be heard later this year*."

31. On 18 August 2011 in the Delaware Chancery Court the Liquidators filed a motion to dismiss or stay the anti-suit proceedings.

32. On 19 August 2011 the Liquidators in Guernsey submitted an application for leave to appeal to a single judge of the Court of Appeal.

33. On 26 August 2011 the Carlyle Defendants filed a Motion for Summary Judgment in the Delaware Chancery Court. In the Introduction it is stated that:

> "*this case seeks to end the flagrant forum shopping of [the Liquidators] in violation of their contractual obligations*."

It recites that:

> "*On July 22, 2011, the Guernsey court enforced the IMA's forum selection clause, staying the Guernsey proceedings and directing the Liquidators to pursue their claims in Delaware….Nevertheless, the Liquidators persist in their efforts to avoid the jurisdiction of this Court by seeking leave to appeal the Guernsey court's judgment*…"

34. The submission that by seeking leave to appeal the Deputy Bailiff's order the Liquidators were persisting in their efforts to violate the IMA's exclusive Delaware EJC is repeated at page 17 of the Motion. It is further submitted at page 29 that "*All of the claims that the Liquidators seek to bring against the Carlyle entities …are "with respect to" the IMA and accordingly must be brought in Delaware*." The Conclusion of the Motion makes it clear that the Carlyle Defendants sought "*summary judgment, permanently enjoin[ing] the Liquidators from further violating the IMA's exclusive Delaware forum selection clause, and … damages, subject to later quantification*". In the alternative a preliminary injunction was sought

prohibiting the Liquidators form pursuing their claims outside of Delaware during the pendency of "*this*" action.

35. On 28 August 2011 the US counsel for the Carlyle Defendants wrote to the Liquidators' US counsel seeking to agree a combined briefing schedule, to which the latter replied on 6 September 2011 proposing a different schedule.

36. On 7 September 2011 the Bailiff directed the Liquidators to present their application for leave to appeal to the full Court of Appeal during the following week for determination of the discrete question whether the Liquidators' application for leave should be heard before or concurrently with the substantive appeal.

37. On 12 September 2011, [by which date no agreement for a briefing schedule had been reached], the Carlyle Defendants filed a motion in Delaware seeking such a schedule. Under the proposed order all briefing was to be completed by 17 October 2011.

38. On 14 September 2011 the Liquidators filed a response submitting that such motion sought to interfere with the Guernsey appellate process and that the various motions pending in Delaware should be stayed pending determination of the appeal in Guernsey.

39. On the same day the Court of Appeal heard the Liquidators' application for leave to appeal. Mourant Ozannes for the Liquidators wrote to Ogier for the Carlyle Defendants seeking undertakings from the Carlyle Defendants not to seek scheduling of the Delaware pending motions for anti-suit relief until after the determination of the Liquidators' appeal in Guernsey.

40. On 15 September 2011, before the Court of Appeal sat to deliver its judgment, Advocate Davies informed Advocate Wessels for the liquidators that the Carlyle Defendants would not give the undertakings sought. The Court of Appeal (The Hon. Michael J. Beloff QC (President), Michael Jones QC and Clare Montgomery QC, JJA,) ordered that the application for leave to appeal, with appeal to follow if granted, would be heard "*as soon as possible preferably before a Court of Appeal in November*……." with "…..*liberty to apply should it prove impossible to arrange for a Court of Appeal to sit in November 2011*".

41. On the same day Strine C. in the Delaware Chancery Court ordered the parties to reach agreement on a briefing schedule for the Liquidators' motion to dismiss and the Carlyle Defendants' motions for preliminary injunction and summary i.e. final judgment.

42. Thereafter correspondence passed between the US lawyers for the parties, in which it is apparent that the Carlyle Defendants were pressing for the motions to be heard and the Liquidators were suggesting that the Delaware motions should await the hearing of the application which had been fixed for 30 January 2012, as the Carlyle Defendants' motions were seeking to interfere with that process.

43. On 21 September 2011 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.

44. On 23 September 2011 the Fifth to Seventh Defendants served a similar Cross-Notice.

45. On 28 September 2011 the US counsel for the Carlyle Defendants informed the Liquidators' US counsel that they had spoken to Strine C. who had scheduled a hearing for all the motions for 9 November 2011 but had said that 28 October 2011 might become available.

46. On 30 September 2011 the US counsel for the Carlyle Defendants informed the Liquidators' US counsel that they had spoken to Strine C. who had set the hearing of all the motions for 28 October 2011 with all briefing to be completed by 21 October 2011.

47. On 4 October 2011 the Liquidators filed in Guernsey their *ex parte* application for an anti-anti-suit injunction against the Carlyle Defendants.

48. On 5 October 2011 the US counsel for the Liquidators wrote to Strine C. with a copy to the US counsel for the Carlyle Defendants, at the bottom of page 2 and the top of page 3 it was stated: -

> "*There is no urgency or prejudice to Carlyle here. All that is basically happening is an appeal; all of Carlyle's rights are preserved and Carlyle is protected on the question of costs and any damages*…"

49. It was submitted by Advocate Davies that as an application for an *ex parte* order had been filed in Guernsey on 4 October 2011, those statements were untrue and may have been an attempt by the Liquidators to mislead the Delaware court into granting a more generous timetable, whilst seeking draconian *ex parte* orders from the Royal Court preventing the Carlyle Defendants from enforcing the EJC in the IMA. We consider that such a construction is not necessarily, reading the passage in context, the only one appropriate; but even were that so, we would not see this issue as decisive of the present appeal.

50. On 6 October 2011 Strine C. made a scheduling order that all briefing be concluded by 21 October 2011.

51. On 7 October 2011 the *ex parte* application was granted by Judge Finch.

52. On the same day the Carlyle Defendants, having been notified of Judge Finch's order, immediately filed in Delaware a Notice of Withdrawal of their motions for preliminary injunctive relief and for summary judgment without prejudice to their right to reinstate as soon as the *ex parte* order was lifted.

53. On 12 October 2011 Strine C. issued an order vacating the scheduling order of 6 October 2011.

54. On 28 October 2011 Judge Finch conducted an *inter partes* hearing on the Carlyle Defendants' application to set aside the ex parte order.

55. On 17 November 2011 Judge Finch dismissed the application.

56. On 2 December 2011 Judge Finch in the course of his supplementary judgment recorded the Carlyle Defendants' apparent intention to "*advance the Delaware proceedings*" and "*to set up a trial in Delaware*" and that would "*cause serious issues before the Guernsey Court of Appeal to be pronounced upon in Delaware and is contrary to the sense of the judgment I handed down*." He granted leave to appeal to the Carlyle Defendants.

57. On 9 December 2011 Ogier applied for an expedited hearing of the appeal against Judge Finch's order (and before the hearing fixed for 30 January 2012), and alternatively that both appeals be heard together. It was submitted by Advocate Davies that this request was driven by the fact that the effect of Judge Finch's order was to give the Liquidators an unwarranted advantage in that it deprived the Carlyle Defendants of an opportunity to obtain an order in Delaware restraining the continued breach of the EJC.

58. On 20 December 2011 the Court of Appeal delivered its ruling, gave reasons for declining to expedite the appeal against the Finch Decision, suspended further steps in that appeal until

after the resolution of the appeal fixed for 30 January 2012 and provisionally fixed the hearing for the Finch Decision appeal for 5 and 6 March 2012.

59. On 23 December 2011 the proceedings issued in the State of New York and in Washington D.C. by the Liquidators were discontinued by consent.

60. Between 30 January and 3 February 2012 the hearing of the appeal from the Deputy Bailiff duly took place before us. We allowed the Liquidators to amend to bring in additional statutory claims. We gave the Liquidators leave to appeal and allowed the appeal against the Deputy Bailiff's decision. We dismissed the Directors' cross notices. In consequence of our order, if not otherwise displaced, all the Liquidators' claims were to proceed in a single jurisdiction i.e. Guernsey.

61. A threshold issue is whether we should consider whether to uphold or dismiss the appeal against the Finch Decision by reference to the position as it was before him, or as it is before us. Advocate Davies contended for the former position; Advocate Wessels for the latter.

62. It seemed to us in principle that it would be a sterile exercise to focus on the past, not the present. If Judge Finch was right to make the order when he did, *non sequitur* that it should be continued if circumstances had changed in a material way: if *per contra* he was wrong, then *non sequitur* that the order should be discontinued again if circumstances had indeed so changed. We remind ourselves of the *locus classicus Hadmor v Hamilton Productions* [1983] 1 AC 191 in which Lord Diplock at 220A-221A set out the circumstances in which an appellate body could review the exercise of a discretionary power to grant an injunction.

> "*Before adverting to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently.* ***The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion*** *on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal;* ***or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it****. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.*
>
> *…The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision.*" (our emphasis)

63. This was followed by the Court of Appeal in Jersey in *Laugee v Laugee* [1990 JLR 236] in a manner germane to the present appeal, where it was stated at p.248.

> "*Although this passage relates to interference with discretion, it must follow equally that the exercise of the discretion can be upheld on the ground that subsequent evidence has appeared which would further justify the original order"*.

64. By virtue of Section 14 of The Court of Appeal Guernsey Law 1961, this court has all the power which vested in the Royal Court as a "Cour des Jugements et Records". We consider that we should exercise these powers rather than remitting the matter to Judge Finch to take a fresh view, which course would be a recipe for delay and would engage other procedural problems. That said, for reasons we shall explain later, we do not accept that the Judge made any real error in principle on a fair reading of his several judgments such as would have entitled us to review his discretion even had we adopted a more conservative position.

65. The anti-anti-suit injunction is a phenomenon infrequently encountered in casebook and commentary. Our researches found only ten instances in which the concept is referred to by that name in electronically available authorities. Counsel between them referred to one case from the United States of America, one from Australia, and one from England; and it was only in the latter two that the injunction granted was given that specific title. Initially Andrew S Bell: Forum Shopping and Venue in Transnational Litigation 2003 OUP ("Bell") was the only academic work referred to which dealt with such phenomenon discretely; though under stimulus from the Court, Counsel's researches produced a further more recent work by Thomas Raphael: The Anti-Suit Injunction 2008 OUP ("Raphael") which contained subject-specific observations.

66. There was a brief discussion of the utility of such a form of order. Since it was axiomatic that it bound only the party to whom it was directed, and not the court in which that party might seek the conventional anti-suit injunction, what then, the question was posed, was there to prevent that party nonetheless making (successfully) an application to that uninhibited court?

67. It seems to us that there is a threefold answer to the question so posed. First, a breach of an anti-anti-suit injunction would constitute a contempt of court. True it is – to take the present case – that the Carlyle Defendants could, notwithstanding such an order, seek anti-suit relief in Delaware; but they would be, for example, in consequence unable to come within the Guernsey jurisdiction, without risk of committal. Second, it is to be assumed that in societies governed by the rule of law a court order (unless successfully appealed or avoided) will be respected by those to whom it is directed, even when outwith the jurisdiction of the court which made it. Third the very premise for the seeking of an anti-anti-suit injunction is that another court (in this case the Delaware Chancery Court) might itself grant an anti-suit injunction against a party proceeding in the court from which such injunction is sought (in this case the Royal Court) (see *Bell* para 4.139). However, if reasons why the Guernsey Court grants the anti-anti-suit injunction are sufficient and seen to be sufficient, the Delaware court would (or could) be in comity persuaded not to grant an anti-suit injunction even if one were subsequently sought from it.

68. Both parties proceeded on the basis that the principles governing the grant of an anti-anti-suit injunction were essentially the same as those which governed an anti-suit injunction. We are prepared to proceed on that premise given that the source of the jurisdiction (inherent or statutory) and the objects served by it are common. However it is well established that a court should exercise caution in the grant of an anti-suit injunction and we agree that as Raphael puts it "*the particular sensitivity of this type of claim and the inherent risks of escalating conflicts between legal schemes should probably mean that anti anti-suit injunctions should be granted with* ***particula****r caution"* (para 5.49).

69. The principles which govern classic anti-suit injunctions in the modern era were set out in the speech of Lord Goff in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871 ("Aerospatiale") at 892A-897A, from which we derive the following principles (to some of which we have already alluded):

(1) First, the jurisdiction is to be exercised when the "ends of justice" require it.
(2) Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.
(3) An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.
(4) As such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.
(5) The decided cases show judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories.
(6) An injunction may be granted to restrain the pursuit of foreign proceedings on the grounds of vexation or oppression; but consistent with the basic principle of justice underlying the whole of this jurisdiction, the notions of vexation and oppression should not be restricted by definition; they vary with the circumstances of each case.
(7) While there is no presumption that a multiplicity of proceedings is vexatious, such multiplicity may, *inter alia*, make them vexatious.
(8) Since the court is concerned with the ends of justice, account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. The court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.

70. It was not suggested that those basic principles had themselves been altered in any of the subsequent cases, although naturally, given that later courts were confronted with a variety of different factual situations, they had to be adapted in their particular application.

71. Three matters in our view stand out from the jurisprudence viewed as a whole. First, the paramount objective is the ends of justice. [See too *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 at 431.] Second, insofar as discrete categories of cases in the granting of such an injunction have been identified, they are not exhaustive. Thirdly, even within the category to which the greatest attention was paid in the present case, that is to say the restraint of vexatious or oppressive conduct, that too was a flexible concept.

72. The case law does, of course, nonetheless provide guidelines. Examples are provided by it of when anti-suit injunctions may, and when they may not, be granted. As far as the latter is concerned, it is clear that the mere fact that a court has determined that a particular jurisdiction is *forum conveniens*, while it may be a necessary step, is not a sufficient basis for a grant of anti-suit relief: *Aerospatiale* cit sup. But as long as the ends of justice are served by the grant of such injunction, the absence of previous precedent should not inhibit the court to which an application is made.

73. It is convenient before summarising the rival contentions to return to our earlier judgment so as to set the scene. At paras 48 and 49 we said:-

> *" 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)."

74. In the course of that judgment we particularly considered the impact of the EJC, which we described as the jewel in the crown of the Carlyle Defendants' submission, and declined to enforce it relying on paragraph 27 of *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425. Advocate Wessels therefore contended that the Carlyle Defendants were seeking to subvert the effect of our judgment by seeking in Delaware that which they had already failed to

obtain in Guernsey i.e. an order which compelled the liquidators' proceedings *quoad* at any rate the Carlyle Defendants to be heard in Delaware.

75. Advocate Davies contended to the contrary that the EJC was indeed compulsive to that end. He said that none of the cases relied upon by Advocate Wessels for general statements of principle addressed, still less permitted the overriding of an EJC. The lynchpin of his submissions was that the Carlyle Defendants and CCC had agreed that any matters arising "*with respect to the IMA''* would be determined in the Court of Delaware. The meaning of that phrase and indeed of other aspects of the IMA, were for the Delaware courts only. If on its true construction the phrase embraced the statutory claims but the Delaware court concluded that it could not adjudicate upon them, that was the consequence of the EJC itself. CCC (and in its shoes the Liquidators) could not therefore complain about its inability to pursue such claims since it was the product of the very bargain it had voluntarily struck.

76. Advocate Davies added that the Delaware court might decide that because of that limitation on their powers, i.e. an inability to adjudicate on the statutory claims, it would not grant the anti-suit relief sought. There were indeed a variety of possible outcomes if the Delaware court were left free to entertain the Carlyle Defendants' application. Moreover the liquidators would have the full opportunity to make their case as to the proper outcome before that Court. His main point was that the Carlyle Defendants had a contractual right to have all such issues decided by the Delaware court, and CCC by signing the IMA was bound to respect that right. It was therefore for the Delaware Court and not for us to determine what effect should be given to the EJC.

77. It was, of course, a necessary consequence of this submission that unless for whatever reason the Delaware court declined to grant the relief sought by the Carlyle Defendants by way of anti-suit injunction, there would be fragmentation since it was not Advocate Davies' case that other persons not party to the IMA could make applications parasitic upon it. Advocate Davies suggested, however, that the Delaware Court might be more tolerant of fragmentation than the Courts of Guernsey (or, indeed, of England and Wales); but in any event whether it could, should or would extend such tolerance was a matter for it.

78. We repeat that we accept that the mere fact that we have found Guernsey to be the *forum conveniens* is not of itself a sufficient basis to grant the anti-anti suit injunction. However, we have gone significantly further than finding Guernsey to be *forum conveniens*. We have found that the Guernsey court is the only court in which all the causes of action, common law and statutory, can be pursued.

79. Looking at the matter in broad terms, there are three possible outcomes were we to allow the appeal and so permit the Carlyle Defendants to pursue their quest for anti-suit relief from the Delaware court. First that the Delaware court would refuse it, in which case the Carlyle Defendants would have lost nothing from the grant of anti-anti suit relief. Second that the Delaware court would grant relief without qualification. In which case, as we have already held, the liquidators' statutory claims, freighted with public interest considerations which we have already emphasised, might disappear into a jurisdictional black hole. Third that the Delaware court, recognising its own lack of power to adjudicate upon those statutory claims, would permit them to proceed in Guernsey, while itself adjudicating upon the so-called common law claims. In our view that would be the recipe for anarchy; multiplicity of proceedings and the possibility of inconsistent results, *a fortiori* if the benefits of the IMA and EJC only apply to the Carlyle Defendants so that proceedings against the other directors, irrespective of the outcome in any putative anti-suit injunction in Delaware, would proceed in Guernsey. It seems counterintuitive for us to countenance the risk of a situation in which the very same allegations against directors can be adjudicated upon in separate jurisdictions depending upon whether particular directors can (or cannot) enjoy the benefit of the IMA and the EJC, when precisely the same claims (other than the ones relating exclusively to breach of the IMA) are advanced against **all** of them.

80. Turning to the perceived advantages of litigation in Delaware, as we understood their submissions to us, the Carlyle Defendants maintained that there were three. The first was logistical: nine of the ten Defendants (including for this purpose the individuals in charge of the Carlyle Defendants) are American, with only the Seventh defendant being resident in Guernsey. The second was that the courts of the jurisdiction specified in the EJC were best placed to apply the law by which the EJC is governed and, particularly whether it should be enforced, against whom, as to which claims, and as to what relief should be available. The third was that without enforcement of the EJC it is rendered valueless since damages generally are regarded as an insufficient remedy for such breach (see Millet LJ in *Aggeliki Charis Compania Maritima SA v Pagnan SpA* (The *"*Angelic Grace*"*) [1995] 1 Lloyds Rep 87 at 96, col 2: "*The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy."*

81. It seems to us that none carries compulsive weight. Clearly there are issues, upon which we touched in our earlier judgment at paras 87 to 90, as to whether or not the nub of the case against the Defendants is properly to be characterised as one relating broadly to insolvency and the general duties of directors of Guernsey companies or one relating narrowly to the operation of the IMA. The key question is, however, where the interests of justice ought to be best served [and those, as we see it, are the interests of justice in the substantive proceedings as a whole] when the claims are pleaded as both but with the main emphasis on the former.

82. The claim here is by Liquidators as part of the winding up of a Guernsey Company. None of the American defendants claims to be so impoverished as to make litigation in Guernsey for him an unfair burden. We are therefore not persuaded that there would be a material benefit to the interests of justice for the litigation to be in Delaware merely because the majority of defendants are American.

83. As to the benefit of control of proceedings being in the hands of the (Delaware) courts of the EJC jurisdiction, we take the view that issues as to the ambit of the clause, albeit they may exist, are merely preliminary to the disposal of the full substantive issues as between the parties; and we are not persuaded that there is a particular and overriding need here to have that preliminary issue determined by one court rather than another. The meaning and scope of the IMA, in particular how it might avail the Carlyle Defendants in respect of the claims advanced against them (on which to date they have kept their forensic powder dry) will be matters for Delaware law on which the Royal Court can form a view after receipt of expert evidence.

84. Nor can we unreservedly endorse the dictum of Millet LJ in the *Angelic Grace*, which we have cited in paragraph 80 as being of universal application. In the present case the additional costs and expenses of being required to litigate in Guernsey as distinct from Delaware are surely capable of quantification.

85. So our preferred conclusion is that the overall interests of justice favour the grant of the anti-anti-suit injunction.

86. Does then the case law compel us to a contrary conclusion? Is an EJC always a trump card which overrides all other considerations?

87. We consider first the main authorities relied on by the Carlyle Defendants. We accept as a starting point that not only would the Delaware Court <u>not</u> be regarded as acting in breach of comity in granting anti-suit relief to enforce the EJC, but that such an injunction is not to be regarded as an interference with the jurisdiction of the Courts of Guernsey. As Lord Hobhouse said in *Turner v Grovit* [2002] 1 WLR 107 at paragraph 23:

> *"The present type of restraining order is commonly referred to as an "anti-suit" injunction. This terminology is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic law. None of this is correct. When an English court makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against the foreign court: Lord Goff of Chieveley, Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871, 892. The order binds only that party, in personam, and is effective only in so far as that party is amenable to the jurisdiction of the English courts so that the order can be enforced against him: "an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy."*

and continued at paragraph 26, "*the making of a restraining order does not depend upon denying, or pre-empting, the jurisdiction of the foreign court*." It does not, however, follow inexorably from that uncontroversial premise that an EJC must be enforced.

88. The Carlyle Defendants cited a number of cases in which the Courts had used the touchstone of vexation and oppression as determination of whether proceedings in a foreign court should be restrained and argued that the existence of either was a *sine qua non* of engagement of anti- or anti-anti-suit relief.

89. In *OT Africa Line Ltd v Magic Sportswear Corp & Ors* [2005] EWCA Civ 710 ("*OT Africa*") Longmore LJ in the English Court of Appeal said at paragraph 31:

> "*As a broad proposition of law, an anti-suit injunction may be granted where it is oppressive or vexatious for a defendant to bring proceedings in a foreign jurisdiction*".

See too *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14 per Rix LJ at [25], *Seismic Shipping Inc & Anor v Total E&P UK Plc* ("The Western Regent") [2005] Lloyd's Rep 359 (CA) per Clarke LJ at para 38 and *Glencore International AG v Exter Shipping Co Ltd* [2002] EWCA (Civ) 524 per Rix LJ at para 42. We remind ourselves, however, that such dicta cannot have been intended to, and indeed cannot, substitute more restrictive criteria for the wider test of interests of justice laid down in *Aerospatiale*.

90. *OT Africa* contained the strongest dictum in favour of the Carlyle Defendants' position. There the Canadian legislature had introduced into Canadian law jurisdiction, through provisions in Section 46 of the Canadian Marine Liability Act, which, in appropriate circumstances, allowed Plaintiffs to ignore EJCs in favour of foreign courts and bring proceedings in Canada. Despite that, the English Court of Appeal upheld an anti-suit injunction and enforced an EJC in favour of England because of the importance attached in English law to "*the autonomy of the parties"* per Longmore LJ paras 19 and 42.

91. *Mutatis mutandis* it would appear that the Delaware Court would be entitled to apply its own policies to the question and not those of the non-EJC forum where proceedings in breach of the EJC had been brought. That analysis, however, does not of itself provide any direct guidance to this Court in determining whether to issue the anti-anti-suit injunction sought.

92. We must nonetheless recognise that the Court of Appeal in *OT Africa*, having identified that the Canadian approach to anti-suit injunctions was similar to the English approach, was satisfied that the English proceedings, which were filed in compliance with the EJC, and in the forum selected by the EJC, would not be restrained by the Canadian Court notwithstanding the statutory regime permitting proceedings in Canada.

> "*[A] Canadian court would* ***not grant an anti-suit injunction against proceedings in England founded on an exclusive jurisdiction clause in an English proper law contract, even in support of Canadian jurisdiction properly founded in Canadian law*** *under Section 46(1).*" [Our emphasis] (per Rix LJ at paragraph 80)

93. It was therefore submitted by Advocate Davies that the *OT Africa* case is distinct English Court of Appeal authority for the proposition that a Court ought not to grant an injunction to restrain the pursuit by a person in a foreign jurisdiction of relief seeking to enforce an EJC in favour of that jurisdiction contained in a contract governed by the law of that jurisdiction, even if the failure to grant such an injunction might prevent a party from pursuing a statutory remedy in the domestic jurisdiction.

94. While we accept that the part of the reasoning of Rix LJ in *OT Africa* which we have quoted in paragraph 92 is persuasive in favour of the Carlyle Defendants we make these observations. First it was dictum only. Second the starting point of the analysis (i.e. the search for oppressive and unconscionable conduct) seems, with respect, to be too restrictive. Third there is in any event no exact read-across from the situation in *OT Africa* to the situation which confronts us.

95. In *OT Africa*, the Canadian statute concerned merely provided that the Canadian Court was entitled to assume jurisdiction in certain cases notwithstanding the existence of a foreign forum clause (see at [5]). Essentially, there were parallel substantive proceedings. By virtue of the Canadian legislation, the Canadian Court was therefore free, pursuant to the relevant legislation, to disregard the English forum clause in adjudging itself the *forum conveniens* and to refuse to grant a stay. The English Court was, of course, not bound by the Canadian legislation and was free to adjudge itself what was the *forum conveniens* on the basis of a forum clause, which ostensibly captured the entirety of the dispute between the parties: the mere fact that the Canadian Court had jurisdiction to hear the proceedings instituted before it by virtue of the Canadian legislation, did not provide sufficiently strong reasons for not enforcing in England the English jurisdiction clause.

96. The analogy between the circumstances leading to the views which we have quoted from the decision in *OT Africa* and those of the present case is weak. In the present case the relevant part of the domestic law is not merely a power to assume jurisdiction and thus provide an alternative forum, it is rather an unique code which, in contradistinction to the laws enforceable by the Delaware Courts, will govern all claims for substantive relief arising out of allegations of breach of duty by the Defendants whether as Directors de jure, de facto or shadow. It therefore follows that it could not be added here, as Longmore LJ indicated at [40] in *OT Africa* that there was a further consideration for the court of the EJC, namely, that "*[i]t is only by granting an injunction that it will be possible to avoid duplicity of proceedings.*" This reference to the undesirability of duplicity resonates in this case in favour of the Liquidators' stance.

97. It is, moreover, indisputable that EJCs can be overridden in appropriate cases. In *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 Lord Bingham (with whom the other members of the House of Lords agreed) said:

> "**29. …..***the first point to be made is that Mr Donohue has as against the first three Armco appellants a strong prima facie right not to be the subject elsewhere than in England of claims by those companies falling within the scope of the clause. Some of the claims made against him by those companies in New York do fall within the clause.*
>
> *…*
>
> ***33.*** *Thus Mr Donohue's strong prima facie right to be sued here on claims made by the other parties to the exclusive jurisdiction clause so far as the claims made fall*

> *within that clause is matched by the clear prima facie right of the Armco companies to pursue in New York the claims mentioned in the last three paragraphs. The crucial question is whether, on the facts of this case, the Armco companies can show strong reasons why the Court should displace Mr Donohue's clear prima facie entitlement. If strong reasons are to be found (and the need for strong reasons is underlined in this case by the potential injustice to Mr Donohue, already noted, if effect is not given to the exclusive jurisdiction clauses) they must lie in the prospect, if an injunction is granted, of litigation between the Armco companies on one side and Mr Donohue and the PCCs on the other continuing partly in England and partly in New York. What weight should be given to that consideration in the circumstances of this case?*
> ***34.*** *I am driven to conclude that great weight should be given to it. The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Messrs Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any Court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such Court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.*
> **…**
> ***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."*(emphasis added)
> (The important qualification, germane to that, is not replicated in this case)

98. The same theme, the need to avoid multiplicity of proceedings and possibility of inconsistent judgments, as also alluded to by Longmore LJ in *OT Africa*, is reinforced by observations of such compelling authority.

99. Not only EJCs in favour of the jurisdiction which is invited to ignore them, but also EJCs in favour of another jurisdiction may be overridden. 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). These views were included as part of the reasoning of the House of Lords in *Donohue v Armco* itself (para 27).

100. To like effect is the decision in *Aratra Potato Co Ltd v Egyptian Navigation Co (The "El Amria")* [1981] 2 Lloyd's Rep 119 where 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. 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 too in echo of the same theme *Citi-March Ltd v Neptune Orient Lines Ltd* [1996] 1 WLR 1367 per Colman J at p.1375-6, *Mahavir Minerals Ltd v Cho Yang Shipping Co Ltd* ("the MC Pearl") [1997] 1 Lloyd's Rep 566, per Rix J at 569 and 575, *Bouygues v Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd's Rep 461, per Knox J at p.470).]

101. There are these additional considerations, beyond the need to avoid fragmentation and inconsistency, which can subvert the apparent paramountcy of an EJC.

102. First the existence of a statutory right in one forum is itself a reason for ignoring an EJC where a right could otherwise not be given effect. The (English) Court of Appeal held in *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd* [2007] 2 CLC 104 (CA) that a statutory right to litigate in England will justify an anti-suit injunction against foreign proceedings, even if the dispute was otherwise subject to a forum selection clause in favour of the foreign forum. Tuckey LJ (with whom Longmore and Lloyd LLJ agreed) explained that in such circumstances, the Court was faced with a choice between granting an injunction to protect the plaintiff's statutory rights and doing nothing; and that it would not be just to do nothing. See at [38]-[39], [41]-[43]:

> *"So does it follow that we should grant an anti-suit injunction? Mr Dunning submits that we should because it is the only way to make the claimants' statutory right to be sued here effective. Damages would not be an effective remedy. Mr Rosen accepted that we could grant an anti-suit injunction if we found that section 5 was engaged but urges us not to do so as a matter of discretion and judicial restraint and in the interests of comity.*
>
> *The position we are in is as follows. The New York court has rejected the challenge to its jurisdiction because of the clear and unambiguous terms of the exclusive New York jurisdiction clause in the bonus agreements. Had we not been concerned with the contracts of employment we should have upheld such a clause as well. But, as it is, our law says that we cannot give effect to it. The claimants can only be sued here. What shall we do? The only choice it seems to me is between an anti-suit injunction or nothing.*
>
> *…*
>
> *We were referred to various English cases which have dealt with these problems in the context of commercial disputes where injunctions have been claimed on the basis of an exclusive jurisdiction clause or forum conveniens. But no case was cited to us where the exclusive jurisdiction of the English court was mandated by statute. Mr Dunning submitted that where that was so, the case for an injunction was at least as strong as a case based on an exclusive jurisdiction clause. I do not necessarily accept this. In general, if parties agree an exclusive jurisdiction clause they should be kept to their bargain; if, as here, the exclusive jurisdiction of the English courts is imposed by statute it can be said that the case for an injunction is not so strong, particularly where the statute has provided that an agreed exclusive jurisdiction clause is of no effect.*
>
> *The converse of this problem arose in OT Africa Line v Magic Sportswear Corp [2005] 1 CLC 923 where a cargo claim under a bill of lading containing an English law and exclusive jurisdiction clause was made in Canada relying on Canadian legalisation which allowed such a claim to be made there in spite of the clause. This court granted an anti-suit injunction to restrain the Canadian proceedings on the ground that the parties should be kept to their English law bargain. This is an*

> *illustration of the court giving full effect to party autonomy which under Article 23 of the Regulation it is required to do, but under Articles 20 and 21 it cannot. We are in the latter position: we cannot give effect to the exclusive New York jurisdiction clause.*
> *Doing nothing is not an option in my judgment. The New York court cannot give effect to the Regulation and has already decided in accordance with New York law on conventional grounds that it has exclusive jurisdiction. The only way to give effect to the English claimants' statutory rights is to restrain those proceedings. A multinational business must expect to be subject to the employment laws applicable to those they employ in different jurisdictions."* (emphasis added)

103. Likewise in *Qantas Airways Ltd v Rolls-Royce Plc* [2010] FCA 1481 the Federal Court of Australia granted an anti-suit injunction to protect the plaintiff's rights under the Australian Trade Practices Act, notwithstanding that the plaintiff's claim was otherwise subject to an exclusive jurisdiction clause in favour of England. Whilst the decision granting the defensive anti-suit injunction is not available, the reasons of Rares J on a later application (at [5]) make plain the circumstances in which the defensive anti-suit injunction was granted. Importantly, there was evidence from Professor Adrian Briggs that an English Court would likely grant an anti-suit injunction to enforce a forum selection clause to the exclusion of claims under the Trade Practices Act only available to the Plaintiff in Australia.

104. This approach is not limited to English or Antipodean jurisprudence. In *Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F. 2d 909 (D.C. Cir 1984), Judge Wilkey of the United States Court of Appeals (District of Columbia Circuit) identified (i) the protection of a Court's legitimately conferred jurisdiction and (ii) prevention of litigants' evasion of important public policies of the forum as the two circumstances in which anti-suit injunctive relief is most often necessary. Judge Wilkey commenced his analysis of this justification for the grant of injunctive relief by observing (at 927) that:

> "*Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings.*"

and continued at 929 to say that:

> *"there must be circumstances in which an antisuit injunction is necessary to conserve the court's ability to reach a judgment. Just as the parallel proceeding rule counsels against interference with a foreign court's exercise of concurrent jurisdiction, it authorizes the domestic court to resist the attempts of a foreign court to interfere with an in personam action before the domestic court."*

and at 931 to say that:

> "*[a]nti-suit injunctions are also justified when necessary to prevent litigants' evasion of the forum's important public policies*."

[in that case, the attempt to escape the application of United States anti-trust laws to their conduct of business in the United States.]

and concluded that there was nothing improper in the first instance decision in that case to "*enjoin appellants from seeking to participate in the English proceedings solely designed to rob the court of its jurisdiction.*" The injunction granted by the United States Court was purely defensive, rather than offensive (at 938):

> "*The district court's antisuit injunction was purely* ***defensive*** *– it seeks only to preserve the district court's ability to arrive at a final judgment adjudicating Laker's claims under United States law. This judgment would neither make any statement nor imply any views about the wisdom of British antitrust policy. In contrast, the English injunction is purely* ***offensive*** *– it is not designed to protect English jurisdiction, or to allow English courts to proceed to a judgment on the defendant's potential liability under English anticompetitive law free of foreign interference.*

> *Rather, the English injunction seeks only to quash the practical power of the United States courts to adjudicate claims under United States law against defendants admittedly subject to the courts' adjudicatory jurisdiction.*" (Original emphasis in italics)

105. As is not infrequently the case, one can identify inconsistent lines of authority in the US casebooks. But we find Judge Wilkey's reasoning impressive and highly germane to a case (such as is before us) where the 1994 Law assigns unique jurisdiction to the Royal Court.

106. The central allegation in this case after all is that each of the Defendants recklessly breached their fiduciary and other duties to CCC, which are governed by Guernsey law and raise important questions of Guernsey company law and public policy. The Joint Liquidators claim (amongst other matters) insolvency remedies under the 1994 Law against each of the Defendants, namely relief for wrongful trading (under s. 67C) and misfeasance (under s. 106) as well as orders for disqualification (under s. 67A). Those statutory claims are justiciable only by this Court and are inextricably linked with the Liquidators' non-statutory claims governed by Guernsey law for breach of fiduciary duty and gross negligence against each of the Defendants.

107. Second a Court has a right to protect the integrity of its own judgments. In *Masri v Consolidated Contractors International (UK) Ltd & Ors (No3)* [2009] 2 WLR 669, Lawrence Collins LJ (as he then was) observed that a court has power to make "*ancillary orders in protection of its jurisdiction and its processes, including the integrity of its judgments"* (at [26]).

108. All the cases, we acknowledge, involve an assessment of the weight to be attached to competing considerations as was acutely noted in *Incitec Ltd v Alkimos Shipping Corporation and Another* [2004] FCA 698 by Allsop J who said:

> "*At this point, one has the intersection of two powerful considerations in international litigation: first, the desire of courts to hold commercial parties to their bargain in terms of exclusive jurisdiction clauses; secondly, the desire of courts to avoid disruption and multiplicity of litigation, in particular a desire to avoid parallel proceedings and the risk of inconsistent findings, and to avoid the causing of inconvenience to third parties…*
>
> *At the outset, it should be recognised that the second competing consideration should not be expressed too broadly. To the extent that the operation of the exclusive jurisdiction clause causes financial or forensic inconvenience to the party which bound itself to the clause, that, of itself, is to be seen as only the direct consequence of the bargain entered and, generally, can be set to one side. What really are of importance in weighing against the operation of the exclusive jurisdiction clause are: (a) the inconvenience, if any, whether financial or other, caused to third parties; (b) the effect, if any, upon the due administration of justice; and (c) any other appropriate public policy consideration that can be discerned in all the circumstances."*

and concluded at 509:

> "*The balance is a fine one, but overall in my view this Court should not promote competing and potentially conflicting litigation in circumstances where one venue can conveniently and promptly deal with the whole controversy."*

We agree though the balance here is, in our judgment, less fine for reasons we now develop.

109. The Carlyle Defendants made an informed tactical choice to litigate the question of forum and jurisdiction in Guernsey, with the alternative of a stay, knowing that it was only in this jurisdiction that they could obtain a stay of the entirety of the Plaintiffs' claims. They sought a stay of all claims against all Defendants on the basis of the forum clause in the IMA (notwithstanding that, even on the Defendants' case, none of the seven director defendants is

entitled to the benefit of the forum clause or to enforce the clause). At no time were the Carlyle Defendants or any of the other Defendants compelled to litigate the jurisdictional dispute in Guernsey. On the contrary, the Defendants were content for the hearing to proceed before DB Collas in Guernsey on the basis that it was "*agreed that all claims in this multi-jurisdictional matter should be tried in a single forum*" and thus they could argue that all the liquidation claims should be determined in Delaware by reason of the fact that some fell within the scope of the forum clause. They pursued their *Exceptions Déclinatoire* to judgment. They did so without ever requesting the Royal Court to await the outcome of any application in the Delaware Court of Chancery before determining their *Exceptions*, or submitting that it would be appropriate for the Royal Court to do so. Further, the revival in this chapter of proceedings of the reliance on the EJC, which we held ineffective in our first judgment, does savour strongly of an attempt to re-litigate a matter already decided against them. *Interest reipublicae ut finis sit litium* is a precept as applicable to interlocutory motions as to substantive trials.

110. In *Masri*, Lawrence Collins LJ (as he then was) observed that cases in which a party seeks to re-litigate abroad the subject matter of an English judgment are (at [95]) *"classic case[s] of vexation and oppression, and of conduct which is designed to interfere with the process of the English court"* and later reiterated this view, stating (at [100]):

> *"It is consistent with principle for an English court to restrain relitigation abroad of a claim which has already been subject of an English judgment. There is long-established authority that protection of the jurisdiction of the English court, its process and its judgments by injunction is a legitimate ground for the grant of an anti-suit injunction."*

111. Indeed the Carlyle Defendants asked this Court in the earlier appeal to determine its own jurisdiction and in so doing set in motion a process (including the exercise of rights of appeal) which has resulted in an appellate decision on the issues of forum and jurisdiction. They now seek to re-litigate the same issues in Delaware, with a necessary concomitant of depriving the Royal Court of its jurisdiction in the matter notwithstanding the fact that an appellate court has determined that Guernsey is clearly and distinctly the appropriate forum for the trial of the Liquidators' claims (and the only available forum for the trial of all the Liquidators' claims).

112. We would therefore, if necessary, characterise the purpose of the Carlyle Defendants' pursuit of the Delaware Anti-Suit Proceedings, and of this Appeal, as vexatious. It is calculated to (1) to prevent the Liquidators from continuing to pursue this litigation in a single forum to a single trial; and (2) to prevent the Liquidators from ever pursuing their statutory insolvency remedies against the Carlyle Defendants, which are available to the Liquidators only in Guernsey.

113. Andrew Bell SC, *Forum Shopping and Venue in Transnational Litigation* (2009) at 198 aptly observes that:

> *"The expedient of seeking an anti-anti-suit injunction will be especially important where there is a difference in the substantive law to be applied in the competing forums, whether by reason of the operation of a mandatory law of one forum that overrides any expressly chosen law, as was the case in Akai, or simply by dint of different choice of law rules……"*

114. Turning, penultimately, to the decision of Judge Finch, his rationale on considering the arguments put before him appears from paragraphs 56 to 58 of his judgment of 17 November 2011. He acknowledged that his starting point was the simple one of asking why – as he understood the likely result of acceding to the Carlyle Defendants' arguments – the Liquidators should be stopped from exercising their right of appeal. In addressing this

conundrum he proceeded to emphasise the importance of the statutory insolvency claims over which the Delaware Courts must be assumed to have no jurisdiction. As he then observed, he was not to be mesmerised by the EJC. Read fairly in context, and bearing in mind his earlier discussion of the EJC at paragraphs 39 to 46, his reasoning appears to recognise that the EJC had to play a part in his process of deliberating on the arguments before him; but did not outweigh the importance to be accorded to the statutory claims and the interests of justice in trying to avoid the problems of fragmentation.

115. The arguments before this court had, as often, moved on from those before the court below into broader and deeper considerations; but we do not consider the Judge's reasoning, as we have indicated our understanding of it, to be flawed.

116. In conclusion there is a strong public policy in Guernsey against multiplicity of litigation and the fragmentation of proceedings that can and should be determined in a single action. The objectives and rationales underlying the policy are clear, including (i) the saving of costs and waste of party and judicial resources, (ii) the avoidance of delay, (iii) the avoidance of the risk of inconsistent decisions and consequent injustice to parties, (iv) the prevention of loss to a complainant of the benefit of a single composite trial, (v) the avoidance of uncertainty and satellite disputes such as on questions of issue estoppel or res judicata, and (vi) the avoidance of potential injustice to third parties. Plainly in this case the interests of justice are best served by the submission of the whole of the dispute to a single tribunal which is best fitted to give comprehensive judgment on all matters in issue in accordance with its own law which governs the vast majority of the claims. It is in reliance on the fundamental principle of the interests of justice, so explained, that we dismiss this appeal.