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The Carlyle Case: what can be learnt from a billion dollar fund collapse

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The collapse of the billion dollar Carlyle Capital Corporation Guernsey-based fund in 2008 led to litigation spanning a decade. The lessons to be learnt from this case and the legal analysis of directors' duties are relevant in the current climate of the COVID-19 pandemic which has caused severe global economic disruption and may lead to other fund collapses.

Introduction

The *Carlyle* case arose from the collapse in March 2008 of a Guernsey fund, Carlyle Capital Corporation Ltd (**CCC**), which led to the loss of all of its US$1 billion of capital. CCC was set up as a Guernsey company in 2006 and invested mainly in residential mortgage-backed securities (**RMBS**) issued by US government-sponsored entities Fannie Mae [1] and Freddie Mac. [2] The case went to trial, was appealed and heard by the Guernsey Court of Appeal. [3] It was further appealed to the Judicial Committee of the Privy Council and was settled a few months before it was due to be heard in October 2020. [4] The trial judgment which runs to 525 pages covered in detail the duties of directors which is of significance to all jurisdictions which hold directors to similar standards, especially during times of crisis. [5]

Facts

In July 2010, CCC and its liquidators issued claims against the former executive and independent directors of CCC, the investment manager, [6] the promoter of CCC and a holding company (**Carlyle**) within the Carlyle Group structure for damages of no less than US$1 billion, which rose to nearly US$2 billion (including interest) by the close of trial.

CCC's business model was to make profits and eventually pay dividends mainly from the difference between the coupon it earned from its RMBS (that were guaranteed to pay full value at maturity)

and the cost of financing those assets. The RMBS assets were financed using short-term one-month secured borrowing from US Banks (called repo financing). [7] The RMBS were subject to daily margin calls if prices changed. CCC's investment guidelines stated that CCC should try to keep a 20% liquidity cushion in cash or equivalent to meet foreseeable margin calls. [8]

By 11 July 2007, the Company had raised US$945 million in capital and had leveraged its capital 30 times [9] to acquire an RMBS portfolio of over US$20 billion. It also held a small portfolio of non-RMBS assets. [10] The extensive risks the fund would take with its business model were clearly disclosed in its Offering Memorandum, including the risks associated with operating with high leverage.

In August 2007, market volatility increased dramatically resulting in the market price of the CCC's assets being reduced significantly. This led its repo lenders to make large margin calls and, in an unprecedented manner, some of them also increased the haircuts on the amounts borrowed. [11]

In August 2007, CCC used virtually all of its liquidity cushion to pay the margin calls, managed to obtain and use a US$100 million loan from Carlyle and sold its non-RMBS assets to bolster its liquidity and meet its higher borrowing costs.

Following the crisis in August 2007, CCC adopted a conservative strategy of negotiating the best funding terms it could, holding onto its assets, freezing asset purchases and allowing its portfolio to deleverage gradually. This was referred to at trial as CCC's capital preservation strategy.

By mid-February 2008, CCC's liquidity cushion had recovered to nearly 20%. [12] However, in March 2008 an unexpected and unforeseen liquidity crisis hit the financial markets, worse than the August 2007 crisis. A consequence of this crisis was a sharp contraction in the availability of repo financing. CCC's repo lenders marked the value of its RMBS down substantially, and as a result made extremely large margin calls which CCC was unable to meet. It was put into liquidation by the Royal Court of Guernsey on 17 March 2008.

In the proceedings that were commenced in Guernsey, New York, Delaware and Washington DC, the plaintiffs alleged numerous breaches of duty which were mainly focused on the defendants' alleged fundamental failure to take steps to reduce CCC's leverage and increase liquidity from July 2007. They claimed that this could have been achieved by selling a substantial amount of its RMBS assets, raising more capital or conducting an orderly winding down of CCC.

CCC had executive and independent directors. [13] CCC's constitution specifically required the appointment of three "Independent Directors" (**IDs**), who were not affiliated with the Carlyle Group. [14] Their roles included providing oversight of decisions and proposals by the investment committee and CCC's management. The IDs had voting rights and sat on the audit committee. However, certain decisions required the approval of a majority of IDs, such as changes to investment guidelines.

Directors' duties in Guernsey law are in substance very similar to those under the English Companies Act 2006 and as they were before that Act under English common law. The plaintiffs' allegations of breach of duty can be broadly categorised into breaches of:

1. fiduciary duties;
2. the duty of skill and care; and
3. statutory duties. [15]

Director duties

Alleged breach of fiduciary duties

Duty to act in good faith

The plaintiffs alleged that the defendants had acted in breach of their fiduciary duty to act in good faith.

The learned Lieutenant Bailiff (**the judge**) stated that this duty is to act in what the director bona fide believes is in the best interests of the company and "… is the essential fiduciary duty of a company director". [16]

She considered that other duties described as fiduciary were really just particular applications of this essential duty and in terms of the scope of this duty. The judge held that a management or governance decision of a director, honestly and responsibly made, amounts to due performance of that director's duty of good faith [17] and confirmed that the test for this is subjective. Therefore, a claim for breach of fiduciary duty only lies where it is shown that the directors did not honestly consider their action to be in the best interests of the company. [18]

Objectivity only comes into play in two scenarios. First,

> "if the relevant decision appears clearly and objectively not to have been in the best interests of the company, [as] this could certainly cast doubt on a director's assertion that he genuinely believed that it was". [19]

An example of this could be if a director sells a sports car owned by his company to her or himself for £10, she is unlikely to be believed when she tells the court that she genuinely thought that was in the best interests of the company.

This is an evidential point, such that the apparent reasonableness (or otherwise) of a decision by a director may be material to an inference as to the directors' state of mind in making it. However, this does not import into the test any requirement that the decision must be in the best interests of the company as determined objectively by the court. [20]

Secondly, objectivity may also come into play is if the directors did not in fact consider the interests of the company at all. [21] In that situation, the test which the court will apply is to examine the relevant decision which a hypothetical director, acting bona fide in the apparent best interests of the company, could reasonably have made in the circumstances. [22] If the decision was within that ambit, then the director will not be liable for breach of fiduciary duty.

In CCC's case, the plaintiffs argued that this duty was breached. They said that the amendment and subsequent suspension of CCC's risk management measures in its Investment Guidelines was "plainly" not in CCC's best interests. [23] However, the judge held that even had it been a breach on its own, which it was not, it caused no loss and added nothing to the key complaint of the plaintiffs. [24] Further, the judge found that in fact the defendants had made their decisions in what they bona fide believed to be the best interests of CCC and that such decisions were, in any case, objectively viewed, within the range of decisions which a reasonable director could properly regard as being in the best interests of CCC. [25]

Duty to exercise their own independent judgment

The plaintiffs raised this breach of duty particularly in respect of the IDs and their independent powers of oversight and separate approval. [26] The plaintiffs alleged that the IDs were not truly independent, but merely acted as a rubber stamp for decisions made by Carlyle including decisions relating to the approval of the reduction and suspension of CCC's liquidity cushion guideline, and also relating to refraining from both selling RMBS and seeking to raise further equity capital.

It was also alleged that CCC failed to convene sufficient board meetings and that they abrogated their duties to CCC by permitting Carlyle and CIM to run CCC as they saw fit after August 2007.

The judge held that a director will breach this duty if she or he merely does what she or he is told by others or acquiesces without question or consideration in what others ask her or him to do. A director must make their:

> "own decision, on all matters where a decision is required of them qua director. They have a duty which is an 'irreducible' minimum, to oversee and keep themselves sufficiently informed about their company's affairs in order to do so". [27]

The judge went on to qualify that this duty did not mean that a director must act entirely alone nor that he must ignore the views of his fellow directors but that he must exercise his own judgment based on his own assessment of the facts. [28] She also accepted that where a director is not an expert in a matter but knows his fellow director is, this duty does not mean the director must:

> "either … make a decision without ascertaining the views of the expert director or without having regard to them, or to make himself a sufficient expert in the area that he can assess the opinions of the expert director from a position of expertise". [29]

The judge held that the directors did exercise independent judgment throughout all decisions they made in respect of CCC. [30]

Duty not to act where there was an actual or possible conflict of interest

The plaintiffs alleged that there was a conflict between, on the one hand, the corporate and reputational interests of Carlyle and the personal financial interests of the Carlyle directors of CCC, and, on the other hand, the interests of CCC.

The plaintiffs said that the best interests of CCC required a "prompt restricting" of its business, but that the reputational interests of Carlyle and CIM, the corporate interests of Carlyle and the personal interests of the Carlyle directors of CCC allegedly all conflicted with that, and effectively made the directors wrongfully cause CCC to continue too long in "business as usual" mode because they did want to jeopardise these other conflicting interests. [31]

With respect to this duty, the parties agreed that an objective test must be applied when assessing whether there is a material conflict of interest. [32] The judge agreed with the defendants in holding that there was no rule in English law preventing a person from being a director of more than one company, even if both companies are in competition and that Guernsey law would follow this rule. [33]

The judge noted that the rule is subject to two qualifications. First, that the director in that position is able to arrange his affairs so that he can discharge his duties to both companies as loyally as if each were his only principal. Second, that any such conflict can be avoided by the director making full disclosure of the position and obtaining the consent of each principal to his also acting for the other. [34]

The judge held that there was no evidence to support the plaintiffs' allegations of conflict and found that in fact the directors felt no tension between CCC's own interests, which they saw as being survival and recovery, and Carlyle's best interests, which they also saw as being CCC's survival and recovery. [35]

In terms of the personal interests of the directors, the judge held that she had some difficulty in seeing any real substance, as opposed to theory, in the alleged conflict of interest itself. [36]

Duty to exercise powers for a proper purpose

The plaintiffs alleged that the defendants acted with the improper purpose of prioritising Carlyle's reputational interests over the interests of CCC. Carlyle's interests were said to be to avoid having to disclose CCC's poor financial performance, which would in turn disclose Carlyle's failure to make CCC a liquid investment company and thereby put at risk what the plaintiffs called Carlyle's Strategic Objectives. [37]

The Carlyle Strategic Objectives were alleged to be:

1. the intended sale of 7.5% of Carlyle to a Middle Eastern Sovereign Wealth investor;
2. the obtaining of an US$875 million loan for Carlyle from a consortium of banks; and
3. the future initial public offering (**IPO**) of the Carlyle itself. [38]

The judge accepted that a director, even if he is acting in good faith and in the interest of the company and its members as a whole, must nevertheless use his powers for the purposes for which they were conferred. [39] However, she could find no evidence at all which might justify the allegations made by the plaintiffs regarding the alleged improper purpose and made clear that neither the decision not to embark on generally selling RMBS, nor the broader decision to continue keeping CCC's business alive, was due to any prioritisation of the interests of Carlyle or the personal interests of any defendant over the perceived interests of CCC as a discrete company. [40] These allegations were therefore dismissed.

Duty to consider the interests of creditors when a company is at risk of insolvency

The plaintiffs alleged that as CCC was insolvent or in the zone of insolvency in August 2007, the directors had a duty to have proper regard to creditors' interests in the decisions they took and, as a result, should have taken immediate steps to sell some of CCC's RMBS assets to improve its overall financial position.

The defendants denied this allegation on the ground that this duty never arose since at the time CCC was never insolvent or close to insolvency and, secondly, even if the duty had arisen, the directors had fulfilled it by adopting a strategy of preserving the company's assets from August 2007 onwards. Furthermore, that such strategy was in both the best interests of CCC's creditors and also its shareholders. The directors were not in a position to foresee the subsequent financial crisis in March 2008 which ultimately led to the demise of CCC. This was the first Guernsey case to consider whether the duty in English law to have proper regard to creditors' interests when a company gets into serious financial trouble is part of Guernsey law. The judge confirmed that the duty did exist in Guernsey law and relied heavily on English cases in this regard, especially the Supreme Court decision of *Bilta (UK) Ltd v Nazir* [41] but put her own interpretation of precisely when and what that duty entails. She accepted that this duty was subsumed into the duty of good faith, since the basis of the duty is that when a company is or is nearly insolvent, the reality of the situation is that the assets it has belong to the creditors rather than the shareholders since they have priority over those assets in a liquidation. [42]

The judge considered that the duty does not so much "arise" by coming into existence at one particular moment, as acquire separately discernible influence because of changing circumstances. In other words, when the interests of creditors and shareholders as to the course of the company's future activities begin to diverge. This tends to happen gradually and is very fact-dependent so

identifying a clear point when the duty "arises" is not easy. [43]

It was common ground between the parties that the tipping point for when the extended duty is established can be something short of actual insolvency, but the parties differed as to the proper description of the legal test for the onset, short of insolvency, of such duty.

The judge decided that the phrase "on the brink of insolvency" best described when the duty arose. She rejected the phrase "zone of insolvency" proposed by the plaintiffs since it suggested a longer period pre-insolvency which did not convey the appropriate sense of imminence. She further described the duty as arising when it can be seen that the decisions about the company's actions could prejudice the creditors' prospects of recovering their debts in a potential liquidation. [44]

Regarding the content of this duty, the judge considered that stating that the interests of creditors became paramount when this duty arose was too "absolutist". She preferred using the words "proper regard" and stated her position as follows:

> "In my judgment the principle, as it applies in Guernsey law is that once it is recognised that the company is 'on the brink of insolvency', the directors' duty to act in the best interests of the company extends to embrace the interests of its creditors, and requires giving precedence to those interests where that is necessary, in the particular circumstances of the case, to give proper recognition to the fact that the creditors will have priority of interest in the assets of the company over its shareholders if a subsequent winding up takes place." [45]

The judge further clarified that the duty was to have regard to the interests of the general body of the company's unsecured creditors as an abstract class. [46]

In the particular circumstances of this case, the judge confirmed that the duty did arise from August 2007 [47] and also that there was no evidence that the defendants gave separate consideration to the interests of the creditors. [48] However, she found that since the interests of the unsecured creditors and shareholders of CCC were aligned and the defendants had taken all material decisions and actions in the best interests of CCC, [49] the defendants had not breached their fiduciary duty in this regard. [50]

In the recent English Court of Appeal case of *BTI 2014 LLC v Sequana*, [51] the judges rejected the use of terms such as "brink of insolvency", used by the judge in the Carlyle case, to determine when this fiduciary duty arises. They instead stated that the duty arises when the directors knew or ought to have known that the company was likely to become insolvent. This new formulation, if it is not overturned, is likely to be persuasive when this issue arises in future Guernsey cases.

However, the Supreme Court heard the appeal of that Court of Appeal decision on 4 and 5 May 2021 and judgment had not yet been handed down. The forthcoming judgment should clarify whether the trigger for the directors' duty to consider creditors is merely a real risk of, as opposed to a

probability of or close proximity to, insolvency.

CCC: the duty of skill and care

This is a duty of competence. The judge stated that the test for the standard of care is that of a reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as those of the relevant director and the actual knowledge, skill and experience of that director. She also confirmed that it is a combined objective and subjective test, with the latter being capable of raising but not lowering the standards to be expected of a particular director. [52]

There were five matters which the judge mentioned were relevant in determining the scope of this duty and whether or not it has been performed by a particular director:

- the particular role of the director in the governance and management structure of the company;
- the particular skills which he has or has held himself out as having;
- his level of remuneration;
- the size of the company and the nature of its business; and
- the circumstances of the company at the time of any alleged breach. [53]

On the question of whether a breach has occurred, the defendants argued, and the judge agreed, that the test for whether there has been a breach is a high one. It requires a court to be satisfied that no reasonably diligent director with the material degree of knowledge, skill and expertise could have acted in the way in which the particular director acted. The court must find that the director's decision "went beyond a mere error of commercial judgment". [54]

The plaintiffs complained that the independent directors breached this duty by bringing too passive a view to their roles and failing to acquire sufficient knowledge of CCC's ongoing affairs. [55]

The plaintiffs also alleged that CCC's board was "dysfunctional" and in breach of this duty by not holding enough board meetings. [56] In response, the judge held that, apart from any legal requirement to hold a meeting under statute or to comply with the company's articles of association, there was no general legal requirement to hold meetings. Holding meetings was not an end in itself but a means to the end of arriving at considered and appropriate decisions on relevant aspects of the conduct of the company's business. [57] The duty of a director in this regard was to:

> "… gain and maintain a sufficient understanding of the company's business and to inform and keep himself informed as to the surrounding facts and circumstances of such business,

sufficiently to enable himself to participate effectively in the making, together with his co-directors, of such decisions as the board is required to make, in whatever manner is effective …” [58]

Wrongful trading

It was alleged by the plaintiffs that the defendants were guilty of the Guernsey statutory offence [59] of wrongful trading, which is similar to the offence contained in English Insolvency legislation, [60] by continuing the operation of CCC’s business from August 2007 in circumstances where the defendants knew or ought to have concluded that there was no reasonable prospect of CCC’s avoiding going into insolvent liquidation.

The judge rejected this allegation since she was satisfied that at no time prior to an “immaterial” few days shortly before CCC was actually placed in insolvent liquidation did the defendants conclude or ought they reasonably to have concluded that there was no reasonable prospect that CCC would avoid going into insolvent liquidation. [61]

Royal Court decision

The trial took 25 weeks (almost six months), the longest ever in Guernsey. The Royal Court handed down judgment in September 2017. All of the 187 pleaded breach of duty claims against the defendants were dismissed in their entirety.

Appeal

The defendants won everything at trial on both the law and the facts. However, despite such a comprehensive loss and after having consented to a costs order against them on an indemnity basis, the plaintiffs appealed. The appeal was heard over two weeks in October 2018 and the Court of Appeal handed down judgment on 12 April 2019.

The appeal included a claim that there had been a “critical misunderstanding which infects the whole body of evidence”. [62] In short, the appellants alleged that the Royal Court had been led into material error and that there should be a retrial.

Court of Appeal decision

The Court of Appeal held that, on the evidence, the prices at which CCC’s directors would have been prepared to sell in August 2007 were lower than the trial judge had found. [63]

However, the Court of Appeal went on to consider that even if the trial judge had made correct findings regarding the prices at which CCC was willing to sell RMBS assets in August 2007, it did not

follow that there had been any breach of duty by the directors. [64]

The Court of Appeal held that:

> "… the existence of such an error [that the findings of the [judge] as to perception of risk were based on a misunderstanding] does not, in our judgment, have the result that the issues are at large for determination by this court or that the case must be sent back for even a partial retrial." [65]

It went on to hold that, taken with other issues, no breach of duty could exist. [66]

The Court of Appeal further found that other findings of the trial judge, including the risks of selling at the lower prices, were not infected by the mistake which the trial judge had made as to the prices at which CCC was willing to sell in August 2007. [67]

In addition, there was no basis for concluding that the independent directors had lacked independence or failed properly to inform themselves of relevant matters. [68]

The Court of Appeal held that:

> "… it was common ground that there was nothing that CCC could have done which would have saved it from the consequences of the March 2008 liquidity crisis, which was unforeseen and unforeseeable. However startling the history of CCC's short life appears at first sight, its failure was the result of circumstances beyond the control of any board of directors. The Lieutenant Bailiff's view was that the appellant's claim depended entirely on hindsight, and we agree with her." [69]

Final chapter

Despite losing again before the Guernsey Court of Appeal, the plaintiffs further appealed to the Privy Council. This appeal was listed to be heard during the first week of October 2020 in Guernsey.

However, in April 2020 the parties reached a non-confidential settlement. The Privy Council subsequently ordered the withdrawal of the appeal on 7 May 2020, after which all proceedings in all jurisdictions were brought to an end.

None of the defendants paid a penny to any of the plaintiffs. In fact, the plaintiffs paid approximately £24 million to the defendants towards their costs of the proceedings.

Conclusions

The CCC case is of particular relevance now, during the climate of the COVID-19 pandemic, which is having severe economic repercussions worldwide and will likely lead to further fund collapses.

When considering what lessons can be learned from the CCC saga, it must be borne in mind that the Guernsey litigation was an extreme case but against that background lessons may include the following:

- Ensure that D&O insurance is adequate, so a director is covered for the largest financial loss that can reasonably be contemplated for that specific business and in particular that it covers defence costs during any proceedings. This case only ended some 13 years after the events complained of took place.
- Make sure that company documentation is kept up to date and appropriate minutes are kept, and are written contemporaneously where possible, that declarations of conflicts of interests are registered, updated and tabled to meetings from time to time in accordance with the constitution of the company and local law.
- Ensure that the fact that questions have been raised by board members is recorded, especially where there is dissent even if the content of the discussion is not fully recorded.
- If the company strategy is to do nothing differently, because that is what is in the best interests of the company, ensure that consideration of this and any alternatives (or even lack of alternatives) is documented so that any future criticisms of a strategic decision are unlikely to succeed.
- Be aware of specific experience and skills that board members may have as that may increase (but not decrease) both the scope and standard of duties that are owed by directors.

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[1] The full name of which is Federal National Mortgage Association.

[2] The full name of which is Federal Home Loan Mortgage Corporation.

[3] *Carlyle Capital Corporation Limited (In Liquidation) v Conway* [2019] GRC014 CA

[4] *Carlyle Capital Corporation (in Liquidation) v Conway* JCPC/2019/0083.

[5] *Carlyle Capital Corporation Limited (in Liquidation) v Conway* (Guernsey Judgment 38/2017).

[6] Carlyle Investment Management LLC (**CIM**).

[7] A repurchase agreement (a **repo**) is a financial transaction in which one party (the borrower) sells an asset to another party (the lender) with a promise to repurchase the asset at a pre-specified later date. It is a form of secured borrowing. US financial institutions often use repos. CCC's business model was predicated on a 2% "haircut" being applied to its repo borrowings by its repo lenders, ie that CCC could borrow 98% of the current value of its RMBS. The nature of repo

financing is summarised in the appeal judgment, *Carlyle* [2013] 2 Lloyd's Rep. 179 at [11].

[8] This percentage arose from stress-testing the business model against the conditions of the worst liquidity crisis in recent memory, the Long Term Capital Management Crisis (**LTCM**) of 1998. The stressed Value at Risk (**VaR**) assessment indicated that a 16% cushion would have allowed CCC to have survived the conditions of such the LTCM crisis to a 99% confidence level assuming no corrective measures were taken to protect the portfolio were taken for 20 days. A decision was taken to increase the cushion from 16% to the 20% level for an extra (25%) safety over and above what would have been needed to survive the LTCM crisis.

[9] The fact that the assets could be leveraged so highly was disclosed to investors in the Offering Memorandum. See [188]-[189] of the trial judgment.

[10] CCC held a much smaller portfolio of riskier but higher earning leveraged finance and credit assets which were sold in August 2007 to raise liquidity without crystallising any significant losses.

[11] ie they were willing to loan to CCC a smaller percentage of the market value of the RMBS it held.

[12] At [2341] of the trial judgment.

[13] There were four executive directors. Two voting, two non-voting. The plaintiffs also claimed that CIM, TCG and Holdings were, by virtue of their power and influence over CCC, either shadow directors or de facto directors and therefore owed to CCC the same duties as de jure directors.

[14] Two of the IDs had banking and finance experience. The third was a Guernsey-based trust administrator.

[15] Only the main breaches of director duties will be addressed in this article.

[16] At [370] of *Carlyle Capital Corporation Limited (in Liquidation) v Conway* (Guernsey Judgment 38/2017)..

[17] At [378] of the trial judgment.

[18] At [379] of the trial judgment.

[19] At [382] of the trial judgment.

[20] At [381]-[382] of the trial judgment.

[21] At [383] of the trial judgment. The judge relied on decision of Pennycuick J in the English case *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch. 62; [1969] 3 W.L.R. 122 Ch D for this principle.

[22] At [384] of the trial judgment.

[23] At [372] of the trial judgment.

[24] At [1422] of the trial judgment.

[25] At [2639] of the trial judgment.

[26] The judge found that the IDs' function was to bring a dispassionate oversight view to the board's decisions, from a more detached perspective—see [1108] of the trial judgment.

[27] At [481] of the trial judgment.

[28] For example, the judge found that the IDs were entitled to accept the recommendations of the executive directors regarding the reduction/suspension of the liquidity cushion requirement since the IDs had given the matter critical and independent thought and after their queries or suggestions had been reasonably answered. At [1422] of the trial judgment.

[29] At [482] of the trial judgment.

[30] At [1510], [2639] of the trial judgment.

[31] At [498] of the trial judgment.

[32] At [485] of the trial judgment.

[33] At [494] of the trial judgment.

[34] At [495] of the trial judgment.

[35] At [1479] of the trial judgment.

[36] At [1499] of the trial judgment.

[37] At [2281] of the trial judgment.

[38] At [1489]-[1493], [1502], [1505] of the trial judgment.

[39] At [472]-[477] of the trial judgment.

[40] At [2478] of the trial judgment.

[41] Bilta (UK) Ltd (In Liquidation) v Nazir [2015] UKSC 23; [2015] B.C.C. 343.

[42] At [436] of the trial judgment.

[43] At [435] of the trial judgment.

[44] At [446] of the trial judgment.

[45] At [455] of the trial judgment.

[46] At [463] of the trial judgment.

[47] At [1440] of the trial judgment.

[48] At [1443] of the trial judgment.

[49] At [2638] (3) of the trial judgment.

[50] At [1445] and [1447] of the trial judgment.

[51] BTI 2014 LLC v Sequana [2019] EWCA Civ 112; [2019] B.C.C. 631.

[52] At [501] of the trial judgment.

[53] At [506]–[509] of the trial judgment.

[54] At [511] of the trial judgment.

[55] At [515] of the trial judgment.

[56] At [529] of the trial judgment.

[57] At [533] of the trial judgment.

[58] At [537] of the trial judgment.

[59] Companies (Guernsey) Law 2008 s.434.

[60] Insolvency Act 1986 s.241.

[61] At [2508] and [2639(5)] of the trial judgment. At [1933] the judge made an interesting observation that CCC's situation did not fit the classic situation when wrongful trading has been found, since if it had continued business as usual, without an unforeseeable global liquidity event (which occurred in March 2008), it would have been able to survive.

[62] Carlyle [2013] 2 Lloyd's Rep. 179 at [76].

[63] Carlyle [2013] 2 Lloyd's Rep. 179 at [85]–[87], [94].

[64] Carlyle [2013] 2 Lloyd's Rep. 179 at [95].

[65] Carlyle [2013] 2 Lloyd's Rep. 179 at [95].

[66] Carlyle [2013] 2 Lloyd's Rep. 179 at [135], [140], [235(i)].

[67] Carlyle [2013] 2 Lloyd's Rep. 179 at [114].

[68] Carlyle [2013] 2 Lloyd's Rep. 179 at [144].

[69] Carlyle [2013] 2 Lloyd's Rep. 179 at [134].

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