

JERSEY / JUDGMENT

Gamlestaden v Baltic Partners

[2005] JCA 015 (10 February 2005)

[2005] JCA 015

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

COURT OF APPEAL

Judgment

reserved: 11 th November, 2004. Judgment handed down: 10 th February, 2005 Before: P. D. Smith, Esq., Q. C., President; Sir Christopher Clarke; and K. S. Rokison, Esq., Q. C. Between Gamlestaden Fastigheter AB. Representor/ APPELLANT And Baltic Partners, Ltd. First Respondent David Paul Boléat Second Respondent/RESPONDENT Michael David de Figueiredo Third Respondent/ RESPONDENT Peter Arthur Neil Bailey Fourth Respondent/ RESPONDENT Appeal by the Representor/APPELLANT against the Judgment of the Royal Court of 22nd July, 2004, striking out the Re-Amended Representation. Appeal by Respondent's Notice, under Rule 5(2) of the Court of Appeal (Civil) (Jersey) Rules, 1964, by the Second, Third and Fourth Respondent/RESPONDENTS, contending that the decision of the court below should be affirmed, but that, if that decision is set aside, paragraphs A(1), (2), and

- (3) of the Prayer of the re-amended Representation should in any event be struck out on the grounds that such relief is unavailable under Article 143 of the Companies (Jersey) Law 1991. Advocate M. St. J. O'Connell for the Representor/ APPELLANT. Advocate T. J. Le Cocq and Advocate R. MacRae for the Second, Third and Fourth Respondent/RESPONDENTS.

judgment

CLARKE ja: 1. This is an appeal from a judgment of the Bailiff given on 22 nd July 2004, by which he struck out a representation made by Gamlestaden Fastigheter AB ("Gamlestaden"), a Swedish company, pursuant to Articles 141 and 143 of the Companies (Jersey) Law 1991 ("the Companies Law") in relation to Baltic Partners Limited ("Baltic") on two grounds (a) that it disclosed no reasonable cause of action and (b) for want of prosecution. Those proceedings seek relief against the three individual respondents, Mr De Figueiredo, who is, and Mr Boleat and Mr Bailey who were at material times, directors of Baltic ("the directors"). Mr Boleat died in September 2000. There are a number of companies in the group of which Gamlestaden forms part, and like the Bailiff, I shall use the term "Gamlestaden" to describe both the Representor and other companies in the group. The facts 2. For the purpose of the application to strike out, it is common ground that we must assume that the Representor will prove the facts that it has pleaded. The summary

of those facts contained in the following paragraphs is largely derived from the summary given by the Bailiff in his judgment, to which I have added certain additional details, together with reference to some of the submissions made to this Court. Advocate Le Cocq for the directors pointed out to us that there were a number of matters about which we had not heard, and I should emphasize that, in an application such as this, the Court is required to assume that the Representor will prove that which, by its pleading, it undertakes to prove. If the Representation is restored, it will remain to be seen whether it does so and what other facts are established, which may cast a different light on the case.

3. Baltic was incorporated in Jersey on 19th April 1989. It was owned as to 22% by Gamlestaden and as to 78% by another Jersey company, Hengoed Limited, which was in turn beneficially owned by Mr Tryggve Karlsten ('Mr Karlsten'). Baltic was incorporated in order to hold an interest in a German partnership, Scandinavian Partners Karlsten and Co KG ('SPK'). SPK was owned as to 22% by Baltic, as to 73% by Mr Karlsten and as to 5% by a Mr Hansen. Those were the profit and loss sharing ratios prescribed by its Articles. Mr Karlsten was the general partner and Baltic and Mr Hansen were limited partners. Baltic subscribed equity capital in SPK. That subscription was credited to an account named "Equity Account 1". Baltic's original subscription (as prescribed by the Articles) was DM 85 million. Mr Hansen's subscription was DM 650,000. Mr Karlsten subscribed no equity capital at all.

4. By virtue of the Articles of SPK there were three partners' accounts, which were named as follows: (i) Equity Account 1, to which the limited capital contributions of the partners were credited; (ii) Equity Account 2, which is described in the Representation as "a flexible participation account recording profit shares, drawings and interest payments"; (iii) A loss carried forward account.

5. SPK was involved in property development in Hamburg. It owned, prior to the events to which I am about to refer, a 95% interest (indirectly held) in a property known as Chilehaus and a 100% interest in a building known as Sprinkenhof. In order to fund the acquisition of the two buildings, and refurbish them, SPK had borrowed heavily. Some of that funding came from Baltic.

6. In 1990 the property market in Sweden collapsed and Gamlestaden became insolvent. Liquidation of the group was avoided by a takeover by a consortium of five Swedish banks, which were creditors of Gamlestaden. Among those banks were Skandinaviska Enskilda Banken ("SEB") and Forenings Sparbanken ("Sparbanken"). The restructuring of Gamlestaden under the aegis of the banks led to disagreements between Gamlestaden and Mr Karlsten as to the extent of Gamlestaden's obligations to finance SPK.

7. As at 30th June 1993 the amount standing to the credit of Baltic on its Equity Account No 1 with SPK had increased to DM 120.9 million and the total amount standing to its credit on all three accounts was DM million.

8. The Articles of SPK contained a provision, favourable to Baltic, (but which we have not been shown) that the whole of the balance due on the three equity accounts was, subject to there being realisable assets, payable to Baltic prior to any distribution of surplus assets between the partners: see paragraph 12 of the Re-Amended Representation. Thus, as Advocate O'Connell put it, Baltic was, prior to the transactions of which Gamlestaden complain, very secure, being, practically speaking, the 100% owner of SPK, which was a going concern owning most of two huge properties in Hamburg, and entitled to repayment of its equity accounts in preference to the other two shareholders.

9. In October 1992 and February 1993 the partners in SPK, including Baltic, acting through its directors, authorised the withdrawal from SPK of DM 104,485,482 by Mr Karlsten and DM

8,172,898 by Mr Hansen. Gamlestaden claim that these withdrawals were (a) not in Baltic's interests since neither of the two properties had been sold and what was, in effect, happening was that SPK was paying to Mr Karlsten and Mr Hansen monies which Baltic had provided or procured to fund the development of the properties by SPK, and (b) illegitimate in that the withdrawals ignored Baltic's right under the Articles to be paid first. They contend that the directors who authorised this withdrawal were acting in a partisan way, and in breach of their fiduciary duty to act in the interests of all the members of the company. The withdrawals are also said to have been in breach of various other provisions in the Articles. 10. The funds were withdrawn in May 1993 and, initially, debited to the capital accounts of Mr Karlsten and Mr Hansen as negative equity. On 31 June 1993 Chilehaus was sold. The proceeds of sale were DM 300 million. SPK's share of DM 160.7 million was paid to it. Gamlestaden claim that the money that was withdrawn in May was needed for the refurbishment of Sprinkenhof, even allowing for the fact that the proceeds of sale of Chilehaus were shortly to come to hand; and that it could not have been in the interests of Baltic, as a shareholder of SPK, to waive Baltic's right to prior repayment of capital. 11. In January 1993 a revaluation had been obtained that valued Sprinkenhof at DM 280,000,000. The Directors cannot, so it is submitted, rely on that revaluation as justifying their permitting the withdrawal of funds, firstly, because it did not exist in October 1992, when the request for distribution of funds was made, and, secondly, because the value of that property was of no relevance because of Baltic's right to repayment of its equity before any payment to the other shareholders, a right that was not affected by whatever might be the value of Sprinkenhof. In addition Gamlestaden contends that the valuation was a "paper" valuation based on highly optimistic assumptions. Nor, so it is said, could the Directors rely on the sale of Chilehaus, which had not yet occurred.. 12. Thus it was, say Gamlestaden, that by June 1993 DM 112 million was withdrawn and SPK was left without enough money to service its loans, refurbish Sprinkenhof or repay its capital. 13. The next matter complained of is that, unknown to Gamlestaden, between September and December 1993 the other partners and the directors caused SPK to be converted into a limited liability company known as Scandinavian Partners Grundstücksgesellschaft MgH ('SPG'). The shareholdings in SPG were then allocated as to 98.36% to Baltic, as to 1.54% to Mr Karlsten, and as to 0.1% to Mr Hansen. Notwithstanding this allocation of shares, Mr Karlsten was permitted to retain management control over the affairs of SPG. In the process of converting SPK to SPG the debit balances owed by Mr Karlsten and Mr Hansen to SPK as a result of the withdrawals of DM 112 million were eliminated and not reflected in the accounts of SPG. This was achieved by changing the value of Sprinkenhof from DM 113 million, as reported in the accounts of SPK as at 30th June 1993, to DM 280 million as reported in the opening accounts of SPG. Gamlestaden allege that this debt was eliminated by "an unaccounted for distribution of an unrealised gain resulting from an overvaluation". 14. Lastly it is said that by an option agreement dated 24th May 1994 Baltic, acting by the directors and without the knowledge of Gamlestaden, granted a Panamanian company, Baltic Partners Holdings SA ('BPHSA'), an option to acquire Baltic's shareholding in SPG for DM 1 million. By a further option agreement dated 25th May 1994 Baltic, again acting by its directors and without the knowledge of Gamlestaden, granted to the bearer of the option the right to acquire the issued share capital of BPHSA for DM 200 million and interest. The bearer option was acquired by Mr

Karlsten for DM 160,000 shortly afterwards. It is said that the cumulative effect of these transactions was to cap the future benefit which Baltic might derive from SPG at DM 18 million (because the option could be exercised when the value of Baltic's shareholding in SPG reached DM 200 million plus interest and Sprinkenhof was valued at DM 182 million when the conversion of SPK to SPG took place), while leaving Baltic with substantial liabilities. 15. Sprinkenhof was sold at the end of 1999 for about DM 110,000,000. 16. In his judgment the Bailiff also set out a summary of the procedural history, which I gratefully adopt : "9. On 22nd May 1995 an application was made by Sparbanken (now part of the consortium of banks which owns Gamlestaden) to declare Baltic en désastre. The application was granted and the declaration en désastre was made. Baltic appealed to the Court of Appeal against that judgment and, on 18th April 1996 , the declaration was recalled. In essence the Court of Appeal concluded that Sparbanken did not have a liquidated claim sufficient to establish a right to have the property of Baltic declared en désastre. In the meantime, proceedings had been issued in Sweden, which later multiplied and involved Gamlestaden, SPG, Mr Karlsten, SEB, Sparbanken and Baltic. Judgment in these Swedish proceedings was entered against Baltic in March 2002 after a trial lasting some 3 months. Baltic was ordered to pay SEB 205 million krona, plus interest and costs and Sparbanken 255 million krona, plus interest and costs. I was told by counsel for the directors that this translates into damages in the sum of approximately £35 million plus interest and costs. Baltic was initially advised by its Swedish lawyers that it had good grounds to appeal this decision, but that success would depend upon obtaining full discovery. In 2003 the Swedish Court of Appeal refused to order discovery and Baltic was then advised that it had no reasonable prospect of succeeding on appeal. Shortly after Baltic's appeal was withdrawn. In the meantime further proceedings had been instituted by Gamlestaden in Jersey. On 26th August 1997 it issued an Order of Justice in this Court against the directors, Baltic and Abacus (CI) Limited (by whom the directors were employed). In February 1998 Gamlestaden was given leave to amend its Order of Justice seeking derivative relief, including damages, in respect of the conduct of Baltic's affairs. On 23rd February the amended Order of Justice was struck out by order of the Greffier Substitute, essentially on the basis that Gamlestaden could not bring its claim within the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 261. Gamlestaden appealed to this Court against the decision of the Greffier Substitute, but on 1st July 1998 the appeal was adjourned sine die so that Gamlestaden could consider whether it should make an application under articles 141 and 143 of the Companies Law.

11. Such an application was made by representation by Gamlestaden in September 1998. The representation was subsequently amended and re-amended. The procedural history of this representation is examined in more detail below in the context of the directors' application to strike out on the ground of want of prosecution". [Underlining added] 17. In the Re-Amended Representation under the heading " Loss to the Company (i.e. Baltic): unfair prejudice to the Representor " the claim pleaded by Gamlestaden is that the directors' breaches of their fiduciary duties caused Baltic to lose " not less than " DM 98,323,487 . That is said to be what would have been the net assets of SPK as at 30 th June 1993 in a balance sheet drawn up upon two assumptions (a) that the Sprinkenhof building was valued in the

sum of DM 113,341,966, its value in the June 2003 accounts; and (b) that the withdrawals complained of were reversed. The whole of that figure, it is claimed, would have been repayable by SPK to Baltic in respect of its capital contributions (which were of the order of DM 121 million) because the partner accounts of Mr Karsten and Mr Hansen would then have been in debit and the Articles provided that, whilst that was so, they could not draw profits. It is to be noted that, in the Re-Amended pleading, the averment that the Representor has suffered loss has been struck out. Neither the Bailiff nor we were invited to restore the words excised. 18. Paragraph 39 (2) of the Re-Amended Representation pleads as follows: "(2) The said balance sheet (which was attached to the pleading and set out the value of Baltic's investment in SPK i.e. SPK's net assets at 30 th June 1993) takes the value of Sprinkenhof, on the abovementioned assumptions, as being equal to its net book value as at 30 June 1993 (DM 113,341,966). Were the value of Sprinkenhof, on the abovementioned assumptions, to be different to the said net book value, the impact of the differing value of Sprinkenhof on the value of the Company's involvement in SPK can be illustrated as follows: DM NBV A B C Value of Sprinkenhof 113,341,966 100,000,000 125,000,000 150,000,000 Baltic's investment value in SPK 98,323,487 84,981,421 109,981,521, 131,009,609 19. The assumptions upon which the claim is based are : (i) that SPK would have continued to trade as a partnership; (ii) the cash available in SPK would have been used to repay Baltic's debts to the banks (iii) in order to repay Baltic's debts to the banks "and in view of the downturn of the property market", Baltic would have required payment of capital contributions made to SPK. 20. No credit was given in this calculation for the actual value of Baltic's interest in SPG since there was said to be none. 21. There are, in my view, five points to note from this pleading: (i) The range of values put forward extends from DM 113 to 150 million; no higher value is put forward as representing the potential value of Sprinkenhof at that time. (ii) the unfair prejudice to Gamlestaden appears to be treated as established by proof of Baltic's loss as a result of the breach of duty of the directors; . (iii) no account is taken of Baltic's debts or whether, upon the assumptions made, Gamlestaden would receive any return in respect of its capital. (iv) The assumption on which the claim proceeds is that Baltic would have claimed everything that it could get from SPK in order to repay its, i.e. Baltic's, debts to the banks. (v) The relief claimed is for damages, on behalf of Baltic, or an order that Gamlestaden be at liberty to conduct the proceedings constituted by the Order of Justice of August 1997, or other proceedings, in the name of Baltic. 22. There was before the learned Bailiff evidence as to what the position would be, so far as Gamlestaden is concerned, once account is taken of Baltic's debts. In Appendix G to his report of 18 th August 2003, Mr Milsom of Moore Stephens, whose evidence was adduced by the directors, made a calculation of what cash would be available in SPK upon the assumption that Sprinkenhof was sold for as much as DM 250,000,000 . That calculation produced a figure of DM 122.2 million 23. Mr Milsom gave evidence that the accounts of Baltic for the year ended 31 st December 1993 showed the following: (i) loans owed to Sparbanken and SE Banken ("the bank loans") of DM 95 million; (ii) interest paid by Gamlestaden of approximately DM 30 million; (iii) further funding provided by Gamlestaden in the sum of DM 19.8 million; and (iv) a further payment made by Gamlestaden directly to SPK of DM 20.7 million. making a

total of DM 165.5 million. These are all liabilities of Baltic. It is apparent that the DM 122.2 million that Baltic would receive from SPK would not be sufficient to pay off even items (i) and (ii). 24. In Appendix H to the same report Mr Milsom also calculated what the position would be if Sprinkenhof was sold for DM 250 million and, in addition, the impugned withdrawals were reversed. In such a case he calculated that there would be DM 234.8 million available for distribution by SPK. This sum would enable payment in full of what would then be the current balances of the partners of SPK, including Baltic. In the case of Baltic, the amount that it would receive, on that hypothesis, would be DM million, being 120.9 million, its limited partner capital, and DM 32.1 million, the sum which would then be due to it on its Equity Account 2 balance. After repayment of the bank loans of DM 95 million there would be DM million left: a sum not enough to cover items (ii) to (iv). Thus he concluded that, even upon the assumption that Sprinkenhof had been sold at a price DM 100 million in excess of the highest price pleaded in the Representation " there would still be a shortfall and therefore there would not be funds available to provide a return to Baltic's shareholders ". 25. As appears from paragraph 18 above and paragraph 4.18 of Mr Milsom's report, if Sprinkenhof was realised for DM 113 million, and the impugned transactions reversed, approximately DM 98.3 million would have been payable to Baltic which would just clear the bank loans but would not nearly cover the indebtedness to Gamlestaden. 26. On 14 th November 2003 a report in reply was provided by Mr Richard Bolton of Pannell Kerr Forster. The report largely deals with the question as to whether Baltic, rather than Gamlestaden, had suffered any loss, notwithstanding the fact that paragraph 21 of the Answer to the Representation had in terms denied that Gamlestaden had suffered any loss as a shareholder. The report did not dispute the calculations put forward by Mr Milsom or the conclusions that Mr Milsom said followed therefrom. The report concluded as follows: "Accordingly, Baltic suffered loss as a result of its investment in SPK/SPG because of the transactions that had taken place under the authority of Baltic's directors. The amount of the loss is not less than the value of SPK prior to the cash withdrawals which could have been used to repay Baltic's creditors". The Companies Law. 27. Articles 141 and 143 of the Companies Law provide as follows: "Article 141 Power for member to apply to court (1) A member of a company may apply to the court for an order under Article 143 on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. Article 143 Powers of the court (1) If the court is satisfied that an application under Article 141 or 142 is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of. (2) Without prejudice to the generality of paragraph (1), the court's order may - (a) regulate the conduct of the company's affairs in the future; (b) require the company to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained it has omitted to do; (c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct; (d) provide for the purchase of shares of

any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly." The argument before the Bailiff. 28. Counsel for the directors submitted to the Bailiff that Baltic was, at all material times, hopelessly insolvent, and that, if any claim against the directors were to be successful, the effect would be that Gamlestaden might recover from Baltic some portion of the debt that Baltic owed to it, but had no hope of receiving any return on its shareholding in Baltic. Gamlestaden could not therefore claim that these proceedings would afford it any relief in its capacity as a shareholder. Articles 141 to 143 are intended, so he submitted, to protect shareholders, and not creditors who happen to be shareholders. 29. Counsel for Gamlestaden's submission, and the reason why the Bailiff rejected it, appear from paragraph 21 of his decision where he said this: "Mr Costa's submission was that serious mismanagement and the diversion of company assets are in themselves prejudicial to the interests of a shareholder in that company. It need not be shown, he submitted, that the shareholder has itself suffered a quantifiable loss, or even that the conduct of which complaint is made has had such an effect on the financial affairs of the company or that the value of the shareholder's interest has been diminished or prejudiced. So far as it goes, I accept that submission as being an accurate statement of the law. The difficulty is that it does not go far enough. It goes to the question whether there has been unfairly prejudicial conduct within the meaning of article 141 of the Companies Law. It does not however go to the argument of the directors that, in order to found the jurisdiction under article 141, there must be something which can be done to protect the interests of the member qua shareholder. In my judgment the jurisdiction given to the Court under article 141 necessarily involves protecting the interests of a shareholder in that capacity. It is not sufficient that the shareholder has some other interest, whether as landlord, creditor or otherwise, which he desires to protect. The law may afford other remedies in such circumstances. The jurisdiction created by article 141 is however limited to affording protection to a shareholder in that capacity. If the company is insolvent, so that the shareholder cannot derive any financial benefit from his shareholding, it is difficult to see how the jurisdiction conferred by article 141 can be engaged". 30. In his submission to this Court Advocate O'Connell, who did not appear below, continues to submit that serious mismanagement and the diversion of the company's assets, being intrinsically prejudicial to the interests of the company and its shareholders, satisfy the precondition for the exercise of the Article 141 jurisdiction. They amount to unfairly prejudicial conduct, which, if established, allows the Court to make such order as it thinks fit. Although the unfairly prejudicial conduct must be prejudicial to the shareholder in his capacity as such, it is not necessary, he submits, that the relief granted should be enjoyed in that capacity. He contends that the Bailiff has added a gloss to the section by holding it to be a jurisdictional requirement to show that there may be some potential value in Gamlestaden's shares in Baltic if the claim succeeds, and has thereby placed minority shareholders in Jersey at a significant disadvantage over minority shareholders in England under comparable legislation. He further contends that the question as to whether or not there would be anything returned to Gamlestaden had the impugned transactions not taken place is a matter for trial. 31. In order to determine the

ambit and extent of the reach of Article 141 it is necessary to examine the language of the Article and the authorities upon the equivalent statutory provisions in England and Wales.

32. As to the language of the Article, it is material to observe, firstly, that relief can only be sought by a member whose complaint is of conduct that is unfairly prejudicial to the interests of all or some part of the membership. That means, as is well established and is common ground, that the conduct must prejudicially affect the member in his position as a member. Secondly, although the power of the court is very wide indeed ("to make such order as it thinks fit"), it is a power to grant relief "in respect of the matters complained of". Since the complaint must, necessarily, be of unfair prejudice to the member's interest as a member, the relief that can be granted must, as it seems to me, be such as will erase or mitigate the prejudice to the member's interests as a member that are said to be prejudiced by the matters complained of. Thirdly, the application may relate, as it does here, to conduct that has happened in the past, to conduct which is continuing, or to things that may happen (or not happen) in the future. The extent to which the Court is capable of granting relief to an applicant, in respect of his interest as a member, may differ according to the stage at which its assistance is invoked. Thus, to take an example close what is said to be to the present case, suppose that the majority shareholders are engaged in a course of conduct that has the effect of improperly depriving the company of assets. If the company is a going concern, the Court may grant relief restraining the continuance of such conduct, and thus give effect to the interests of members of the company in having the company's affairs conducted in a way that is not unfairly prejudicial to their interests as shareholders. Even in a case where no financial loss to shareholders, actual or potential, can be readily identified, it may be appropriate for the court to intervene in order to secure that the company is managed in a way that the minority shareholder is entitled to expect. But if the conduct is over and done with, no question of restraining its continuance arises; and, if the company is no longer a going concern, albeit not in liquidation, there may well be no scope to regulate its management or purpose in doing so. In respect of conduct in the past it may be possible to say that, had it not occurred, the petitioner's position, as a member, would have been significantly improved. In such a case the Court may be able to grant relief against those who have misconducted the company's affairs. This will, classically, be the case if an unfairly prejudicial course of conduct has diminished the value of the representor's shares. Alternatively it may transpire that, even if the conduct complained of had not occurred, the representor would have been no better off in respect of his membership interest. In the latter circumstance, as it seems to me, upon the wording of the Article there is no scope for the Court to give relief since there is no damage to the applicant's interest as a member of the company that the Court can relieve. In such a case, although a member is within the category of persons who may make the application he has no legitimate interest in the relief sought: see *Deloitte & Touche AG v Johnson*

(1999) 1 WLR 1605, 1611. To cause the respondents in such a case to restore to the company assets diverted by them would benefit only the creditors. It was submitted to us that Gamlestaden had an interest in preserving its reputation with Baltic's creditors, from

whom it procured finance, by seeing that they are paid, and that the relief sought would advance this interest. I do not accept that such an interest is an interest that it enjoys, qua shareholder. The proposition blurs the clear distinction between the separate interests of shareholders and creditors. There is, in addition, something unreal in regarding this application as an attempt by Gamlestaden to vindicate its reputation. It is now a wholly owned subsidiary of a consortium of Banks, functioning, insofar as it does, to promote their interests. The English Authorities. 33. We were referred to a considerable number of authorities. I propose to refer only to those that seem to me to be the salient ones. In *Re J E Cade & Son Limited*

- [1992] BCLC 213, to which the Bailiff referred, Warner J struck out a petition under section 459 of the English Companies Act 1985 on the grounds that the applicant, who was a 6% shareholder in the company, was only seeking to protect his interest as a freeholder of a farm licenced to the company. The applicant had complained that the company's affairs were being conducted unfairly in that the company was claiming protection under the Agricultural Holdings Act in respect of its occupancy of the farm of which, so he claimed, the company was to enjoy a licence, but no tenancy, as part of the arrangements for the termination of a partnership. In the course of his judgment Warner J said this: "However, the second difficulty to which Mr Girolami pointed was this. It is well established, and was common ground between counsel in this case, that the interests of a member of a company that the court has jurisdiction to protect under article 459 are only his interests as a member. Whilst those interests are not necessarily limited to his strict legal rights under the constitution of the company, they do not extend to interests of his in some other capacity. I was referred to a number of authorities on this point: *Re a company* (No 00477 of 1986) [1986] BCLC 376, *Re a company* (No 003843 of 1986) [1987] BCLC 562, particularly at 572-573, *Re Ringtower Holdings plc*
- (1989) 5 BCC 82 at 95, and *Re a company* (No 00314 of 1989), *ex p Estate Acquisition and Development Ltd* [1991] BCLC 154. Here, Mr Girolami submitted, the interests that Tony seeks to protect by this petition are his interests as a freeholder of Marriotts Drove Farm." And later - "I can see no way in which, at a hearing of the petition, Tony could overcome the objection that, in seeking possession of Marriotts Drove Farm, he was pursuing his interests as a freeholder of the farm and not his interests as a member of the company." 34. The circumstances of that case were very different from the present. Mr O'Connell submits that the case does nothing to support the proposition that, in order to demonstrate prejudice to one's interests as a shareholder, it is necessary to show that there is a potential for financial benefit from one's shareholding that has been prejudicially affected. That may be so, although it would seem to me that the petitioner in that case was claiming that he had lost a financial benefit, which he was entitled to expect from his shareholding, namely that the company would not be run in a way which unfairly prejudiced him by claiming rights under the Agricultural Holdings Act inconsistently with the expectations that had been created when the company was established. But the principle that the case does affirm, following earlier authority, is that the scope of the

section is the protection of interests of members as members, and that a petition which seeks relief only in respect of loss or prejudice suffered in another capacity will be struck out. 35. A year earlier, in *Re Elgindata Ltd*

[1991] BCLC 959 Warner, J was concerned with a case in which a director had improperly used assets of the company for the benefit of himself his friends and family, albeit not in a very serious way. In the result Warner, J said this: "This is not, to my mind, a case in which it can be said that conduct that was unfair to the petitioners was prejudicial to their interests because it resulted in a serious diminution of, or in serious jeopardy to, the value of their shares. Of course, the misuse by Mr Purslow of the company's money was reflected in its profit-and-loss account and to the extent that it reduced the company's profits or increased its losses, it reduced the value of the petitioners' shares. But it cannot have been a major cause of the diminution in the value of those shares. The reason why I have concluded that it was conduct unfairly prejudicial to the petitioners' interests is that it was inherently so. By its very nature the misapplication of a company's assets by those in control of its affairs for their own benefit or for the benefit of their family and friends, is unfairly prejudicial to the interests of minority shareholders" As a result, and not without " a great deal of hesitation " the judge made an order for the majority shareholder to purchase the shares of the minority shareholder, on the basis that, because of the former's propensity for using the company's money for his own benefit, it would be unfair to leave the petitioners "locked in" as minority shareholders. 36. The relief ordered in that case was well within the scope of the section, since its effect was to grant relief against the continuing infringement of the petitioners' rights to have the company conducted otherwise than in an unfairly prejudicial way. Potentially, at any rate, that would diminish the value of his minority shareholding, although it appears to me that Warner. J, based his judgment on the fact that the petitioner was entitled not to have the company operated in this improper manner. 37. In *Re Hailey Group Ltd*

[1993] BCLC 459 the petitioner was a 25% shareholder in the company. When the petition was presented the company was apparently in good health. By the time that the petition came to be heard it was in administrative receivership. The conduct complained of included the making of improper payments to the other shareholders. The relief sought was an order that the company should forthwith demand repayment from the shareholders of the moneys improperly paid out to them and that in default the petitioner should be authorised to bring proceedings in the company's name. The Deputy Judge (Mr Richard Sykes Q. C.) declined to make such an order because of the " insurmountable practical difficulties " that arose once an administrative receiver had been appointed. The petition, as amended, also asked for an order that the other shareholders be ordered to buy the shares of the petitioner at a price to be agreed, and the petitioner sought an order that the shares be valued as at the date of presentation of the petition. The learned deputy judge said this: "A petition is obviously well founded if some or all of the allegations of unfairly prejudicial conduct are established. That is the case here. Section 461(1) therefore gives me jurisdiction to make such order as I think fit for giving relief in respect of the matters

complained of". Advocate O'Connell relies on these words since, as he submits, the Representation contains allegations of unfairly prejudicial conduct, which must, for present purposes, be taken as established. The deputy judge went on to hold that the relief need not be directed solely towards remedying the particular things that had happened, but could extend to making orders that would enable the company to be properly conducted in the future. But he held that that was not necessary since the appointment of receivers had enabled the company to be properly run. In respect of the request for an order that the petitioner's shares be bought out he said this: "It is very common that the order made on petitions under S 459 is for one warring faction to purchase the shares of the other. In the case of a company which is continuing in business it certainly gives relief in respect of the matters complained of. The petitioner is no longer the bedfellow of the wrongdoer; he is either in control of the company because he has bought the wrongdoer's shares or he is free from the company for a fair price, often adjusted for the damage done to the company by the wrongdoer. Such relief might well have been appropriate in the present case at the date of the presentation of the petition and so long as it continued as a going concern. To impose on some of the respondents an obligation to purchase the petitioner's shares in the events which have happened is tantamount to imposing a fine on them: there is nothing of any value for them to purchase. Nor does the petitioner need to dispose of his shares in order to obtain relief in respect of the matters complained of: the administrative receiver has provided that relief. So far as counsel in the case and I are aware there is no authority covering the circumstances, which exist in the present case. My conclusion is accordingly arrived at without the assistance of precedent. There might be circumstances in which, despite the appointment of an administrative receiver (or administrator or liquidator) before the hearing of the petition, the court would feel it necessary to impose on respondents an obligation to purchase the petitioner's shares. Such an order would, in my view, be appropriate where the unfairly prejudicial conduct had prevented the petitioner from selling his shares at a proper price prior to the onset of insolvency. That, however, is not the present case. There is no evidence that the petitioner had any intention to sell his shares; on the contrary the order he sought until after the appointment of the administrative receiver was for the purchase of shares held by the respondents. Another exception might be the case where the substantive relief originally asked for, at a time when the company was solvent, was for a purchase of the petitioner's shares by respondents. . In that case it might reasonably be said that the petitioner should remain entitled to the relief he was entitled to at the outset despite supervening insolvency. That again is not the case here: a purchase order was sought at the eleventh hour. In the circumstances I have decided to make no order granting substantive relief to the petitioner". 38. It does not seem to me that that case assists, or hinders, Gamlestaden. As to assistance, the words first quoted (" A petition is obviously well founded ..") must be taken in their context. This was not a case in which it was, or could be, suggested that the relief sought would, if granted, have protected some interest of the petitioner other than his interest as a shareholder. As to hindrance, I agree that the bases upon which relief was refused do not apply to the present case. 39. It is apparent from that case that the fact that

a company is insolvent does not mean that there is no scope whatever for the court to exercise its jurisdiction under Article 141. But the fact that the company is insolvent may either limit the relief that is appropriate, or mean that there is no practical relief that can be granted. 40. In *In Re Macro (Ipswich) Limited*

[1994] 2 BCLC 354 Arden, J., as she then was, had to consider the extent to which mismanagement could constitute conduct that was unfairly prejudicial. She decided that, in an appropriately serious case, it could, and that, in that case, it did. In the course of her judgment she said this: "As the conduct is prejudicial in a financial sense to the companies, it must also be prejudicial to the interests of the plaintiffs as holders of its shares." Later the learned judge said - "I would add that the jurisdiction under s 459 has an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case. 41. In that case, also, the relief ordered was well within the scope of the section. The prejudice was to the interests of the plaintiffs as holders of the company's shares, upon whose value (and the shares had value) the mismanagement was having a continuing prejudicial effect. Advocate O'Connell submits that *Re Macro* is authority for the proposition that, if there is serious mismanagement of a company's affairs, then not only is there unfair prejudice to the shareholders but that the prejudice is caused to them as such. It appears to me that whether that is so must depend upon the facts of any particular case as they are shown to be when the question comes to be determined. Conduct that might have been restrained as unfairly prejudicial whilst the company was a going concern may, in the events which have happened, turn out not to have unfairly prejudiced the interests of shareholders, qua shareholders, in any way that the Court can relieve. 42. In England the question arises as to the nature of the interest that a fully paid up shareholder must show in order to petition to wind up the company. In *In Re Chesterfield Catering Co Ltd*

[1976] 3 AER 294, Oliver J., as he then was, cited the dictum of Buckley J. in *Re Othery Construction Limited* : "it remains the rule that before a contributory can petition successfully for the winding-up of the company, he must show either that there will be a surplus of assets available for distribution among the shareholders or that the affairs of the company require investigation in respects which are likely to produce such a surplus." When Buckley J referred to a " contributory " he was, as Oliver J pointed out, referring to a fully paid shareholder. Oliver, J., then proceeded to consider whether the only means to demonstrate a sufficient interest, for the purposes of a winding up petition, was to show that there were surplus assets available for distribution and said (299 a d):- "I also think ... that the references to 'a surplus' or to 'assets for distribution amongst the shareholders' which appear in some cases are to some extent an unnecessarily restrictive gloss on what was said in *Re Rica Gold Washing Co*. What was required for a fully paid shareholder to petition was, Jessel MR said, 'a sufficient interest to entitle him to ask for the winding up of the company'... I do not, however, think it can be quite accurate to say that the tangible interest of the fully paid shareholder must necessarily and in all cases be restricted to the existence or prospective existence of a surplus. Indeed, Jessel MR himself in *Re Rica Gold*

Washing Co, in the opening words of the paragraph which I have read, seems to suggest that the potential liability of a shareholder can constitute an interest for this purpose. And, for instance, a fully paid shareholder who petitions to wind up a company on ground (d) of s. 222 of the 1948 Act, i.e. that the number of members has been reduced below the requisite minimum, has the strongest possible interest in seeing that the company's business is brought to an end, for otherwise he might find himself personally liable for the company's debts under s 31; and I cannot conceive, if the company were insolvent and his peril thus increased, that the court would tell him that the petition was incompetent on this ground..." 43. He then proceeded to consider what was a sufficient interest and said: "However, it is I think clear that in referring to a "sufficient interest" Jessel MR meant an interest by virtue of the petitioner's membership. In order to establish his locus standi to petition a fully paid shareholder must, as it seems to me, show that he will, as a member of the company, achieve some advantage, or minimise or avoid some disadvantage, which would accrue to him by virtue of his membership of the company ; for instance, a member of a company might have a strong interest in terminating its life because he was engaged in a competing business or because he was engaged in litigation with the company, but I do not think that was the sort of interest that Jessel MR had in mind." [underlining added]. 44. In that case the petitioners had claimed that they had a sufficient interest to present a winding up petition because they were the personal representatives of a deceased member, whose estate was a possible creditor of the company. They might have been able to secure the presentation of a winding petition, by another route, but only by a very cumbersome procedure, which would involve asking the court to rectify the register by registering them as members, requisitioning a meeting for the purposes of electing directors, calling the meeting themselves, and, if unable to obtain a quorum, applying for directions from the court, and then, once the meeting had been held and directors appointed, the company could resolve to present its own petition. Their interest was to avoid this cumbersome procedure. As to that Oliver J said: "But I have not been referred to any case in which so amorphous an interest as that alleged in the present petition has been held to support a petition by a fully paid shareholder, and it seems to me to be contrary to the principle of all the cases to suggest that, even allowing that there may be exceptions to the general rule, a petitioner can demonstrate his locus standi by pointing to some private advantage which he may derive from the winding-up and which is unconnected with his membership of the company." 45. That case concerned a winding up petition and not an application under section 459. So the jurisdiction invoked was different, as was the basis for exercising it, and the range of relief that might be granted. Nevertheless, in my respectful view, Oliver J's formulation of what interest a winding up petitioner must show by virtue of his membership of the company is instructive as to what must be the effect of the relief sought, to which an applicant under Article 141 must be able to point, in order to establish that, in granting relief the Court will be protecting his interests as a shareholder. 46. In *Doolan v Powerhouse Promotions* , 16 th February 2000, the Vice Chancellor of the County Palatine dismissed a petition under section 459 on the basis that there was an " insuperable objection " to the relief claimed namely that, by the

time of the conduct justifiably complained of, the company was insolvent in both of the usual senses, even if assets that were sold at an undervalue were valued correctly, so that the petitioner had " no interest in the company in the sense of any commercial or financial interest capable of being unfairly prejudiced ", and that, on that account, the petition failed. Advocate O'Connell points out that in that case the relief sought was a buy out of the petitioner's shares, but, as it seems to me, the objection is equally insuperable in the present case. Application of the law to the facts. 47. I return then to examine the evidence. As Hoffman, L. J., as he then was, said in *Re Saul v Harrison*

- (1995) 1 BCLC 14: "...a court should be willing to scrutinise with care the allegations in a Section 459 petition, and, if necessary, the evidence adduced in support, in order to see that the petitioner really does have an arguable case" Both sides have adduced evidence on the present controversy, whose resolution does not depend upon any determination of disputed fact. No relevant documentation has been identified as missing. The parties have seen the relevant accounts of Baltic, the financial statements of SPK, and the very lengthy Swedish judgment. Whilst the company was en desastre, the Viscount commissioned a report from Deloitte & Touche in relation to the company, which was produced on 2 nd April 1996, and which the parties have seen. That report revealed the impugned withdrawals. No one has been able to identify any respect in which the evidence before the Court is relevantly deficient. The upshot of the evidence is that, even if the impugned transactions were to be reversed, and even if Sprinkenhof were worth as much as DM 250 million, there would be no funds available in Baltic to return capital to Gamlestaden after payment of Baltic's debts. The shortfall that would arise on the repayment of indebtedness on various assumptions as to the pleaded values of Sprinkenhof can be expressed in the following table: Value in DM million Indebtedness of Baltic Return from SPK to Baltic
- | | | | | | | | | |
|--------------------------|--------|-------|--------|--------|-------|--------|-----|------|
| Indebtedness outstanding | 165.5. | 12.5. | 165.5. | 131.1. | 34.4. | 165.5. | 98. | 67.5 |
|--------------------------|--------|-------|--------|--------|-------|--------|-----|------|
- The third column is the lower of (i) the net assets of SPK and (ii) the maximum contribution that Baltic would be entitled to receive from SPK. The figure of 153 in the third column is derived from Paragraph 4.17 and Appendix H of the Moore Stephens Report. The figures of 131.1 and 98 are derived from the Particulars under paragraph 39 (2) of the Re Amended Representation. 48. In those circumstances it seems to me that any relief that was granted, which had the effect of putting Baltic in the same position as if the impugned transactions had been reversed, would only serve to improve Gamlestaden's position as a creditor. Even upon the most optimistic assessment of the value of Sprinkenhof put forward by Gamlestaden in the Re-Amended Representation there would still be nothing left over for it as shareholder, and not even sufficient for all its creditors, and that would be so even if Sprinkenhof was sold for another DM 100,000,000. These figures take no account of interest. In addition Baltic has come under further indebtedness in consequence of the Swedish proceedings, which include over SEK 4,000,000 in costs. 49. Advocate O'Connell points out that, whether you take the value of Sprinkenhof as DM 113 or DM 250 million, the debit balances that would have been left outstanding after payment to the banks are balances in favour of Gamlestaden itself. Accordingly, as he submits, if the impugned

transaction had not taken place, it was possible that Gamlestaden's investment in Baltic would have remained in place with a view to realising value out of the investment through SPK in the German properties. By that I understand him to mean that Gamlestaden might not have called in its loans. Advocate O' Connell submitted that Gamlestaden had been deprived of the opportunity to leave its investment in place and let Baltic trade on to realise a profit for its shareholders, and suggested that it might have engaged in continuing investment in German property. 50. This was not an argument advanced below; nor is it pleaded, nor was it supported by evidence. Further it seems to me to part company both with what was pleaded and with reality. Gamlestaden's claim is that, if the impugned withdrawals had not taken place the cash available in SPK would have been used to repay Baltic's debts to the banks, and that, in order to do so, Baltic would have required payment of capital contributions made to SPK. As Moore Stephens point out in paragraph 4.12 of their Report "the only manner by which Gamlestaden could have realised its investment would have been by a liquidation of SPK/SPG which would have necessitated a sale of Sprinkenhof". Baltic would then be left with the proceeds of the sale of Sprinkenhof, after payment of its debts to the banks, which would not be enough to pay its debts to Gamlestaden. It seems to me inconceivable that the banks that controlled Gamlestaden would, in those circumstances, have been prepared to leave the remaining proceeds in Baltic. 51. Accordingly, in my judgment, there is no relief that the Court could grant that would protect the Appellant's interests as shareholders of Baltic, and that the Bailiff was right to hold that the facts pleaded disclose no reasonable cause of action. In the words of Oliver J, Gamlestaden cannot by the relief sought in this action "achieve some advantage, which would accrue to [it] by virtue of [its] membership of [Baltic]." 52. At paragraph 13 of his judgment the Bailiff recorded that Counsel for the directors accepted that he must proceed on the assumption that the company's affairs had been conducted in a manner which was unfairly prejudicial to the interest of the members or some of them. In paragraph 21 of his judgment, although accepting Advocate Costa's submission that the conduct pleaded was prejudicial to the interests of Gamlestaden as shareholder of Baltic, he struck the claim out on the ground that no relief could be given which would protect Gamlestaden's interest as such. At first sight the conclusion might seem inconsistent with the accepted premise. The paradox is, however, more apparent than real. Advocate Le Cocq told us that what he accepted before the Bailiff was that the conduct alleged was unfairly prejudicial to Gamlestaden if it had in fact impacted upon Gamlestaden's interests as shareholder, but, as he successfully submitted, it had not. In my view the appropriate way of looking at the matter is to conclude that, in the particular circumstances of this case, it can now be seen that the conduct complained of has not prejudiced Gamlestaden as shareholder in any relevant way. 53. Accordingly in my judgment the Bailiff was right to decide that Gamlestaden had no reasonable cause of action. Want of prosecution. 54. Again I gratefully adopt the Bailiff's summary of some of the procedural history: "30. The facts may be summarized in the following way. The representation was issued in September 1998 . An application to strike out the representation was due to be heard on 3rd April 2000 but was adjourned. In August , a draft amended representation was sent to

counsel for the directors. On 11th November 2000 that amended representation was filed by consent. A letter signed by counsel for both parties agreed that the directors would have six months from the filing of further and better particulars of the amended representation to file an answer. On 11th December 2000 a request was made by the directors for further and better particulars, namely particulars of Baltic's alleged loss of DM 98,323,487.

31. Those particulars were filed on 11th January; corrected particulars were filed in June 2001. A date to hear the strike-out application was fixed for 29th November 2001. In July, counsel for Gamlestaden pressed for the filing of an answer and in August Counsel for the directors requested an extension of time. In September 2001 the directors withdrew their application to strike out the representation pending the resolution of the Swedish proceedings. On 11th September 2001 the directors filed an answer to the amended representation. 32 In March 2002

judgment

was delivered in the Swedish proceedings. In June 2002 counsel for the directors requested further particularization of Gamlestaden's case. On 11th June 2002, Gamlestaden promised a further amendment of the representation. In November 2002 the request by counsel for the directors was repeated; the directors claimed that their strike-out application could not be pursued until they had a better understanding of Gamlestaden's case. On 11th November 2002 counsel for Gamlestaden replied stating that a revised representation would be provided "within the next couple of weeks. 33 On 11th February 2003 a draft re-amended representation was sent to counsel for the directors. In April 2003 the application to strike out the re-amended representation was served by counsel for the directors" (underlining added). 55. The Bailiff adopted, as do I, as an accurate statement of the law of Jersey on this topic the summary thereof in the decision of Birt, DB in *Garfield Bennet v Phillips* (6th November 2002) Jersey Unreported. [2002/214]; [2002]JLR N.42] in the following terms: "10. It is well established at the level of the Royal Court that the principles to be applied on an application to dismiss for want of prosecution are those laid down in the leading English case of *Birkett -v- James*

(1978) AC 297 as subsequently elaborated by decisions of the English courts. 11. A convenient summary of the principles as they have developed is to be found in *Shtun -v- Zalejski*

(1996) 3 All ER 411. With minor alterations, we would adopt those principles as reflecting the law of Jersey and would set them out as follows:- i. In a case where there has been no contumelious conduct by the plaintiff, the Court, if it is to strike out an action for want of prosecution, must be satisfied (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiff, or between each other, or between them and a third party. ii. The delay which must be shown to have caused such risk or such likelihood of prejudice is the delay after the issue of proceedings. iii. But where the plaintiff delays in issuing

proceedings and by such delay causes prejudice, the additional prejudice which must be shown to justify dismissal of the action need not be great, provided that it is more than minimal. iv. Further, once the plaintiff is guilty of further delay causing more than minimal additional prejudice, the prejudice caused by the totality of the period of his delay can be looked at. v. The prejudice may take a variety of forms, but one recognised form is the impairment of the memory of witnesses. Another form consists of the prejudice to the defendant through having a serious claim hanging indefinitely over him. But the Court should only in exceptional cases treat the anxiety which accompanies all litigation as alone being sufficient to justify dismissing an action. vi. Save in exceptional cases, an action will not be struck out for want of prosecution before the expiry of the relevant limitation period. We would add two further points -

- (i) It is clear that the later a plaintiff starts his action, the higher his duty to prosecute it with all due speed. A pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before proceedings were issued. (See Lord Diplock in *Birkett -v- James* at 322). This is particularly important in the context of the lengthy limitation period of ten years under Jersey law. The need for a plaintiff to act with diligence and expedition in such circumstances is that much more necessary in Jersey. (See *Skinner -v- Myles* [1990 JLR 88] at 94). (ii) Where the prejudice relied upon takes the form of impairment of witnesses' recollections, it is not necessary that there should be evidence of particular respects in which potential witnesses' memories have failed; the Court is entitled to draw appropriate inferences from delay (see *Shtun -v- Zalejski* (supra). Furthermore the Court can infer that any substantial delay at whatever period leads to a further loss of recollection (see Lord Browne-Wilkinson in *Roebuck -v- Mungovin* (1994) 1 All ER 568 at 574). 56. I accept, however, the submission on behalf of the directors that where, as here, the Representor is seeking the exercise in his favour of a statutory remedy which is discretionary and not subject to any prescribed limitation period, then, if the case falls to be dismissed on *Birkett v James*' principles, it is for the Representor to show that it should not be struck out because there is at least a prima facie case for his being able to overcome the difficulties arising from the doctrine of laches. 57. The period between the filing of the representation in September 1998 and the filing of the strike out application in April 2003 was 56 months (i.e. 4 years 8 months). The Bailiff held as follows: (i) Between October 1998, by which date the Representation had been issued, and March 1999, when a date in October 1999 was agreed for the hearing of a strike out application, there was a delay of 6 months for which Gamlestaden was, as it accepted, responsible; (ii) Between September 1999 and August 2000 6 months at least of the delay was delay for which Gamlestaden must take responsibility, as was the case with the periods to which I refer below; (iii) Between January and June 2001 there were at least another 3 months of delay; (iv) Between July 2001 and March 2002, a further 3 months; (v) Between June 2002 and 28th February 2003 another 6 months of delay; making at least 24 months in all. This delay he held to be inordinate, particularly against the background of events prior to the Representation. He, also, held that the delay was inexcusable and that the

directors had suffered serious prejudice, that prejudice consisting of the effect of time on memories, and the death of Mr Boleat. 58. It is convenient to consider the issue by reference to the periods of delay that the Bailiff found to be inordinate. In doing so I shall refer to Ogier & Le Masurier, who act for the directors, as "OLM" and Crill Canavan, who originally acted on behalf of Gamlestaden as "CC". There are, however, three preliminary matters. Firstly, it is necessary to determine the Appellants' application to adduce new evidence. Before the Bailiff there was exhibited to the affidavit of Mr De Figueiredo, a set of what was said to be the relevant correspondence passing between the parties. The Appellants have sought to supplement that bundle and, before the hearing, Bailhache Labesse, their new solicitors, produced a lever arch file containing the originally exhibited correspondence together with a substantial quantity of further correspondence (copied on yellow paper) inserted in the appropriate chronological sequence. Strenuous objection was taken to the admissibility of this evidence, not least because, as was rightly pointed out, the formal procedures required to secure its admission had not been taken, the requirements of the Practice Direction been not been followed, and the order for bundles to be submitted by 1 st October had been disobeyed. The bundle, with the new documents had simply been supplied in the middle of the week before the hearing without explanation or apology. It was submitted that it would be the worst possible precedent if this Court were to allow this sort of material, which could have been produced below, to be produced late in the day. The principal reason for the late production of the material and the absence of a formal application for its admission was that Advocate O'Connell was only instructed in September. He did not become aware of the schedule of correspondence, which was before the Bailiff, and to which I refer below, until OLM drew attention to its omission from the bundles at the end of October. Only then did he appreciate that there were gaps in what was before the Court. He then decided to review the correspondence, notifying Advocate Le Cocq that he was in difficulty in early November. In those circumstances he took the view that the best thing to do was simply to produce the new material in this form. We decided to see what use was sought to be made of the material before reaching any conclusion as to its admissibility. As it turned out, only some 12 or so letters were referred to by Advocate O'Connell, and at least one was referred to by Advocate MacRae for the directors. In my judgment we should admit this material. It does not significantly alter the position as shown by the correspondence initially exhibited; and, in my view, it would, in this case, be unacceptably artificial for us to look at a sequence of correspondence between the parties that was incomplete, when the parties themselves had a full hand of it, and when no prejudice could result from our seeing those parts of it that were not previously exhibited. That does not mean that an Appellant will, routinely, be permitted, without, or even upon, prior application, to add to the evidence items of inter partes correspondence that for one reason or another he chose not to place before the Court below. 59. Secondly I should observe that there was before the Bailiff a schedule of delay prepared by OLM ("the original schedule"). At the hearing, so we were informed, Advocate Costa took no issue with the factual content of the original schedule but asked to be allowed to comment on it, and did so by reference to the Affidavit of Jane

Martin, who was a partner in CC. For the purposes of the hearing before us Advocate O'Connell produced a revised version of the original schedule with more extensive or, on occasion, quite different comments. As will become apparent some of the contents of the original schedule may have misled the Bailiff. 60. Thirdly, the Bailiff attributed various periods of delay as the responsibility of Gamlestaden. The Respondents submit that, in some respects, he may have been generous to the Appellants. But they do not submit that in respect of any of the periods we should increase the period of culpable delay. 61. I now turn to consider the individual periods as considered by the Bailiff. The headings of the paragraphs that follow identify the period in question and state, firstly, its length in months, and secondly, the time within it over which Bailiff held that Gamlestaden were guilty of inordinate delay. Period 1 October 1998 to March 1999 months/6 months. 62. Between October 1998 and March 1999 practically nothing happened. In the original schedule OLM attributed responsibility for this delay to Gamlestaden. No comment to the contrary was made on its behalf. The Bailiff understood, no doubt in consequence, that Gamlestaden accepted that they were responsible for this period of delay. But, in my judgment, they were not responsible for any of it. Upon the service of the Representation it was for the Respondents to file an Answer, which they did not do prior to their summons to strike out or stay the representation that was issued in April 1999. On 14 th October 1998 OLM wrote to CC saying that their client would require a considerable period to be in a position to put in a properly particularised pleading. On 10 th March 1999 CC recorded that in October OLM had been told that their clients would be afforded adequate time to respond and gave OLM until 16 th April 1999 to file an Answer. In fact no Answer was filed at this time because CC agreed to OLM's suggestion that CC should take no further procedural steps until OLM's strike out application was heard. On 1 th May 1999 OLM issued that summons. In those circumstances I do not think that it is open to the directors to complain that there has been inordinate delay on the part of Gamlestaden. Period 2 September 1999 to August 2000 months/6 months. 63. Between April 1999 and September 1999 again practically nothing happened. In particular OLM did not file any affidavit in support of their application to strike out. That delay is not, and is not suggested to be, attributable to Gamlestaden. 64. On 1 th September 1999 the Bailiff's secretary wrote advising that the Summons was unable to proceed as scheduled because of the Court's unavailability, and on 22 nd September 1999 new dates were fixed for 3 rd to 5 th April 2000. Meanwhile, on 1 th September 1999 OLM had pointed out in a letter, as was the case, that the Representation failed to plead what loss and damage Baltic had suffered and offered Gamlestaden the opportunity to amend their pleading. In a letter of 1 th October OLM explained why, in their view, the pleading was defective, namely that it did not show that Gamlestaden had suffered a loss. On 1 th November 1999 CC replied to the letter of 8 th October, and subsequent chasing letters, promising that an amended Representation, amended so as to particularise the loss suffered by the alleged breach, " will be with you shortly ". It was plainly inappropriate, in those circumstances, for the directors to file an affidavit or skeleton argument since, in the light of whatever the amendment said, they might not seek to pursue the strike out at all. On 1 th January 2000 CC told OLM that they

would be meeting with their clients on 18 th January " with a view to discussing the possible amending of the pleadings ". As it turns out, it was at that meeting that Mr Bolton announced that he was shortly to leave Arthur Anderson and move to Pannell Kerr Forster. In early March the application to strike out was refixed for want of an amended pleading. On th May 2000 CC informed OLM that the earliest date when it would be possible for Mr Santos Costa to meet with his client, English Counsel and their financial expert was th July. On th August 2000 a draft amended representation was produced. In my judgment the Bailiff was entirely justified in treating Gamlestaden as responsible for 6 months of inordinate delay, particularly since the question of what loss had been suffered should have been addressed, at least in outline, when the proceedings were begun. Apart from the addition of the plea of loss set out in the next paragraph, which itself is not very extensive, the amendments were very modest. The draft pleading. 65. The draft Amended Representation pleaded that: "The Company's loss is the sum of not less than DM 98,323,487. The Representor brings these proceedings and the Original Proceedings to compel restitution to the Company of not less than DM 98,323,487". On the day that the Amended Representation was served, OLM wrote to CC saying that the alleged loss gave no indication as to how it was calculated or how that figure related to any of the financial information pleaded earlier. On th August 2000 CC wrote: "The figure quantified is based on the assumption that had Baltic directors not permitted the cash withdrawals, it was likely that the cash available in SPK would have been used to repay debts to the mortgage (sic) or Banks and furthermore in order to (sic) Baltic's loans from Banks, and in view of the downturn in the property market, Baltic would have required payment of capital and loan capital contributions made and on that basis SPK would have had net assets of approximately DM 98 million as at 30 th June 1993. For that reasons (sic) we have alleged that specific sum and as far as I am concerned the loss has now been quantified. You are quite right in stating that your clients would be entitled to particulars of that figure however I do not believe that it is incumbent upon me to plead the exact variables etc at this stage and those precise calculations will of course be provided to you during the simultaneous disclosure of our respective expert reports". On th December a Consent Order was agreed to, which allowed the amendments to the representation and provided that Baltic should have six months from the provision of further and better particulars by Gamlestaden to file an Answer to the Amended Representation. OLM requested further and better particulars of the method of calculation of the DM 98,323,387 on the same day. Period 3 January to June 2001 months/3 months. 66. On th January 2001 Gamlestaden provided the further and better particulars, which were expressed to be subject to the reservation of a right to alter or amend the calculations when expert evidence had been finalised. CC stated, correctly, that the time for filing the answer began from that date. Between then and June 2001 practically nothing happened, so far as anything passing between the parties is concerned, except that on 18 th June 2001 CC corrected some typographical errors in the particulars previously filed. In January 2001 Gamlestaden were told that English Counsel, who had been advising them since September 1996, had been appointed a High Court judge. A new Counsel was instructed on 15 th May 2001. The Bailiff

held that Gamlestaden should be held responsible for at least another 3 months in respect of this period. In this respect he may have been misled by the failure of the original schedule to point out that throughout this period the Answer was due. In my judgment none of this period of delay is attributable to Gamlestaden. 67. On 14 June 2001 the directors lodged a new summons to strike out the Amended Representation as disclosing no reasonable cause of action (but not on the ground of want of prosecution), or to stay it pending the resolution of the Swedish litigation, together with a summons for security for costs. The strike out summons was fixed for 29 November 2001 for hearing before the Master. But on 6 July 2001 OLM issued a new strike out summons to be heard before the Royal Court and a date was fixed for a hearing on 6 and 7 December. Period 4 July 2001 to 8 March 2002 months/3 months. 68. On 14 July 2001 CC wrote to OLM asking for the Answer. On 14 July a telephone conversation took place between OLM and CC in which OLM suggested that the hearing of the strike out and stay summonses should be delayed until after the conclusion of the Swedish proceedings. On 14 August CC declined to agree upon the basis that the proceedings in Sweden (including appeals) might take a very long time and their outcome would have no direct effect on the Jersey proceedings. The letter suggested that if OLM wished to pursue this proposal they should apply for an adjournment. On or before 14 September OLM withdrew their summonses to strike out the Amended Representation or stay it pending the resolution of the Swedish proceedings. In a letter of explanation they said that they had done so because "there are a number of issues in the Swedish litigation that will have a direct bearing on the Jersey litigation" and that it was premature for the court to consider the application to strike out. 69. On 14 September an Answer was filed on behalf of the directors. On 22 October OLM sought further and better particulars of (a) the Amended Representation, which had been provided in August 2000 and (b) the further and better particulars thereof, which had been provided in June 2001. Responses were given on 28 November, which on 30 November OLM said were inadequate. On 29 November the Representation was stayed pending Gamlestaden paying £95,000 for security for costs. 70. Between January and March 2002 Advocate Costa was involved in a lengthy commercial trial. On 8 March 2002 judgment was given in the Swedish proceedings and on or about 19 March 2002 £95,000 was paid into court. 71. The Bailiff attributed 3 months of this period as inordinate delay. He was, in my judgment, entitled so to find. It should not have taken Gamlestaden, owned by a consortium of banks, more than a few weeks to produce the security ordered, as opposed to a period in excess of 3 months. Period 5 End June 2002 to 28 February 2003 months/6 months. 72. On 14 June 2002 OLM complained of a lack of particularity of Gamlestaden's case, and on 14 June 2002 CC said that they hoped to have a further amendment to the Representation available, in the light of the Swedish judgment, "within the next few weeks". Summer gave way to autumn, and autumn to winter before the Re-Amended Representation was delivered on 14 February 2003. On 14 April 2003 OLM issued a new strike out application. In respect of this period the Bailiff was, in my judgment, fully entitled to conclude that Gamlestaden had been guilty of at least 6 months inordinate delay. 73. For ease of reference I set out below the periods of delay as found by the Bailiff

and as varied by this judgment: PERIOD THE BAILIFF HEREIN

1. October 1998 to March 1999 6 months Nil
2. September 1999 to August 2000 6 months 6 months
3. January to June 2001 3 months 3 months
4. July 2001 to March 3 months Nil
5. June 2002 to 28 th February 2003 6 months 6 months TOTAL 24 months 15 months As is apparent from the above it seems to me that the Bailiff was entitled to find that there was inordinate delay, but of only 15 months in all. Were the delays inexcusable? 74. The Bailiff held that the 24 months of delay which he held to be inordinate were also inexcusable because he rejected the excuses that were put forward, namely (i) that for different reasons there had been delays in obtaining advice from a forensic accountant, (ii) that Counsel for Gamlestaden had been engaged in other weighty litigation; (iii) that Gamlestaden's English Counsel was appointed to the Bench and it had taken five months to replace him and (iv) that the directors had, at one stage, themselves been seeking a stay pending the conclusion of the Swedish proceedings. 75. It is, of course, necessary to examine the excuses put forward by reference to the periods in respect of which the Bailiff was entitled to find that the delay had been inordinate. Gamlestaden sought to excuse the delay in period 2 on account of their difficulties in obtaining advice from a forensic accountant. This seems to me to be untenable. The problem is said to have been that in February 2000 Mr Bolton moved from Arthur Andersen, to whom instructions had been given in February 1998, to Pannell Kerr Forster. The case itself moved to that firm in March 2000 and the team beneath Mr Bolton changed, According to paragraph 35 of the affidavit of Fredrik Vinge, sworn on behalf of Gamlestaden, " some additional time of approximately a month was spent by the new team getting up to speed with the case ". According to paragraph 21 of the affidavit of Jane Martin the earliest time that a meeting could be organised with the new forensic accountancy team was 19 th July 2000. Whilst I accept that the calculation of Baltic's loss must have taken some time, there is nothing before us to suggest that that was something of great complexity. I cannot accept that a delay of that long was excusable, even allowing for the difficulties, which were not great, arising from the change of Mr Bolton's firm. As to period 4 it is true that OLM had suggested that there should be a stay of proceedings pending the judgment of the Swedish Court. But the fact remains that CC had objected to OLM's proposal and OLM had withdrawn their summons seeking a stay. It was, therefore, incumbent upon Gamlestaden to proceed with the action. It is no excuse for their failure to do so that their failure achieved the result that OLM had originally sought. Nor is it an excuse that the banks running the litigation were bureaucratic, or that the relevant committee lacked familiarity, as we were told it did, with the concept of security for costs. As to period 5 again it seems to me that there was no excuse for the delay in re-amending the Representation, which in June 2002 had been promised within weeks and was finally produced on the last day in February of the next year. Prejudice. 76. Having regard to the conclusions that I have reached, it is

necessary to examine whether such delay after the issue of proceedings as I hold to have been inordinate and inexcusable, has either (a) caused there to be a substantial risk that it is not possible to have a fair trial of the issues in the action, or is likely to have caused serious prejudice to the defendants, or (b) has caused there to be prejudice additional to that attributable to the delay in issuing proceedings, which is more than minimal. The Bailiff reached the conclusion that the directors had suffered serious prejudice by reason of the delay that he found because it seemed to him inevitable that after ten years memories would have faded and because the death of Mr Boleat in September 2000 was a significant factor. He did not specifically identify what he regarded as the period of pre-action delay, or deal separately with the impact of the delay before and after the action was brought. As to the former, Gamlestaden claim that they did not become aware of the facts that underpin their claim until they learnt about them from the Deloitte & Touche report of 2 nd April 1996. I do not regard there to have been any relevant delay until after this Court had given its ruling in the desastre proceedings on 18 th April 1996, and Gamlestaden had had time to consider it and commence proceedings thereafter. Advocate MacRae, for the directors, was disposed to accept that the delay before the action was of the order of 2 years and 4 months. As to the latter, I am not prepared to infer that the delay in periods 2, 4 and 5 has had either of the consequences to which I have referred. So far as the death of Mr Boleat is concerned the position is that there had been six months of culpable delay in the period immediately prior to his death. That was the first period of delay. I cannot accept that such delay caused any prejudice of substance, when there was never any prospect of the trial taking place before he died, and when it was Mr de Figueiredo who appears to have been most concerned with the events critically in issue. So far as fading of memories generally is concerned, whilst I do not doubt that the Court can infer that any substantial delay can lead to a further loss of recollection, I am not persuaded that the delay in the 3 relevant periods, whether they be looked at in isolation or cumulatively, has caused more than a minimal degree of prejudice. In reaching that conclusion I have had in mind (a) that the earliest period of delay began six years or so after the events complained of and the other two a year or more later; (b) that the individual periods are short and, in the case of the first two, separated by over a year's interval; and (c) whilst there was inexcusable delay in period 4, which ended in March 2002, I doubt that it had any impact at all on the overall progress of the proceedings. If the security had been lodged in December 2001 or January 2002, further progress of the proceedings would still, in practical terms, have been dependent on seeing the outcome of the Swedish proceedings. Further, I am sceptical as to the extent to which disputed oral evidence will be of critical importance. The most important issues in the action seem to me to concern (i) the meaning and effect of the Articles of SPK; (ii) the valuation of Sprinkenhof and the advice given about that; (iii) the financial position of SPK in 1993; (iv) the state of the partnership accounts when the impugned withdrawals were made; and

- (v) the considerations which caused the directors to agree to the impugned withdrawals and the German Court to approve the conversion of SPK to SPG, all of which I would expect either to be the subject of, or, at least, reflected in, a documentary record. Lastly, before the

proceedings were instituted, Mr de Figueiredo was asked, by letter of 25 th October 1996, for a full account of the affairs of Baltic. The need to be able to do so must, therefore, have been apparent at an early stage. 77. Accordingly, I would set aside the decision of the Bailiff insofar as he dismissed the Representation for want of prosecution. The Cross Appeal. 78. In the light of his decision on the first point the Bailiff did not have to decide the additional point taken by the Respondents, and pursued before us by way of cross appeal. Nor do we. But since the matter has been fully argued, I think it appropriate to express the conclusion that I have reached. The Respondents contend that Gamlestaden cannot, in these proceedings, claim damages on behalf of Baltic. The most that they can obtain is an order authorising Gamlestaden to conduct separate proceedings in the name of Baltic. 79. In *Re a Company*

- (1986) BCLC 68 section 459 petitioners sought an order that a former shareholder account to the company for certain unauthorised payments. It was submitted that this was not a proper approach. Hofmann, J. remarked that it did not seem very convenient from a practical point of view to require the petitioner to institute separate proceedings, and declined to strike out the petition. I respectfully agree. The directors placed reliance on the case of *Re Premier Electronics GB Ltd*, (Unreported 21 st December 2000). The issue in that case was whether the Court could grant Mareva relief against directors in section 459 proceedings. Pumfrey, J., held that it could not, upon the ground that a section 459 petition was not a proceeding in relation to which a cause of action of the kind contemplated by Bingham, J. in *The Siskina*
- (1979) A. C. 210 was in issue. That seems to me to be a quite different question. 80. Accordingly I would dismiss the cross appeal. I should like to record my appreciation of the quality of the argument on both sides. smith ja: I agree. rokison ja: I agree. Authorities Companies (Jersey) Law 1991: Articles 141 & 143. Royal Court Rules 1992: Rule 6/13. Companies Act 1985: S.459. *Kinsella -v- Lido Bay Hotel (Jersey) Ltd* (24 th April, 2001) Jersey Unreported; [2001/89]. *Jersey Financial Services Commission -v- Black* [2002]JLR443. *Garfield Bennett -v- Philips* (6 th November, 2002) Jersey Unreported; [2002/214]. *McGorrin -v- Pascoe* (7 th June, 2002) Jersey Unreported; [2002/113]. *Re: Chesterfield Catering Company Limited* [1976] 3 All ER 294. *Joyce -v- Joyce* [1979] 1 All ER 175. *Re: Bird Precision Bellows Ltd* [1985] BCLC 493. *Re: Commercial & Industrial Insulations Ltd* [1986] BCLC191. *Re: Charnley Davies* (No. 2 ChD)
- (1990) BCLC. *Re: Cade* [1992] BCLC 213. *Re: Hailey Group Ltd* [1993] BCLC 459. *Re: Saul -v- Harrison*
- [1995] 1 BCLC. *Re: Marchday Group plc* [1998] BCLC 800. *Re: Premier Electronics GB Ltd* [2002] 2 BCLC 634. *McGree on Limitation Periods* (4 th Ed'n 2002): paras 3 -016. *Blenheim Trust Co. Ltd. -v- Morgan, Abacus (Guernsey) Ltd and another* (17 th March 1999) Jersey Unreported; [1999/51]. *Esteem Settlement and the No. 52 Trust* [2000]JLR119. *Bridgmen -v- McAlpine-Brown* 2000LTL. *Re: Macro (Ipswich) Ltd* 1994 2 BCLC 354. *Elgindata Ltd* [1991] BCLC 959. *Mauger -v- Barry* (9 th October, 1995) Jersey Unreported; [1995/197]. *Birkett -v- James*

[1978]AC297. Shtun -v- Zalewski [1996] 3 All ER 411. Moulipied -v- Sturdy [2003]JRC025. Garfield Bennett -v- Phillips (6 th November 200) Jersey Unreported; [2002/214]. [2002]JLR N.42. Besant -v- Pavan [1997]JLR270. Re A company, ex parte Estate Acquisition and Development Ltd [1991] BCLC154. Re a Company (No 005287 of 1985)

[1986] BCLC 68. Anderson -v- Hogg (2002) SLT 354. Re Bhullar Bros Ltd

[2003] 2 BCLC 241 . Foss -v- Harbottle

(1843) 2 Hare 461 . Re Saul D Harrison & Sons plc

[1995] 1 BCLC 14. Trafford Park Estates -v- Lowe (14 th October, 1999) LTL. Doolan -v- Powerhouse (16 th February, 2000) LTL Re Hailey Group Limited [1993] BCLC 459. Byblos Bank -v- Al-Khudiary [1987] BCLC 232. Deloitte & Touche A. G. -v- Johnson & Anor

[1999] 1 WLR 1605 . Walker Morris -v- Khalastchi (2000) WL 33148794. Atlasview Ltd & Ors -v- Brightview Ltd & Ors [2004] EWHC 1056. Rahman -v- Chase Bank (1984) JJ 127. Gheewala -v- Compendium Trust [1999 JLR 154]. Slous-v-Thermal Transfer Services (11 th June, 2002) Jersey Unreported; [2002/117]. Supreme Court Rules (1999): Order 25, 59/10. Austin Securities-v-Northgate and English Stores [1969] 2 AllER 753. Hunter-v-Skingley (1997) 3 AllER 568 CA. Roebuck-v-Mungovin (1994) 1 AllER 568 HL. County and District Properties Ltd-v-Lyell [1991] 1 WLR 683. Reynolds-v-British Leyland, Ltd. [1991] 2 AllER 243. Ortansk-v-Spencer Associates (19 th February, 1998) The Times. Court of Appeal (Civil) (Jersey) Rules, 1964: Rule 12. Civil Procedure Rules: Rule 52.11. Ladd-v-Marshall

[1954] 3 AllER 745 CA. Langdale-v-Danby [1982] 3 AllER 129. Skone-v-Skone [1971] 2 AllER 182 HL. Roe-v-Robert McGregor and Sons [1968] 2 AllER 636 CA. Corbett-v-Corbett [1953] 2 AllER 69. Rowell-v-Pratt [1937] 3 AllER 660. Andrew-v-Andrew [1953] 1 WLR 1454. Braddock-v-Tillotsons Newspapers [1949] 2 AllER 306. Meek-v-Fleming [1961] 3 AllER 148 CA. Pursell-v-Railways Executive [1951] 1 AllER 536. Momin Ali---v-Secretary of State for Home Department [1094] 1 AllER 1009 CA. Murphy-v-Stone Wallwock (Chartin) Ltd. [1969] 2 AllER 949 HL. Mulholland-v-Mitchell [1971] AllER 307 HL. Skinner -v- Myles [1990 JLR 88]. Page Last Updated: 14 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2005/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/gamlestaden-v-baltic-partners-2005-jca-015-10-february-2005>

Prepared on 23 October 2026 · Esheria