[2003–04 Gib LR 1]

CHALLE LIMITED v. BELTANA PROPERTIES LIMITED

SUPREME COURT (Pizzarello, Ag. C.J.): February 26th, 2003

Companies—capital—increase of share capital—conversion of loan capital into share capital by increasing share capital reasonable strategy to safeguard future of company if in good faith and no prejudice to minority shareholders

Companies—directors—powers and duties—duty to act in good faith and in best interests of company—court has no power to prohibit directors' actions if reasonable and legitimate

The applicant brought an action to restrain the respondent company from taking any steps to increase its share capital and to prevent the holding of a general meeting (at which a resolution to increase the share capital would be considered).

The applicant, a company which held 34.7% of the shareholding of the respondent company, raised a statutory demand on the respondent for the repayment of moneys paid as loan capital. The respondent resolved to attempt to meet, rather than defend, the statutory demand (even though it submitted that it was defensible on the ground that the loan was not actually an on-demand loan). Different ways of obtaining funds to repay the loan were considered by the directors, including recalling a loan from the company's subsidiary company, but the final conclusion was that the best way to do so was to increase the share capital in the company. Additional shares would be offered for purchase by the current shareholders in proportion to their previous holdings and the funds raised could then be used not only to meet the applicant's statutory demand, but also to repay other loan capital. This would mean that all the shareholders would thenceforth be financing their commitment to the company by means of share capital rather than loan capital and the company would no longer be at risk of either the applicant company or the majority shareholder claiming back its loan capital simply as debts owed by the company.

The applicant submitted, *inter alia*, that (a) the respondent could meet the statutory demand by simply demanding repayment of its loan to the subsidiary company; (b) the real reason for the directors' attempt to increase the share capital of the company was, in fact, to dilute the applicant's shareholding and hence constituted prejudicing a minority shareholder; and (c) this would involve the directors using their fiduciary

powers for a purpose other than that for which they were granted, which would clearly be improper.

The respondent submitted that (a) the directors' choice of increasing the share capital as a means of resolving the company's difficulties was reasonable; (b) they had acted *bona fide* in the best interests of the company; and (c) the court did not therefore have the power to prevent the holding of a general meeting to approve the reorganization.

Held, dismissing the application:

The directors' reason for recommending the increase in share capital of the company and converting the loan capital into share capital, was clearly the fact that the applicant company had already tried once to wind up the company, and by raising the statutory demand, was apparently attempting to do so again. Converting the loan capital into share capital was not an attempt by the company unfairly to prejudice the minority shareholder applicant, as it submitted, but was in fact a reasonable way in which to attempt to raise the required funds and put the company's capital on a surer footing. It was true that directors had not only to act within their powers but had also to exercise those powers *bona fide* in what they believed to be the best interests of the company but in this case their actions could not be faulted, and the court did not have the power to prevent the holding of a general meeting to approve the reorganization (paras. 9–11).

Cases cited:

(1) *Clemens* v. *Clemens Bros. Ltd.*, [1976] 2 All E.R. 268, followed.

(2) *Smith (Howard) Ltd.* v. *Ampol Petroleum Ltd.*, [1974] A.C. 821; [1974] 1 All E.R. 1126, considered.

D.J.V. Dumas, Q.C., *N.W. Howard* and *J. Verrall* for the applicant;
J.E. Triay, Q.C and *J.E. Triay* for the respondent.

1 **PIZZARELLO, Ag. C.J.:** The application herein dated February 24th, 2003 came before me as an urgent matter on notice. The application is to restrain the shareholders of Beltana Properties Ltd. ("the company") from taking any step to increase the share capital of the company and in particular from passing or acting on the following resolution:

> "That the authorized share capital of the company be and is hereby increased from its present limit of GBP1,000 to the new figure of GBP4,499,000 by the creation of 4,499,000 new ordinary shares of GBP1 each the new shares to rank *pari passu* with the existing shares in all respects."

The application also seeks that provision be made for the costs of the application. The expression "GBP4,499,000" in the proposed resolution is an error and should read "GBP4,500,000."

2 Mr. Dumas explained that the urgency for the application came about because the company was calling an extraordinary meeting to be held at 3 p.m. on February 24th, 2003 proposing to create new capital in the terms of the proposed resolution referred to above.

3 The facts of the matter, as far as I can distil them, are these:

(a) The total authorized and issued share capital of the company is 1,000 shares of £1 each.

(b) The company was incorporated on January 18th, 1991.

(c) The registered address of the company is 28 Irish Town, Gibraltar.

(d) T & T Nominees Ltd. holds 652 shares in the company and has the same registered address.

(e) Tower Holding Ltd. holds one share in the company and has the same registered address.

(f) Challe Ltd. is the holder of 347 shares in the company and its registered address is Suite 2C, Eurolife Building, 1 Corral Road, Gibraltar.

(g) A petition to wind up the company was presented by Challe Ltd. to the court and was dismissed last year with costs. An appeal from that decision has been withdrawn.

(h) On February 5th, 2003, the company issued a notice of an Extraordinary General Meeting to be held on March 4th, 2003. A covering letter explains that the notice relates to an EGM that was to have been held on November 18th, 1999 which had been adjourned. “Now that the litigation has finished, the meeting is reconvened.”

(i) Costs of the petition have been taxed and a statutory demand raised thereon was on February 6th, 2003 served on Challe Ltd. claiming the sum of £84,439.50 and €6,000.

(j) On February 7th, 2003, a statutory demand was served on the company by Challe Ltd. seeking payment of £492,862.

(k) On February 13th, 2003, the board of directors of the company held a meeting the minutes of which are these:

> **“Minutes** of a meeting of the Board of Directors of Beltana Properties Ltd. held at 28 Irish Town, Gibraltar on the Thursday the 13th day of February 2003.
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> | **Present:** | **Christine Lopez (in the Chair)**
Rosanna Duran |
> | **In attendance:** | **Mr. F. Javier Triay** of Triay & Triay, solicitors for the company. |

Statutory demand served on the company

The chairman tabled the statutory demand served on the company by Challe Ltd. ('Challe'), on the 7th day of February 2003. It was noted that Challe was the holder of 347 ordinary shares of £1 each in the company, *i.e.* 34.7% of the company's share capital, and that the statutory demand required payment of the sum of £492,862 within three weeks of the date of service.

The chairman was seriously concerned with the statutory demand and, accordingly, had requested Mr. Triay to attend the meeting and advise on the matter and on the steps that the company could take in response thereto.

The meeting noted that the company had itself made a demand of Challe in respect of the costs awarded to the company in a petition to wind up issued against the company by Challe in 2002, consequent upon the dismissal of Challe's petition on the ground that it showed no *prima facie* case for winding up. The company's demand was served on Challe on February 5th and was due for payment on February 27th, 2003. The meeting felt that Challe's demand was likely to have been served as an answer to the company's demand against Challe.

Consequences of the statutory demand

It was noted, on the advice of the company's lawyers, that failure to meet a statutory demand would normally be followed by the filing of a petition to wind the company up. Upon presentation of a petition, the exercise of the powers of directors would be inhibited by the fact that if a winding-up order was made, the winding up would be deemed to date back to the date of the petition by reason of which the authority of the directors to bind the company would be deemed to have ceased as from that date. Moreover, if an order for winding up was made, a liquidator would be appointed by the court to take possession of, sell and distribute the company's assets to pay creditors and thereafter, shareholders. Thus the management of the company would pass from the directors to a liquidator appointed by the court. This was not considered to be in the best interests of the company, currently engaged in a development project in Spain through a wholly-owned subsidiary, Las Colinas de Marbella S.A. ('Las Colinas'). Thus the consequences of failure to pay were serious. The meeting then went on to consider the matters of defence available to the company.

The accounts for the period ending March 31st, 2001

The accounts of the company for the period ending March 31st, 2001 were reviewed. There was noted the existence of long-term

shareholder loans which included a loan by Challe in the total sum of £744,797. This amount represented 34.7% of the initial acquisition cost of the land acquired by the company's subsidiary, corresponding to Challe's percentage shareholding in the company. Likewise, the accounts showed a long-term loan in favour of the Bou Habib Family Settlement in a sum of £1,401,594 which represented 65.3% of the total acquisition cost of the land referred to, and corresponding to that settlement's percentage shareholding in the company. In addition, the accounts showed that the Bou Habib Family Settlement had made a short-term loan of £1,935,365 not presently reflected in any shareholding. No such short-term loan appeared due to Challe.

It was recalled that the company had been formed pursuant to arrangements made in or around February 1994 between Mr. Darwish, on behalf of Challe, and Mr. Habib, on behalf of the Bou Habib Family Settlement, to act as holding company of Las Colinas. Under those arrangements each shareholder was to contribute proportionately in accordance with their shareholding to both the capital acquisition cost of the assets, and also the running costs of the new structure. In this regard, reference was made to the petition filed by Challe on April 25th, 2002 in proceedings Comp. No. 9 of 2002, at para. 17 thereof, which noted as follows:

> 'On April 30th, 1993, Mr. Darwish, at Mr. Habib's suggestion, agreed with Mr. Habib that a new company would be set up by Mr. Habib through his advisers to acquire the shares in Las Colinas from Leisure. It was further agreed that Mr. Darwish would retain a shareholding in the new company of approximately 34.38% [34.7%] representing his shareholding in the old company. The parties would try to resolve the question of the B.C.C.I. debt and the running costs of the new structure would be shared proportionately.'

It was further noted that Challe's petition to wind up the company aforesaid itself reflected the terms of the arrangements referred to above. In fact, the second affidavit of Elizabeth Plummer filed by Challe in those proceedings, refers (at para. 62) to the payment of the sum of Pta, 88,835,528 being the capital contribution of Challe to the acquisition cost of the investment. Further, at para. 63, Elizabeth Plummer acknowledges that pursuant to the arrangements made, the company would be at liberty to request its shareholders for moneys to maintain the company and its subsidiary. This was not consistent with the present treatment of a loan by Challe, as one repayable on demand. It was noted that neither shareholder had, until now, made a demand for the loan capital.

In the light of the above, the meeting concluded that the amount advanced by Challe and reflected in the accounts was a contribution to the permanent capital of the company by way of permanent loan capital, required to fund the company in the acquisition of its asset, and that these loans were not on-demand loans and had never been considered to be so by the company.

Defences available to the company on the accounts

Having regard to the history of the above matter, whilst it was admitted that the company owed the sum of £744,797 to Challe, it was clear that the loan was not repayable on demand as claimed in the statutory demand, but was part of the permanent loan capital of the company. The company's lawyers had advised that whilst such a defence was meritorious and likely to succeed, it would entail laborious and probably lengthy and expensive litigation. Having so recently been engaged in costly litigation unsuccessfully commenced by Challe against the company, the meeting was reluctant to be made to embark on a second round.

Moreover, a successful defence of the statutory notice still left the company with an unsatisfactory capital base, financed in a substantial part by a shareholder lender who had already tried and failed in a first attempt to petition for the winding up of the company and was now demanding repayment of loan capital to make a second attempt. Whatever the prospects of success, in so far as it was clear that Challe was intent on bringing the company down, the company needed to consolidate its capital structure. Successful litigation on the present statutory notice did not achieve such consolidation and, accordingly, the defence of the statutory notice on this basis would result in further wasted costs in litigation which did not resolve the needs of the company and was therefore not in the interest of the company.

In these circumstances, the meeting concluded that, regardless of the defences available, the company should consider alternative methods to raise the moneys demanded by Challe with a view to avoiding the winding up and a second round of litigation with Challe.

Proposals for raising capital

1. ***Bank loan***

There was considered the possibility of an approach to various banks in Gibraltar with a view to raising the moneys required upon security of a pledge of shares in Las Colinas. Whilst it was thought that the shares of Las Colinas afforded sufficient security for the

amount required, Gibraltar banks did not customarily lend on the security of asset situated outside Gibraltar. Further, the time available would probably be insufficient to raise such funds. The meeting therefore noted that this option was unlikely to meet with success.

2. ***Las Colinas***

The accounts of the company showed that Las Colinas owed the company the sum of £1,933,625. The company had advanced these moneys to Las Colinas as loan capital for the purposes of assisting Las Colinas in the marketing and development of the lands. In other words, it had been advanced to the company, *i.e.* as long-term capital. Such a loan was thus not repayable on demand.

Nevertheless, the meeting had noted that Las Colinas had recently entered into a transaction with Prasur S.L. for the sale of part of the land. Accordingly, Las Colinas might have available funds to repay the loan. In these circumstances, **it was resolved** that an attempt be made to recover part of the amount outstanding to the company to fund repayment of the amount due to Challe.

3. ***Seek further loans from shareholders***

Since Challe had made a demand of the company it was obvious that the company should not waste time seeking a loan from Challe. The chairman therefore suggested that an approach be made to the trustees of the Bou Habib Family Settlement with a view to procuring that they fund the company with this further amount in order to avoid a possible liquidation.

4. ***Increase of share capital***

The company could increase its share capital and thereafter offer the same to its shareholders in order to raise the amount required.

The directors had been unnerved by the demand made by Challe which threatened the very existence of the company and were anxious to put an end to the situation whereby a disgruntled shareholder, financing his commitment to the company by means of loans rather than equity capital, could at any time subject the company to demands for repayment, thus exposing the company to the risk of a winding-up petition at the shareholder's whim. Whilst the company had throughout its existence operated on the basis of loan capital which it believed was not repayable on demand, Challe was prepared to risk the future of the company by the demand to have its loan capital returned. Further, bearing in mind that the company's lawyers had advised that the defences available to the company would lead to laborious proceedings, the result of which, as always, was impossible to guarantee, the meeting expressed

anxiety to put an end to the company's dependence on loan capital which could be the subject of a demand for its withdrawal, whether justified or not, and ensure that its capital resources were placed on a proper footing.

Bearing the above in mind, it seemed sensible to the meeting to recommend to the shareholders that the capital of the company be increased by an amount sufficient to pay off all the shareholders' loans and other indebtedness and that the new shares created be offered to the shareholders in proportion to their respective holdings in the company. In effect such a proposal would result in the conversion of loans into share capital. This would resolve the issue with Challe immediately and protect the company from future potential threats.

5. ***Sale of subsidiary***

The meeting considered an alternative option for the company to sell the subsidiary. This was quickly dismissed because quite apart from the question whether this option might be acceptable to shareholders, there was insufficient time to market the sale of the subsidiary in a manner that procured the best possible price. Moreover, Las Colinas was still involved in litigation with Mr. Singer and others. Las Colinas also had accounting issues in relation to the application of the B.C.C.I. loan by Mr. Darwish and others, as the previous directors of Las Colinas. The meeting noted that the sale of the company would be difficult if not impossible in those circumstances. It was certainly not something that could be rushed.

Recommendations of the board

Having considered the various alternatives, the chairman recommended the following action:

1. that the shareholders be informed of the threat to the company immediately;

2. that the company attempt to raise the amount required to pay off Challe and other creditors of the company from any of the sources above referred to. It was noted that the sum of £4,500,000 would be required to enable the company to pay off all the shareholder and bank loans;

3. that the directors recommend to a general meeting that the company increase its share capital to enable repayment of all outstanding shareholder loans; and

4. that a general meeting be called for the purposes of considering the increase of share capital and the financial status of the company."

These minutes were first shown to Challe Ltd.'s legal advisers during the course of the hearing before me on February 24th, 2003.

(l) On February 14th, 2003, Challe Ltd. received notice (dated February 14th, 2003) of an EGM to be held on February 21st, 2003 at 3 p.m. to consider—

> "1. the statutory demand served on the company by Challe Ltd.;
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> 2. the defences available to the company; and
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> 3. the raising of capital to meet the demand of Challe Ltd. and other debts of the company. Also for the purposes of considering and, if thought fit, passing the following resolution as an ordinary resolution [viz. the resolution set out in para. 1 of this judgment]."

(m) The EGM scheduled for February 21st, 2003 was adjourned to February 24th, 2003 due to the inability of Mr. F. Picardo of Hassans to attend because of a fault in the aeroplane in which he was travelling. Mr. Picardo indicated that he would attend on the 24th.

[The learned Acting Chief Justice set out the exchange of emails confirming this arrangement and continued:]

(n) On February 21st, 2003, or thereabouts, Challe Ltd. wrote to the company outlining Challe's objections on the proposed increase.

4 In his submissions Mr. Dumas argued that there was no need for the company to raise capital to meet Challe's statutory demand for the time it takes to resolve these matters. Challe Ltd. will undertake not to pursue its claim for the time being. Challe Ltd. complains that it has not had full accounts, since they have not been audited as is required by the Articles of Association, art. 110. There may not be a statutory obligation by an exempt company to have audited accounts but the Registrar of Companies has appointed an auditor who is still there. Challe is not in a position to verify the accounts and if they have been audited why has this not been disclosed? Nevertheless on the basis of the accounts as they are, Mr. Dumas submits there are enough funds to meet Challe's claim. Land sold by Las Colinas (wholly owned by the company) raised the sum of approximately €15m. net. After tax in Spain, that is reduced to €10m. Las Colinas owes the company €3m. and so Las Colinas has €7m. balance. There is a withholding tax at 15% and this leaves €5.5m. which equals £3.7m. The short-term loans appearing in the statement of shareholders' funds can be paid off leaving the company with £1.7m. and no need to increase the capital of the company. The point then is: why for that apparent shortfall is there a need to create 4,449,000 shares more?

5 The concern of Challe Ltd. of course is that in this way its percentage shareholding will be diluted. Mr. Dumas submits this action is not taken

bona fide in the interest of the company and it should not be allowed. The proposed increase in the share capital is unreasonable. It constitutes unfair prejudice and oppression on Challe Ltd. as a minority shareholder which could be forced at short notice and at high expense to find funding to pay for the company's debts which have not been proved or substantiated. More so when Challe wants to leave the business to the knowledge of the company. The real reason for the increase is an ulterior motive to squeeze it out and dilute its shareholding and not for the benefit of the company as a whole. The situation calls into question the abilities of the co-shareholders and the directors. With no foreknowledge of the meeting arranged for March 4th, 2003 Challe Ltd. was called for an EGM. He submits there is lack of probity and the procedure is that there should be a petition to wind up and so it is necessary to restrain the EGM for February 24th, 2003 from taking place.

6 In support, Mr. Dumas refers to *Smith (Howard) Ltd.* v. *Ampol Petroleum Ltd.* (2), and the judgment of Lord Wilberforce ([1974] A.C. at 834):

> "Thus, and this is not disputed, the issue was clearly *intra vires* the directors. But, *intra vires* though the issue may have been, the directors' power under this article is a fiduciary power: and it remains the case that an exercise of such a power though formally valid, may be attacked on the ground that it was not exercised for the purpose for which it was granted."

and (*ibid.*, at 835):

> "On the other hand, taking the respondents' contention, it is, in their Lordships' opinion, too narrow an approach to say that the only valid purpose for which shares may be issued is to raise capital for the company. The discretion is not in terms limited in this way: the law should not impose such a limitation on directors' powers. To define in advance exact limits beyond which directors must not pass is, in their Lordships' view, impossible. This clearly cannot be done by enumeration, since the variety of situations facing directors of different types of company in different situations cannot be anticipated. No more, in their Lordships' view, can this be done by the use of a phrase—such as '*bona fide* in the interest of the company as a whole,' or 'for some corporate purpose.' Such phrases, if they do anything more than restate the general principle applicable to fiduciary powers, at best serve, negatively, to exclude from the area of validity cases where the directors are acting sectionally, or partially: *i.e.* improperly favouring one section of the shareholders against another. Of such cases it has been said:
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> > 'The question which arises is sometimes not a question of the interest of the company at all, but a question of what is fair as

> between different classes of shareholders. Where such a case arises some other test than that of the "interests of the company" must be applied . . .' (*Mills* v. *Mills* (1938), 60 C.L.R. 150 at 164, *per* Latham C.J.)."

and (*ibid.*, at 837):

> "By contrast to the cases of *Harlowe* (1968), 121 C.L.R. 483, and *Teck* (1973), 33 D.L.R. (3d) 288, the present case, on the evidence, does not, on the findings of the trial judge, involve any considerations of management, within the proper sphere of the directors. The purpose found by the judge is simply and solely to dilute the majority voting power held by Ampol and Bulkships so as to enable a then minority of shareholders to sell their shares more advantageously. So far as authority goes, an issue of shares purely for the purpose of creating voting power has repeatedly been condemned: *Fraser* v. *Whalley* (1864), 2 Hem. & M. 10; *Punt* v. *Symons & Co. Ltd.*, [1903] 2 Ch. 506; *Piercy* v. *S. Mills & Co. Ltd.*, [1920] 1 Ch. 177 ('merely for the purpose of defeating the wishes of the existing majority of shareholders') and *Hogg* v. *Cramphorn Ltd.*, [1967] Ch. 254. In the leading Australian case of *Mills* v. *Mills* (1938), 60 C.L.R. 150, it was accepted in the High Court that if the purpose of issuing shares was solely to alter the voting power the issue would be invalid. And, though the reported decisions, naturally enough, are expressed in terms of their own facts, there are clear considerations of principle which support the trend they establish. The constitution of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management. Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office (*Automatic Self-Cleansing Filter Syndicate Co. Ltd.* v. *Cuninghame*, [1906] 2 Ch. 34), so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to interfere with that element of the company's constitution which is separate from and set against their powers. If there is added, moreover, to this immediate purpose, an ulterior purpose to enable an offer for shares to proceed which the existing majority was in a position to block, the departure from the legitimate use of the fiduciary power becomes not less, but all the greater. The right to dispose of shares at a given price is essentially

> an individual right to be exercised on individual decision and on which a majority, in the absence of oppression or similar impropriety, is entitled to prevail. Directors are of course entitled to offer advice, and bound to supply information, relevant to the making of such a decision, but to use their fiduciary power solely for the purpose of shifting the power to decide to whom and at what price shares are to be sold cannot be related to any purpose for which the power over the share capital was conferred upon them. That this is the position in law was in effect recognised by the majority directors themselves when they attempted to justify the issue as made primarily in order to obtain much needed capital for the company. And once this primary purpose was rejected, as it was by Street J., there is nothing legitimate left as a basis for their action, except honest behaviour. That is not, in itself, enough."

Mr. Dumas also made reference to Joffe, *Minority Shareholders: Law, Practice and Procedure*, 1st ed. (2000).

7 Mr. Triay submits that the application to restrain a general meeting is wrong. There is competency to call one, it is not unlawful and the directors have provided the reason why it has been called, namely the statutory demand. The minutes of the directors' meeting, now in the hands of Challe Ltd.'s legal advisers, flesh out the reasons. The company has a commitment of approximately £4m. and there is only £1,000 share capital. The rest is loan capital and that is the base of the company's finances. Given the statutory demand raised on the basis that the loan is repayable on demand (a point which is not accepted by the company) this is a convenient point for the directors to put right the situation where the company will be at the mercy of the actions of Challe Ltd. It is, he submitted, a correct decision of the directors to put the company's finance on to a solid basis. And it is not that the company wants new capital, the effect is that the long-term loans and the short-term loans will fund the new issue. Note that the loans reflect the equitable division between the shareholders and are kept to that percentage division notwithstanding that the short-term loans have all been paid by the majority shareholder; there is no dilution but Challe Ltd. will have to pay. Given the past history, the company has already resisted one winding-up petition, to leave matters as they are will not augur well and the idea is to convert the loan capital into capital of a permanent form. There is no attempt to deprive anyone. In so far as procedure is concerned, this application is not an action against directors; it is directed to restraining the shareholders. It is an application for an injunction and therefore this should have been done without delay. If things are wrong today they were wrong 10 days ago, yet there was a request to adjourn and furthermore, Mr. Picardo in his exchange of emails on February 19th, 2003, said: "I am not at present instructed to seek any injunction relief." What is new? He submitted the directors have acted

beyond criticism and the attempt to convert loan capital into share capital is not improper and in this case it is not oppressive. Challe Ltd. has tried to get re-paid. If it does get paid why should all other creditors not, including the majority shareholder. The directors are right to treat the whole of the loan capital in the same way. They have called the meeting and a general meeting does not have any fiduciary duties: the test for shareholders is no fraud and no *ultra vires*. No case has been cited where the court has stopped a general meeting from being held. The court, Mr. Triay submits, does not have jurisdiction to prevent a general meeting being held.

8 Mr. Dumas in reply submits that the court can consider this injunction. He will undertake to present a petition and give an undertaking as to costs. The matter lies against the directors; they can call on Las Colinas to provide capital and this they have not done. The recommendations they make suggest they have not acted even-handedly. Underlying the cases that have been cited is impropriety and he submits this is clear: no one thinks of or takes into account the minority, the minutes of the board could and should have been appended to the notice for the EGM, and Challe Ltd. is still waiting for audited accounts.

9 I hold the law relating to this matter to be sufficiently encapsulated in *Clemens* v. *Clemens Bros. Ltd.* (1) ([1976] 2 All E.R. at 280–281):

> "There are many cases which have discussed a director's position. A director must not only act within his powers but must also exercise them *bona fide* in what he believes to be the interests of the company. The directors have a fiduciary duty, but is there any, or any similar, restraint on shareholders exercising their powers as members at general meetings?
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> *Menier* v. *Hooper's Telegraph Words* (1874), 9 Ch. App. 350, is a very clear case, since it involved the majority shareholders expropriating the company's assets to the exclusion of the minority. In *North-West Transportation Co. Ltd.* v. *Beatty* (1887), 12 App. Cas. 589 at 593, Sir Richard Baggallay said:
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> > 'The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest, in the subject-matter opposed to, or different from, the general or particular interests

> of the company. On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and it is not illegal or fraudulent or oppressive towards those shareholders who oppose it.'"

10 In the present application there are two stages which call for attention. The first is the directors' impropriety as suggested by the applicant. I stand back and look at what has been put to me. I cannot see how the directors can be criticized for their actions. The directors are not shareholders. They have reacted to a statutory demand in a way which in my view cannot be considered unreasonable: their minutes are full and detailed as to why they have recommended as they have. I cannot see that they can be faulted in calling the meeting of February 21st, 2003 and I do not accept their action can be tainted on the grounds that they have not yet provided for audited accounts or cleared up questions on the accounts to the applicants' satisfaction and generally not been as forthcoming as the applicants would wish. The second point is the EGM itself. I agree with Mr. Triay's submissions.

11 The application is dismissed.

Application dismissed.