[2003–04 Gib LR 207]

CHALLE LIMITED v. T & T NOMINEES LIMITED, TOWER HOLDINGS LIMITED and BELTANA PROPERTIES LIMITED

SUPREME COURT (Pizzarello, Ag. C.J.): June 12th, 2003

Estoppel—res judicata—cause of action estoppel—cause of action estoppel prevents relitigation if essentially same issues already decided in previous proceedings

Estoppel—res judicata—issues available in previous proceedings—no relitigation of issues which could or should have been raised in previous proceedings, even if not strictly res judicata—constitutes abuse of process giving court discretion to strike out proceedings—public interest in ending litigation prime consideration

The petitioner (C Ltd.) filed a petition for the winding up of the third respondent company (B Ltd.).

C Ltd., which held 34.7% of the shares in B Ltd., petitioned unsuccessfully in 2002 for the winding up of B Ltd. The petition was dismissed on the ground that no *prima facie* case had been shown. C Ltd.'s appeal against the dismissal was lodged but subsequently withdrawn. C Ltd. then made a statutory demand for the repayment of moneys paid to B Ltd. as loan capital said to be repayable on demand; in response, B Ltd. proposed to increase its share capital and use the proceeds to repay C Ltd. and other contributors to the loan capital. C Ltd.'s application to restrain B Ltd. from doing so was dismissed, but leave to appeal was granted together with an injunction restraining any steps towards this financial reorganization pending determination of the appeal (see 2003–04 Gib LR 1). Following this, C Ltd. filed a second petition for the winding up of B Ltd., and subsequently applied for leave to amend, present and serve an amended petition. B Ltd. applied to strike out the petition, and for an order that C Ltd. give security.

B Ltd. submitted that it should be struck out since (a) it was an abuse of process because (i) it was based on the same grounds as the first petition of 2002; (ii) it was based on the same grounds that led to the refusal of the interlocutory injunction in February 2003; (iii) it was presented for a collateral purpose, *i.e.* a purpose which differed from the relief claimed or obtainable, namely to embarrass and prejudice the interests of B Ltd. in order to pressure B Ltd.'s co-shareholder to buy C Ltd.'s shares; and (iv) it was a retaliation for the issue of a statutory

demand for costs, by B Ltd. on C Ltd.; and (b) it was also on the same ground as the refusal of the injunction to restrain the holding of a general meeting.

C Ltd. submitted in reply that (a) there were new circumstances which meant that the petition was not based on exactly the same grounds as either of the earlier hearings, and the petition was not therefore an abuse of process; and (b) even if it were found to be based on similar grounds as the judgment refusing the injunction in 2003, this did not constitute *res judicata* because that judgment was both interlocutory and made on an *ex parte* application.

Held, staying the proceedings:

(1) The first refusal to grant the petition in 2002—followed by C Ltd. withdrawing its appeal, which indicated that it accepted that it had not made out a *prima facie* case—was a sufficient basis on which to invoke the doctrine of *res judicata*. The present petition was not, however, barred by the application of that doctrine in its primary sense, *i.e.* that all the points raised in the petition had been decided in the earlier proceedings, but rather raised issues of abuse of process which justified refusing to allow it to proceed as a matter of public policy. There were issues which could have been raised at the time of the first petition but were not (raising *res judicata* in its secondary sense) and any new circumstances which had arisen later which were too insignificant to create a new cause of action. Proceeding with the petition would therefore be barred as a matter of public interest in bringing an end to litigation (para. 12; para. 14).

(2) Even if this were not the case, cause of action estoppel arose out of the decision refusing the interlocutory injunction in 2003, as C Ltd. was now attempting to relitigate the same issue as arose in that decision. Any new circumstances alleged were but a new slant on the considerations taken into account in that previous decision, and so did not result in the issues litigated being, in essence, any different. The petition was therefore an abuse of process, and C Ltd. was estopped from proceeding. The petition could not, however, simply be dismissed as there was an appeal pending against the refusal of the injunction and could not be dismissed until the appeal had been disposed of (para. 15; para. 17; para. 21).

(3) Were it to be established, it would be an abuse of process for C Ltd. to pursue its petition for a collateral purpose. However, the decision whether there were collateral motives here involved matters of fact for resolution at a trial. The result of the pending appeal against the refusal to grant the injunction to restrain the passing of the share increase resolution would have an impact on these proceedings, since if the Court of Appeal were to reverse the dismissal and the petition go forward, these collateral matters would have to be resolved on evidence at the trial (para. 18; para. 20).

Cases cited:
(1) *Barber* v. *Staffordshire C.C.*, [1996] 2 All E.R. 748; [1996] I.C.R. 379; [1996] I.R.L.R. 209, followed.
(2) *Bellador Silk Ltd., Re*, [1965] 1 All E.R. 667, followed.
(3) *Bradford & Bingley Bldg. Socy.* v. *Seddon*, [1999] 1 W.L.R. 1482; [1999] 4 All E.R. 217; [1999] Lloyd's Rep. P.N. 657, followed.
(4) *Henderson* v. *Henderson*, [1843–60] All E.R. Rep. 378; (1843), 3 Hare 100; 1 L.T.O.S. 410; 67 E.R. 313, followed.
(5) *Johnson* v. *Gore Wood & Co.*, [2002] 2 A.C. 1; [2001] 1 All E.R. 481; [2001] C.P.L.R. 49; [2001] B.C.C. 820; [2001] 1 B.C.L.C. 313, followed.
(6) *Smith (Howard) Ltd.* v. *Ampol Petroleum Ltd.*, [1974] A.C. 821; [1974] 1 All E.R. 1126, considered.
(7) *Talbot* v. *Berkshire C.C.*, [1993] 4 All E.R. 9; [1994] Q.B. 290; [1993] RTR 406; [1993] P.I.Q.R. P319, followed.
(8) *Thoday* v. *Thoday*, [1964] 1 All E.R. 341, followed.

R. Hollington, Q.C. and *D.J.V. Dumas, Q.C.* for the applicant;
J.E. Triay, Q.C. and *J.E. Triay* for the third respondent.

1 **PIZZARELLO, Ag. C.J.:** On April 26th, 2002, a first petition was filed by Challe Ltd. against Beltana Properties Ltd. (hereinafter referred to as "Beltana"). This petition was dismissed by me upon the delivery of judgment on July 10th, 2002 ("the first judgment"). An appeal was lodged against this judgment which was subsequently withdrawn.

2 On July 29th, 2002, on application made by Challe Ltd., the Registrar of Companies appointed Deloitte & Touche to act as auditors pursuant to s.124(2) of the Companies Ordinance 1930.

3 On February 24th, 2003, Challe Ltd. applied to the court as an urgent matter on notice for an order that the shareholders of Beltana and its directors be restrained from taking any step to increase the share capital of Beltana and in particular from passing or acting on a resolution to increase its share capital from 1000 shares of £1 each to 4,500,000 shares by the creation of 4,449,000 new shares at £1 each to rank *pari passu* with the existing shares.

4 On February 26th, 2003, I dismissed the application ("the second judgment"). However, I granted leave to appeal and granted the injunction sought pending the determination of the appeal (in proceedings reported at 2003–04 Gib LR 1). On February 26th, 2003, the petition herein was filed and on March 6th, 2003 notice of appeal was filed.

5 On March 7th, 2003, Beltana applied to restrain the petitioner from proceeding further upon the petition and that the petition be removed from the file of proceedings. On March 18th, 2003, Beltana applied for an order that the petitioner give security within 21 days, that proceedings be

stayed pending the provision of such security and that in default the petition should stand dismissed. On March 24th, 2003, the petitioner applied for leave to amend, present and serve an amended petition.

6 There are therefore three applications before me at this stage:

(i) The application by Beltana to strike out the petition. The application is supported by the affidavit of Mr. Francis Javier Triay dated March 6th, 2003. Mr. Triay, Q.C. argued, and I summarize his submissions as I understand them, that the petition is an abuse of the process, first, because it is based on the same grounds as the first petition; secondly, because it is based on the same grounds as led to the refusal of the interlocutory injunction on February 26th, 2003; thirdly, because it is presented for a collateral purpose, *i.e.* a purpose which is different to the relief claimed or obtainable and that is that Challe, now wishing to withdraw from participation in Beltana, wants its co-shareholder to buy its shares and is using every stratagem available to embarrass the company and prejudice the interests of Beltana to force that issue; and, fourthly, because it is a retaliation for Beltana's issue of a statutory demand for costs which had been taxed and on which Beltana had issued a statutory demand.

(ii) The application by Beltana on March 18th, 2003 for an order that the petitioner give security within 21 days, that proceedings be stayed pending the provision of security and that the petition be dismissed in the event that Challe fails to provide the security ordered within the time limit.

(iii) The petitioner's application dated March 24th, 2003 for leave to amend, present and serve an amended petition and that provision be made for costs.

7 The facts surrounding the matter are these:

(a) T & T Nominees Ltd., the first defendant, holds 652 ordinary shares in Beltana. Tower Holdings Ltd., the second defendant, holds one share. These 653 shares are held on behalf of "The Habib Family Settlement" and are controlled by Mr. Habib. The petitioner holds the remaining 347 shares and it is owned and controlled by Mr. Darwish. This shareholding reflected the agreement of Mr. Habib and Mr. Darwish to hold Beltana in shares of 65.3% for Mr. Habib and 34.7% for Mr. Darwish, the running costs of Beltana to be shared proportionately.

(b) The underlying asset of Beltana is a land development in Spain held by Beltana's wholly-owned Spanish subsidiary, namely Las Colinas de Marbella S.A. ("Las Colinas").

(c) The directors of Beltana are Ms. Christine Lopez and Ms. Rosanna Duran. It is to be presumed that they were appointed by the shareholders or their properly appointed proxies and I make the point here that it is far

too late for anyone to complain about their (lack of) qualifications. The secretary of Beltana is T & T Management Services Ltd. Ms. Lopez and Ms. Duran are employees and form a part of a management structure set up by Messrs. Triay & Triay which is ultimately controlled by them. Thus Ms. Lopez signed the notice of an EGM on February 5th, 2003 as director of Beltana and sent it off to the petitioner under T & T Management Services Ltd. letterhead.

(d) On January 20th, 2003, the final costs certificate, in relation to the costs of the first (dismissed) petition, was issued by the costs judge in the sum of £84,000 and 6,000.

(e) On February 5th, 2003, an Extraordinary General Meeting was convened for March 4th, 2003. This EGM had been adjourned from November 18th, 1999 to transact the following business:

(i) to appoint new directors;

(ii) to appoint legal advisers;

(iii) to approve accounts; and

(iv) to discuss the status of Las Colinas pre-1993, and accounts prior to 1993.

No accounts were attached.

(f) On February 6th, 2003, Beltana issued a statutory demand on Challe for the payment of the taxed costs.

(g) On February 7th, 2003 Beltana received a statutory demand by Challe for the payment of £492,862 in respect of loans said by Challe to be repayable on demand.

(h) On February 13th, 2003, a meeting of directors was held to decide action in response to Challe's statutory demand. It was decided to call an EGM on February 21st, 2003 to recommend an increase in capital. I note at this stage the following observation by Lord Wilberforce in *Howard Smith Ltd.* v. *Ampol Petroleum Ltd.* (6) ([1974] A.C. at 832):

> "[S]uch a matter as the raising of finance is one of management, within the responsibility of the directors: [their Lordships] accept that it would be wrong for the court to substitute its opinion for that of management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."

(i) On February 19th, 2003, this EGM was adjourned to February 24th,

2003 to enable Mr. Fabian Picardo of Hassans to attend on behalf of Challe.

(j) On February 24th, 2003, a further request for adjournment was made by Challe.

(k) On February 24th, 2003, Challe requisitioned Beltana, under s.106 of the Ordinance, for an EGM.

(l) On February 24th, 2003 (the same day), Challe issued an application for a restraint order to prevent the EGM of February 24th, 2003 from taking place.

(m) On March 3rd, 2003, the meeting called for March 4th, 2003 was adjourned.

(n) On March 7th, 2003, Challe wrote to the directors of Beltana requesting that Triay & Triay cease to act for Beltana on the grounds of lack of independence on the part of the directors.

(o) On March 12th, 2003, T & T Management Ltd. convened the EGM requested by Challe under s.106 to be held on April 16th, 2003. The directors added in their covering letter: "The directors view your requisition as abusive in this respect."

(p) On March 12th, 2003, Messrs. Triay & Triay wrote to Hassans detailing their perception of the history of the matter.

8 There is no doubt that, following from *Henderson* v. *Henderson* (4), if a matter is resolved in a judgment, that firmly stops the point from being relitigated and any attempt to do so is a misuse (abuse) of process. A matter equally becomes a misuse of process if a point could fairly have been litigated in the previous action. In *Henderson* v. *Henderson*, Wigram, V.-C. said ([1843–60] All E.R. Rep. at 381–382):

> "I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

9 This was explained in *Barber* v. *Staffordshire C.C.* (1) by Neill, L.J., in a reference to the judgment of Stuart-Smith, L.J. in *Talbot* v. *Berkshire C.C.* (7), that the rule as stated in the *Henderson* case is in two parts ([1996] 2 All E.R. at 757):

> "'The first relates to those points which were actually decided by the court; this is res judicata in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of res judicata but rather is founded upon the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation . . .'
>
> In *Arnold*'s case the House of Lords considered what 'special circumstances' would allow the reopening of an issue which had already been decided inter partes. It was held that the doctrine of issue estoppel was not inflexible and a disputed issue can be reopened where it would in effect be an abuse of process if permission were refused."

10 A cause of action estoppel was defined by Diplock, L.J. in *Thoday* v. *Thoday* (8), referred to by Neill, L.J. in *Barber*, as follows (*ibid.*, at 755):

> "[A cause of action estoppel] is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the judgment . . . If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."

11 In the latest case cited to me of *Johnson* v. *Gore Wood & Co.* (5), Lord Bingham quoted, with approval, Auld, L.J. in *Bradford & Bingley Bldg. Socy.* v. *Seddon* (3) ([2002] 2 A.C. at 29–30):

> "In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum [of Sir James Wigram, V.-C. in *Henderson* v. *Henderson*]. The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances': see *Thoday* v. *Thoday* [1964] P. 181, 197–198, *per* Diplock L.J., and *Arnold* v. *National Westminster Bank plc*. [1991] 2 A.C. 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court

being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter."

For himself, Lord Bingham in his speech said (*ibid.*, at 30–31):

"It may very well be, as has been convincingly argued (Watt, 'The Danger and Deceit of the Rule in *Henderson* v. *Henderson*: A new approach to successive civil actions arising from the same factual matter' (2000) 19 CLJ 287), that what is now taken to be the rule in *Henderson* v. *Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *Henderson* v. *Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter . . . It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before . . . While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

12 Is Mr. Triay right when he submits that the petitioner is attempting to relitigate in the second petition that which was decided in the first? In my judgment, the second petition does not offend the first part of the rule in *Henderson* because the judgment in the first petition did not directly embrace the whole of the matters which were argued by counsel. In my judgment, I said:

". . . [T]he arguments have ranged very widely on several detailed issues, credibility, probity, clean hands, frittering assets and I do not propose to touch on them as it is unnecessary because Challe has not persuaded me there is a *prima facie* case."

13 I do not consider that because I held there was no *prima facie* case, *res judicata* applies. More serious in my view is the submission that,

having withdrawn its appeal, the second petition falls foul of the second limb of *Henderson*, *i.e.* as clarified in *Talbot* v. *Berkshire C.C.* (7) ([1993] 4 All E.R. at 13):

> "The second is not a true case of res judicata but rather is founded upon the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation . . ."

14 I am happy to accept in principle the submission of the petitioner's counsel to the effect that, subsequent to the first judgment, events have taken place which, similar as they might be to those canvassed in the first petition, may in the context of new circumstances take upon themselves a new cause of action. I consider, however, that the petitioner is estopped because the matters complained of in the second petition (and I include in this the proposed amended petition) are in essence no different from the first petition. It is my view that by withdrawing its appeal it is to be taken that the petitioner recognized that it did not make out a *prima facie* case. Mr. Hollington, Q.C. submits it does not matter why the appeal was withdrawn—so be it but, in my opinion, it has that effect. Testing the matter as Lord Bingham suggests in *Johnson* v. *Gore Wood & Co.* (5), leaves me in the same position. The only real new circumstance is the appointment of Deloitte & Touche, but in my opinion this has no impact on the estoppel point.

15 But even if I am wrong on that, it seems to me that cause of action estoppel arises out of the second judgment. I was, and am firmly convinced, that no court would criticize the judgment of the directors, honestly taken in the decision they took, having regard to the circumstances that were adumbrated and are reflected in the minutes which have been forcefully criticized by Mr. Hollington in this vein: the legal adviser to the company was not impartial; he is and was at the time a partner in the firm which acts for Mr. Habib in his affairs; Mr. Habib is the majority shareholder in Beltana; the directors of Beltana are employees of the management structures of Triay & Triay; they are accustomed to carry out Mr. Habib's instructions given directly or through agents; there is little indication from within the minutes themselves that the directors applied their mind individually to the matters purported to be considered; and the minutes read like a prepared document. I set out the minutes at this stage:

> "**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.
>
> **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 monies 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."

16 The minutes seem to me to be full and frank and the relevant matters are considered. Maybe they are not in the detail and with the approach indicated by Challe in its reply to the proposed EGM being held on February 24th, 2003, but I think I am justified on a reading of the minutes in thinking that those circumstances broadly were considered and the directors took a decision which the petitioner does not like. I do not understand the criticism Mr. Hollington makes as to the style and phrasing in which the terms of the minutes are couched. There seems to me to be nothing so wrong with them that can give rise to any implication. My only comment is that there is no formal record that the directors actually voted and accepted the recommendation of the chairman, but in my judgment that makes no difference. The only truly new circumstances are those which I have set out in para. 7 at (k), (m), (n), (o) and (p).

17 Standing back and looking at the matter at the present moment, with the benefit of considering the authorities which have been put before me, and having heard the arguments and considering the proposed amended petition, it is my judgment that, in effect, the petitioner is relitigating the same issue. This is because Mr. Dumas's assertion of lack of probity includes the nature of Mr. Habib's influence in all matters directly and indirectly in all spheres of the running of Beltana as well as Las Colinas, which in my first judgment I held to be intrinsically involved one with the other. Thus the matters alluded to by Mr. Hollington, that Messrs. Triay & Triay are the lawyers of Mr. Habib, that the directors of Beltana are intimately involved as persons owing their allegiance to Mr. Habib in T & T Nominees Ltd., Tower Holdings Ltd. and T & T Management Services Ltd., which is the secretary of Beltana of which Ms. Lopez is a signatory, that these companies are part of the Triay & Triay management set-up and the question of accounts and auditor, were argued by Mr. Dumas in a manner fully set out in my second judgment. I do not accept Mr. Hollington's submission that the second judgment does not afford grounds for *res judicata* because of its interlocutory nature on an *ex parte* application on notice. I agree with Mr. Triay that the petitioner, having appealed that decision, is bound by it until the Court of Appeal rules on it. Moreover, it seems to me that to proceed otherwise is to anticipate the ruling of the Court of Appeal in the pending appeal and this corresponds to Mr. Triay's observation that the hearing is but a pre-run of the arguments for the appeal. The matters alluded to as new in para. 7 at (m) to (p) are in my opinion but a new slant on the considerations that I took into account in the second judgment.

18 What is the effect of the argument in respect of collateral purpose which also gives rise to a dismissal of the petition? Strictly, having come to the conclusion that *res judicata* estops the petitioner, I need not address the matter. Notwithstanding that, I should say this. In *Re Bellador Silk*

(2), one reason why the case failed was ([1965] 1 All E.R. at 671–672, *per* Plowman, J.) that—

> "it became obvious during Moss Simmons' cross-examination that he did not really want the relief for which he was asking in the petition and that its real object was to achieve a collateral purpose, namely, to get some satisfaction in regard to the repayment to Bellador Ltd. or to the Simmons group of companies, of the outstanding loan. Indeed, he made no bones about this in the witness-box . . . A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that I would dismiss this petition."

I think that is good law in Gibraltar notwithstanding that Plowman, J.'s judgment was given in the context of s.210 of the Companies Act 1948.

19 So what is it that shows that the petitioner is pursuing its petition to wind up Beltana for a collateral purpose? Mr. Triay points to:

(a) The affidavit of Ms. Elizabeth Plummer of February 24th, 2003, in which she states, in para. 11(2), that the petitioner has made its wish known not to continue with its participation in Beltana.

(b) The attempt on and about April 26th, 2002, during the course of the first petition, to stop the completion of the sale by Las Colinas of part of the development project which would have prejudiced the interest of Las Colinas and thereby of Beltana.

(c) The riposte by the petitioner to the statutory demand of Beltana for its taxed costs by serving a statutory demand for the payment of £492,862 representing the loans advanced to Beltana as loan capital. This riposte is admitted by Ms. Plummer in para. 10 of her third affidavit of March 5th, 2003. The petitioner is claiming that the loan capital is re-payable on demand when the company refutes that claim because the loan was on long term to provide capital for the company.

(d) Attempting to compel Mr. Habib to purchase the petitioner's share by means of a petition which threatens the very existence of the company and which he submits will not place the petitioner in any better position to negotiate a sale on a winding up.

(e) The letter of Hassans of December 18th, 2002 is indicative of Mr. Darwish's wish to be bought out.

(f) Mr. Darwish has launched criminal proceedings in Spain.

20 It is my view that whether the above matters show that Challe's petition is motivated by collateral motives (though I am not sure that

there is at present any evidence to justify (f)) are matters of fact for resolution at a trial. I am mindful that there is an appeal against my decision of February 26th, 2003 and the result will have an impact on these proceedings. If the decision is reversed and as a result the petition goes forward, these collateral matters will be a matter for resolution on evidence at the trial.

21 In his written submission at para. 6.19, Mr. Triay argues that—"an injunction to restrain the holding of a general meeting has already been refused. Accordingly a petition for winding up on this same ground should be dismissed." There is a great deal of force in this, but it overlooks the appeal factor. In the event that the appellate court reverses my decision (and depending on the terms of that reversal), that might justify the petitioner's stance. I am of the opinion, therefore, that until the appeal is disposed of, I should not dismiss the petition. It will be axiomatic that if the Court of Appeal upholds the decision in the second judgment, I will reconvene to dismiss the petition.

22 As a consequence of the conclusion I have reached in para. 17 above, the application for leave to amend will also stand dismissed if the Court of Appeal upholds my decision. If the appellate court rules otherwise, the petition will proceed in the terms of the proposed amendment.

23 I do not propose to make any order for security at this stage. It seems to me that the proper course is to stay further proceedings in this petition until the appeal is heard.

Stay granted.
