

ROYAL COURT
(Samedi Division) 95.

22nd May, 1995

Before: The Deputy Bailiff and
Jurats the Hon. J.A.G. Coutanche and P. J. de Veulle

In the matter of Baltic Partners Limited and
in the matter of an application by Sparbanken
Sverige AB, Creditor, to declare the property
of Baltic Partners, Ltd en désastre under the
Bankruptcy (Désastre) (Jersey) Law 1990.

Advocate N. M. Santos-Costa for the applicant
Advocate M.S.D. Yates for the intervenor

JUDGMENT

THE DEPUTY BAILIFF: This is an application by Sparbanken Sverige AB
(publ) ("Sparbanken") a limited company incorporated by the
Kingdom of Sweden, to declare the property of Baltic Partners
5 Limited ("Baltic") en désastre. Baltic is a company incorporated
in Jersey on the 19th April, 1989, and its registered office is at
La Motte Chambers, La Motte Street, St. Helier. Sparbanken
conducts the business of bankers.

10 The application first came before this Court on Friday 12th
May during the Court's public business. The application was
strenuously opposed by Advocate Yates, who appeared for Baltic. We
adjourned the hearing to today, so that we could hear the
applicant and the objections to the application.

15 The application is made under Article 6 of the Bankruptcy
(Désastre) (Jersey) Law 1990 and by a statement and an affidavit
sworn by John Lennard Nordlund a senior Vice-President of
Sparbanken. The claim of the debtor is for 64,167,837 Deutschmarks
20 inclusive of interest to 5th April, 1995. Although rates of
exchange fluctuate rapidly this represented, at the best
calculation that could be made at 11th April, 1995, as being
equivalent to £28,559,656.

25 The affidavit of John Lennard Nordlund mentioned above sets
out the facts as understood by the applicant in this way:-

Scandinavian Partners Grundstuckgesellschaft mbH ("SPG") is a limited company incorporated in Germany having been transformed from a limited partnership according to German law on 1st March, 1994. In about 1989, SPG acquired directly or through its subsidiary company two substantial properties in Hamburg known as Chilehaus and Sprinkenhof. The total price paid for these properties was approximately 222,000,000 Deutschmarks. Chilehaus has since been sold by SPG and there the proceeds are held in cash. We were told that the cash secures warranties given to the purchaser of the property but we have no better information.

Mr. Nordlund alleges in his affidavit that mortgage funds from unspecified German banks totalling 100,000,000 Deutschmarks and a loan of 55,000,000 Swiss francs from a Swedish bank Skandinaviska Enskilda Banken ("S.E.Banken") bankers to SPG were given to assist with the refurbishment of the properties. The funds to purchase the properties and to make up any shortfall in the financial requirements of SPG have been provided by Baltic. These funds have apparently all been provided by share capital. We find this surprising.

Baltic presently owns 98% of the share capital of SPG and this according to Mr. Nordlund's affidavit and to the statement filed under the Law is the sole asset of Baltic. There are injunctions in place in Germany but again we were quite unable to weigh their efficacy in this Court.

In order to enable Baltic to provide the share capital to enable it to purchase the properties, Baltic borrowed funds from Sparbanken, S.E. Banken and from another Swedish financial institution called Gamlestaden AB ("Gamlestaden"). The borrowing from Sparbanken was provided on short term financing in an agreement dated 29th April, 1993. The loan amount was stipulated to be 56,000,000 Deutschmarks with interest at a fixed rate of 10%. Apparently, the maturity date was 30th August, 1993.

It seems to us that S.E. Banken could have made the application and we were concerned that because Sparbanken has 9.34% interest in Gamelstaden and S.E.Banken 29.72% interest in Gamelstaden, that there was some undisclosed reason for the form that the application took. Mr. Costa, however, has persuaded us today that there was no underlying motivation.

Baltic also entered into two loan agreements with Gamlestaden, both dated 18th June, 1992, one in the capital sum of 14,157,591 Deutschmarks and the other in the capital sum of 19,814,398 Deutschmarks. Apparently, and according to Mr. Nordlund's affidavit, (we could see no evidence of the undertaking) Gamlestaden undertook to make good the financial deficit of both Baltic and SPG by way of additional loans from time to time to Baltic. Again according to the affidavit, the

total amount currently due by Baltic to Gamlestaden is in excess of 90,000,000 Deutschmarks.

5 On 5th April, 1995, Sparbanken made a formal demand to Baltic
to repay the loan and interest outstanding which totalled
64,167,837 Deutschmarks, with interest running at 23,478
Deutschmarks per day. No repayment has been made to date, but on
10 the 18th April, that is the day before the deadline, a letter was
sent. It seems to us to be as clear and unequivocal an
acknowledgement of debt as this Court has seen. It reads:-

" BALTIC PARTNERS LIMITED

15 La Motte Chambers,
St. Helier,
Jersey,
JE1 1BJ.
Channel Islands.

20 Our Ref: MDEF/219C/JG/B1093

BY FACSIMILE AND MAIL

25 18 April 1995

Sparbanken Sverige AB (Forsta Sparbanken)
S-105 34 Stockholm,
Sweden.

30 For the attention of John Nordlund/Gunnar M Carlsson

Dear Sirs,

35 Loan Agreement number 859010795 - DM56,000,000
(fifty-six million Deutschmarks)

40 Further to your facsimilies of 5 and 10 April 1996,
we hereby confirm that we are actively pursuing all
courses of action with a view to repaying the above-
mentioned loan together with all outstanding interest
due.

45 Yours faithfully,
Baltic Partners Limited

Director"

50 We will deal with another letter, sent on the same day,
relevant to that letter, later on in this judgment.

On the face of it, Baltic is insolvent in that it cannot meet its obligations and debts as they fall due and there is a clear case for a declaration en désastre. In the Application of Rosedale (JW) Investments Ltd. re Barra Hotel & Others (30th March, 1995) Jersey Unreported, we said this at page 8:

"The test of insolvency in law appears to us to be that of a cash flow test and not a balance sheet test. The cash flow test is concerned with the payment of debts as they fall due; the balance sheet test requires account to be taken of liabilities both contingent and prospective. There are examples of the cash flow test in Article 56(a) of the Companies (Jersey) Law 1991 and of the balance sheet test in Article 56(b) of that Law. Both tests are described in Article 74(b) of the Law and in Article 176(6)(a) and (b). There are other examples. We do not need to cite them here. A clear explanation (if explanation should be needed) is found in the work "Principles of Corporate Insolvency Law" by R. M. Goode [1990] where at page 26 the author says:

"Under the cash flow, or commercial insolvency test, a company is unable to pay its debts as they fall due. For this purpose the fact that its assets exceed its liabilities is irrelevant; if it cannot pay its way in the conduct of its business it is insolvent, for there is no reason why creditors should be expected to wait while the company realises assets some of which may not be held in readily liquidated form. The cash flow test is relatively easy to apply in practice, for the Court looks at what the company is actually doing; if it is not in fact paying its debts as they fall due (ignoring cases where there is a bona fide dispute as to the indebtedness) it is assumed to be insolvent"."

Were it not for the intervention of Advocate Yates, we would have had little difficulty in granting the demande. Mr. Yates however brings forward matters which have not been declared in Mr. Nordlund's affidavit. There have been omissions, but Mr. Nordlund was present in Court and was prepared to give evidence. In our view, the omissions on Gamelstaden's troubled financial history were not relevant. The proceedings in Sweden had not been served by the Court, although they had been filed when Mr. Nordlund made his affidavit. We are not minded to penalize the applicant for lack of candour. Apparently, Gamlestad is owned by a consortium

of banks and Sparbanken and S.F.Banken are apparently members of the consortium. Mr. Yates gave us a very helpful breakdown of how the lending was formulated by the various companies. We are told that the action being taken by Sparbanken is because Gamlestaden has failed to fulfil its option to acquire Hengoed's 78% shareholding in Baltic. Hengoed is a company incorporated in Jersey. But as we see it, this is an internecine war between shareholders and despite Mr. Yates' most interesting argument, we cannot see that it is entirely relevant to the application. It is argued that Gamlestaden's failure in this regard and indeed its failure to fund the deficit in Baltic are in breach of contractual obligations that Gamlestaden has in respect of Baltic with Hengoed and maybe others. In consequence, Baltic and Hengoed have now filed suit against S.E.Banken, Sparbanken and Gamlestaden in Sweden. Mr. Yates argues that Swedish lawyers (that is lawyers acting for Baltic and Hengoed) have advised that they will succeed in these actions and if the declaration were declared we would have the position that the Viscount could be seized of an action where he would have to continue against the company which successfully applied for the *désastre* in Jersey. That may very well be so. But the applications have been filed only with the Gothenburg District Court. They have not yet been served and we were told that an action could take up to three years to resolve and in any event, there is clearly going to be dispute as to the correctness of their content. There is no doubt that the loan agreement is governed by Swedish law but only the Jersey Court, of course, can declare a *désastre* in this jurisdiction against a Jersey company. Article 3 of the Bankruptcy (Désastre) (Jersey) Law 1990 states that an application for a declaration may be made by a creditor of the debtor with a claim against the debtor of not less than such liquidated sum as shall be prescribed.

We have some sympathy with Baltic in regard to the historic situation where it appears that funding arrangements were made with a Swedish financial institution which subsequently found itself in very severe financial difficulties requiring banking and government intervention on a substantial level. Had that not happened, of course, we might not have had to sit on this matter today.

In the action filed in Sweden, but as we say not served, the grounds for claim of Baltic and Hengoed say this, and I quote from the declaration:-

"The grounds for Baltic's and Hengoed's claims are that Gamlestaden entered into a contract imposing an obligation on Gamlestaden as towards Baltic to cover all types of deficit in Baltic. There is a liquidity deficit corresponding to the principal loan sums due for repayment by Baltic to S.E.Banken and Sparbanken Sverige, and a liability to make

payment thus exists. Despite being urged to do so, Gamlestaden has refused to fulfil its obligations in this respect.

5 The grounds for Baltic's claim is that since
Gamlestaden does not need to book payments made
pursuant to the guarantee as liabilities, such
payments do not constitute any financial sacrifice
10 on the part of Gamlestaden. Hence, no claim on
Baltic arises."

In any event, Mr. Yates argues that the main asset of Baltic
is the remaining property in Hamburg, which he tells us is worth
15 some 300,000,000 Deutschmarks, thus far exceeding the total bank
borrowing. He further tells us that S.E. Banken have obtained an
injunction in Germany preventing any dealings with the remaining
property known as Sprinkenhof.

20 We found much of the facts of the case that we heard today
eminently confusing. The injunctions however are against the
shareholders and we were informed that there is nothing in law to
prevent SPG from selling the properties or in fact giving up the
cash if the warranties fall in.

25 We deliberately do not wish to involve ourselves in the
complexities of the inter-company borrowing as explained to us by
Mr. Yates, nor indeed in the refinements of Swedish or German law.

30 The letter of the 18th April that we have referred to earlier
is supported according to Mr. Yates by a letter sent that day from
Baltic to Gamlestaden and it reads:

35 " Loan from Sparbanken
DM 56,000,000 (fifty-six million
Deutschmarks

40 Under an Agreement, which is detailed in a letter
to Mr Tryggve Karlsten dated 11th May 1992 and
signed by your Mr Bjorn Tornvall, you are obliged
to meet all deficits incurred by this company.
Accordingly, we are hereby informing you that our
45 loan from Sparbanken in the sum of DM56,000,000 has
been called, and that we expect you to fulfil your
above-mentioned obligation immediately."

50 We could understand the argument contained in this letter
more clearly if it had been sent by Hengoed and had made reference
to the option agreement. To us, Baltic appears to be the subject

matter of the option agreement rather than a principal of the option agreement. We are not even convinced that the option agreement is so binding that it would have allowed us to regard it as a document which nullified the acknowledgement of the debt made in the letter of the same date. Mr. Yates, however, puts an alternative to us and he says that we have a discretion and can grant a stay and we assume that he was here referring to Article 6(1) of the Law.

10 That Article reads:-

"The Court after considering an application and the affidavit required by paragraph 3 of Article 3 to accompany it may make a declaration"

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and Article 6(2) of the Law reads:-

"The Court may at any time adjourn the hearing of an application for such term as it thinks fit and may require the applicant to furnish such further information as it may require."

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25 As we have said before, if we are to exercise a discretion we must exercise it judicially. It seems to us that we could grant an adjournment on the basis that technicalities have not been observed. We could grant an adjournment if the debtor could show to our satisfaction that the debt could be paid in full, and we could grant an adjournment on a matter of dispute to allow evidence to be called so that the Court had the fullest picture before it. Now, Mr. Yates made a very strong case to claim that the debt was heavily disputed, but the question that we have had to ask ourselves is by whom is the debt disputed. Baltic have unequivocally acknowledged that the debt is due and have shown us no indisputable evidence that they have assigned their obligation in law to a third party. Nor in fact do they appear to us to be able to enforce an action in law against a third party. There is in our view no link between the purported assignee and Sparbanken which enables Baltic to walk away from its clear obligation. On the facts as presented to us, we have no hesitation in granting the declaration made to us today by Sparbanken.

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Authorities

Bankruptcy (Désastre) (Jersey) Law 1990: Articles 3,6.

Application of Rosedale (J.W.) Investments re Barra Hotel & Ors.
(30th March, 1995) Jersey Unreported.