COURT OF APPEAL.

18th April, 1996. 75

Before: J.M. Collins Esq., Q.C., President,
R.C. Southwell, Esq., Q.C.; and
J.G. Nutting, Esq., Q.C.

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

Appeal by the Appellant against the Order of the Royal Court (Samedi Division) of 22nd May, 1995, declaring its property *en désastre*.

Advocate T.J. Le Cocq for the Appellant.
Advocate N. M. Santos-Costa for the Creditor Respondent.
The Viscount.

JUDGMENT

SOUTHWELL, J.A.: This is an appeal from a judgment of the Royal Court on 22nd May, 1995, declaring *en désastre* the property of Baltic Partners Limited (Baltic), a company incorporated in Jersey on 19th April, 1989, on the application of Sparbanken Sverige AB (Sparbank), a bank incorporated in Sweden.

Though Baltic and Sparbank initially intended to place before this Court a large quantity of documentary evidence, in the end they confined themselves to reference to the evidence which was before the Royal Court on 22nd May, 1995, with these exceptions:

(1) Reference was made to a later judgment of the Royal Court dated 30th October, 1995, in this matter.

(2) Sparbank sought and we gave leave to refer to a report made to the Viscount by accountants engaged by him, Deloitte & Touche, dated 2nd April, 1996.

I wish at the start of this judgment to pay a special tribute to Advocate Le Cocq (for Baltic) and Advocate Santos-Costa (for Sparbank) and to the Viscount for their most helpful, concise and

clear submissions, and responses to the many questions which I and the other members of the Court put to them.

I begin by briefly summarising the facts appearing from the evidence before the Court.

In 1989 Mr. Tryggwe Karlsten arranged for two substantial properties in Hamburg (referred to as Chilehaus and Sprinkenhof) to be bought by a German limited partnership, Scandinavian Partners Karlsten & Company KG (which can conveniently be referred to as SPG), for DM 222 million. Chilehaus has since been sold. When this matter was before the Royal Court it appeared that the proceeds of sale of Chilehaus were retained to secure warranties given to the buyer; but it now appears that the proceeds may have been distributed, principally to Mr. Karlsten, a matter to which I will return.

In 1989, as I have said, Baltic was incorporated in Jersey. The shares of Baltic were held as to 78% by Hengoed Limited (another Jersey company) and as to 22% by Gamlestaden Fastigheter AB (Gamlestaden). For convenience I use (as did the parties) the term "Gamlestaden" to include each of the companies in the Gamlestaden Group.

On 27th February, 1991, two agreements were entered into by Hengoed and Gamlestaden in relation to Baltic. The first was a shareholders' agreement, in which it was recited that *(inter alia)* the then ownership structure in the partnership of SPG was 73% for Mr. Karlsten, 22% for Baltic, and 5% for a Mr. Hansen. The second was an option agreement, by which Gamlestaden was given an option to take over Hengoed's 78% shareholding in Baltic between 1st July, 1994, and 31st December, 1998, provided that Baltic remained merely a 22% owner in the SPG partnership. If Gamlestaden exercised the option it was to lend or to procure the lending to Baltic of sufficient money to cover the financial deficit of Baltic regarding the acquisition of Sprinkenhof and Chilehaus down to 1st July, 1994. The option could be assigned by Gamlestaden, provided that the loan of DM 21 million by Gamlestaden to Mr. Karlsten was permitted to remain until 1st July, 1994. Both agreements were expressed to be governed by Swedish law, and the shareholders' agreement provided for arbitration according to Swedish law in Stockholm.

On 11th May, 1992, Gamlestaden wrote to Mr. Karlsten at SPG, in relation to the option agreement, confirming an earlier agreement that *(inter alia)* Gamlestaden was responsible for covering deficits in Baltic and SPG from 1989 to 1994 inclusive, which were to be covered by secured loans to Baltic.

On 29th April, 1993, Sparbank agreed to lend DM 56 million to Baltic, consolidating earlier loans. The agreement is in Swedish

and it is plain from its terms (and common ground between the parties) that it is governed by Swedish law.

It appears that on 1st July, 1993, SPG was converted from a German limited partnership into a German limited company, Scandinavian Partners Grundstuckgesellschaft mbH. At that stage certain moneys were released to Mr. Karlsten (and also to Mr. Hansen). The shareholdings changed from what had been the partnership shares, so that Baltic now held 98.4%, Mr. Karlsten 1.5% and Mr. Hansen 0.1%.

On 3rd August, 1994, Baltic wrote to Gamlestaden, relying on the agreement contained in the letter from Gamlestaden to Mr. Karlsten dated 11th May, 1992, and requiring Gamlestaden to repay a loan of DM 24 million by Skandinaviska Enskilda Banken ("SE Bank") to Baltic which was repayable on 30th June, 1994. Gamlestaden did not repay this loan.

On 2nd January, 1995, Mr. Vinge, a lawyer acting for Gamlestaden, wrote to Hengoed exercising the option (pursuant to the option agreement of 27th February, 1991) to buy Hengoed's 78% of the shares in Baltic at nominal value.

On 24th March, 1995, a Swedish lawyer, Mr. U. Stigare, acting for Hengoed, confirmed that Hengoed was willing to perform under the option agreement, provided that Gamlestaden first performed its obligation to cover the financial deficit in SPG of DM 12 million for 1992 and the deficit for 1994 as soon as it was established and confirmed by the auditors. On the same day (24th March, 1995) Mr. Stigare wrote to Mr. Vinge for Gamlestaden stating that, in view of Gamlestaden's failure to cover the 1992 deficit in SPG of DM 12 million, Baltic would consider arranging external financing of this amount.

Mr. Santos-Costa for Sparbank contended that the option agreement could not be effective, because Baltic's share in SPG had become 98.4% (rather than the specified 22%), without some further agreement between the parties.

But it is clear from these letters of 2nd January and 24th March, 1995, that the parties regarded the option as one which Gamlestaden could then validly exercise, provided (as Hengoed indicated) that Gamlestaden performed its obligation to meet the relevant deficits.

On 5th April, 1995, Sparbank demanded payment by Baltic of DM 64,167,837 (which was said to be, at 11th April, 1995, the equivalent of £28,559,656), and this demand was delivered by hand to Baltic's registered office in Jersey on 12th April, 1995.

On 18th April, 1995, Baltic wrote two letters to Sparbank and Gamlestaden respectively, the text of which is as follows:

First, the letter to Sparbank:-

"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".

Secondly, the letter to Gamlestaden:-

"Under an Agreement, which is detailed in a letter to Mr Tryggwe 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 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".

There followed a formal demande to the Royal Court by Sparbank (which was not dated) requesting that the property of Baltic be declared *en désastre*. This undated demande was supported by an affidavit of Mr. J. L. Nordlund, a vice president of Sparbank, dated 2nd May, 1995. There was a letter from Crill Canavan for Sparbank to Baltic of 10th May, 1995, giving notice of intention to apply to the Royal Court on 12th May, 1995, for the *déclaration en désastre*. In his affidavit Mr. Nordlund stated *(inter alia)* that (1) loans had been made by German banks and SE Bank to SPG, and other moneys needed by SPG had been provided by Baltic; (2) Baltic had no assets other than the shares in SPG; (3) Baltic had borrowed from Sparbank, SE Bank and Gamlestaden, all these loans being, he stated, due or overdue for payment; (4) demand had been made to Baltic by Sparbank for repayment and Baltic had not paid; (5) Baltic was insolvent.

It appears that at some time before this Gamlestaden's shares had become held by a consortium of banks set up to rescue Gamlestaden, the banks and their holdings being:

Sparbank:	19.8%
SE Bank:	17.3%
Handesbanken:	28%
Nordbanken through another entity:	35%

Questions have arisen as to the control of Gamlestaden, to which I will return later.

Faced with the demande in the Royal Court, and the threat that the property of Baltic might be placed *en désastre* on 12th

May, 1995, Hengoed and Baltic responded by commencing two actions in the Gothenburg City Court in Sweden on 11th May, 1995. I observe that (1) it was remarkable that Mr. Stigare on behalf of his clients was able to draft the necessary proceedings so quickly; (2) this response by means of the Swedish actions could not have been unexpected by Sparbank; and (3) the proceedings were plainly brought in Sweden because of the domicile of the defendants in Sweden and the fact that the relationships between them, contractual and/or delictual, were all governed by Swedish law.

In the first Swedish action the plaintiffs were Baltic and Hengoed and the defendants Gamlestaden and an associated company. In this action the plaintiffs contend *(inter alia)* that:

(1) Gamlestaden have duly exercised on 2nd January, 1995, the option to buy 78% of the shares in Baltic from Hengoed; it is a condition of the exercise of the option under the option agreement of 27th February, 1991, that Gamlestaden would lend or procure the loans to Baltic of sufficient money to cover Baltic's deficit down to 1st July, 1994; but Gamlestaden have failed to perform these obligations from 1992 paying interest on Baltic's loans from SE Bank and Sparbank but not the principal.

(2) SE Bank had applied for an attachment order in respect of Baltic's assets in Germany.

(3) The consortium of banks (including SE Bank and Sparbank) owns and controls Gamlestaden.

(4) It is understood that the banks have agreed that, if any of the banks wishes to invoke a guarantee given by Gamlestaden in respect of Baltic's loans, such bank must make a corresponding contribution to Gamlestaden which will not be booked as a liability by Gamlestaden.

(5) Gamlestaden's breach of contract in failing to pay the principal of Baltic's loans is a consequence of the control exercised by the banks over Gamlestaden.

(6) Gamlestaden should be ordered to pay to Baltic a sum corresponding to the amounts due to SE Bank and Sparbank, and it should be declared that Baltic is not liable to Gamlestaden in respect of such amounts when paid by Gamlestaden.

(7) The two actions should be tried together.

In the second Swedish action the plaintiff was Baltic and the defendants SE Bank and Sparbank. The contentions of Baltic are similar to those in the first action. Baltic claimed a declaration that it is not liable to SE Bank and Sparbank in respect of the loans those banks have made to Baltic.

The grounds for the claims against these two banks are of some importance, and I quote them in full.

> *"1. SE Banken and Sparbanken Sverige individually and jointly exercise effective control over Gamlestaden. Gamlestaden has committed a breach of contract against Baltic. The breach is a serious one. SE Banken and Sparbanken Sverige have deliberately or negligently contributed to Gamlestaden's breach and Baltic thereby has a counterclaim amounting to at least the same sum as the banks' claims on Baltic. These are to be set off against each other.*
>
> *2. It has been open to SE Banken and Sparbanken Sverige to receive full payment from Gamlestaden in respect of their loans to Baltic but they have refrained from even requesting payment from Gamlestaden. SE Banken and Sparbanken Sverige have thereby failed to fulfil their duty to minimise their loss, which loss would otherwise not have occurred in relation to Baltic. SE Banken's and Sparbanken's Sverige's entitlement to payment from Baltic has therefore been forfeited".*

On the same day (11th May, 1995) an affidavit was sworn by Mr. Stigare on behalf of Baltic and Hengoed exhibiting the pleadings in the two Swedish actions together with documents appended to those proceedings to which I have already referred.

The application to the Royal Court was adjourned from 12th May to 22nd May, 1995.

On 12th May, 1995, an affidavit was sworn by Mr. M.D. de Figueiredo, a director of Baltic, in which he stated that he had been advised by Baltic's Swedish lawyer that Baltic has a complete defence to Sparbank's claim, and this is the subject of the Swedish actions. He also exhibited three letters from Ogier and Le Masurier for Baltic to Crill Canavan for Sparbank seeking an adjournment. In the third of these letters attention was drawn to the fact that Mr. Nordlund had not referred in his affidavit to the exercise of the option by Gamlestaden in January 1995 or to the banks' ownership of Gamlestaden.

On 17th May, 1995, an affidavit was delivered by Mr. Vinge, the Swedish lawyer acting for Gamlestaden. He referred to, but did not exhibit, letters dated 26th October, 1994, and 8th March, 1995. He stated that the extent of the liability of Gamlestaden under the option agreement was subject to dispute between the parties, and expressed his opinion that:

"any liability which may exist under the agreements with Hengoed Ltd will have the effect of an indemnity of Baltic's liability only, and will not remove a principal liability towards the banks from [Baltic]".

On 19th May, 1995, Mr. Stigare delivered a second and much longer affidavit. In this he set out a number of relevant facts, and a number of arguments and conclusions under Swedish law. He referred to:

(1) Gamlestaden's obligation to make good the financial deficit of Baltic and SPG.

(2) Sparbank's nearly 20% shareholding in Gamlestaden.

(3) The release of Gamlestaden's guarantees to SE Bank and Sparbank.

(4) The decision of the shareholders of Gamlestaden to "shift out" most of Gamlestaden's remaining credit commitments and assets to the members of the consortium of banks in their capacity of pledgees, the refusal of the banks to disclose the "shift out" agreement, and the effect of such an agreement under Swedish law.

He expressed the opinion that in the two Swedish actions and under Swedish law it could be argued successfully that Baltic is not obliged to pay Sparbank, for a number of different reasons.

On 22nd May, 1995, the Royal Court gave judgment in favour of Sparbank and declared the property of Baltic *en désastre* under the Bankruptcy (Désastre) (Jersey) Law, 1990 (the 1990 Law). I will return later to consider this judgment in some detail.

On 14th June, 1995, the directors of Baltic gave notice of Baltic's appeal from the Royal Court. Their appeal is now limited to seeking an order recalling the *déclaration en désastre*. They also issued a summons for a stay pending the appeal, but this was not pursued.

Further steps were no doubt taken in the two Swedish actions, but the parties have elected not to seek to refer to the relevant documents before this Court.

In early October, 1995, by an undated representation the Viscount informed the Royal Court that he had withdrawn instructions from Mr. Stigare, and in the light of advice received from his Swedish lawyers, Advokatfirman Lindahl, he sought a direction to withdraw Baltic from the two Swedish actions. The advice given by Lindahl is summarised in the Royal Court's judgment, in which the Royal Court agreed with the Viscount's recommendation that Baltic should withdraw on the terms advised by

Mr. Vinge and Lindahl. The advice as set out in the judgment (and this Court was not asked to examine the relevant letters of advice and affidavits) can be summarised in this way:-

(1) The facts relied on and the claims made in the two Swedish actions are identical or based on substantially the same grounds.

(2) A successful outcome for Hengoed in the first action would lead to Gamlestaden paying off the loans to Baltic by SE Bank and Sparbank, so that Baltic would be the beneficiary of the action.

(3) The Swedish lawyers expressed considerable uncertainty whether Baltic has any right to claim under the option agreement between Hengoed and Gamlestaden as a third party beneficiary.

(4) Nothing would be lost by withdrawal. If the present appeal succeeded, Baltic could return to the actions. If the present appeal failed, Baltic would have avoided liabilities for costs.

The Report by Deloitte & Touche (D & T) dated 2nd April, 1996 was helpfully placed before us by the Viscount. D & T examined the position relating to SPG and its two Hamburg properties and reported on its examination. Their report was expressed to be a preliminary one, based on limited information, and subject to several other *caveats*. In relation to the Chilehaus property they found that after receipt of the proceeds of sale nearly DM 104.5 million were withdrawn from the partnership by Mr. Karlsten, and over DM 8 million by Mr. Hansen. In relation to the Sprinkenhof property, this had been revalued at DM 280 million, the unrealised gain on revaluation had been allocated to the partners in SPG, and appeared in part to account for the total withdrawals by Mr. Karlsten and Mr. Hansen already referred to. At 1st July, 1993, SPG became a limited company, and Baltic's share of the share capital was increased from 22% to 98.4%, the shares of Mr. Karlsten and Mr. Hansen being reduced to only 1.5% and 0.1% respectively. The inference may reasonably be drawn that these changes in their respective shares reflected the effect of the withdrawals by the two individual partners. The conclusion of D & T was that the two individuals had received large sums of money out of SPG, while (and I quote):

> *"Baltic is left with the majority share of a depreciating asset and the majority of the losses incurred after 30th June, 1993".*

It is against this factual background that I now turn to consider the issues raised on this appeal.

Locus standi

The first issue is whether Baltic acting through its directors can appeal to this Court with a view to having the *déclaration en désastre* set aside.

Mr. Santos-Costa for Sparbank contended that, once a company's property is placed *en désastre*, the directors have no power to act on the company's behalf, even to appeal against the *déclaration en désastre*. He relied in this regard on the provisions of the Bankruptcy (Désastre) (Jersey) Law 1990, and in particular on:

(1) Article 8 (1) and (2) by which the property and powers of the company vested in the Viscount immediately upon the making of the *déclaration* comprise (a) all property belonging to or vested in the company at that date, and (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of any property as might have been exercised by the company itself for its own benefit at that date.

(2) Article 18 by which the company is placed under stringent duties to assist the Viscount in getting into his possession or control all the company's property.

(3) Article 26 which sets out the Viscount's general powers in relation to property of the company *en désastre*.

He referred to the decision of the Royal Court in Royco Investment Company Ltd (en désastre) (27th June, 1994) Jersey Unreported. That case concerned directions to the Viscount in respect of property of a company five years after it was declared *en désastre*, and does not, in my view, assist us. He also referred to Articles 149, 163 and 166 of the Companies (Jersey) Law, 1991 concerning companies in liquidation, but again these do not, in my view, assist.

As the Viscount rightly pointed out, the 1990 Law is not a codifying Law, and, except to the extent that express provision is made in the 1990 Law, the existing common law of Jersey concerning *déclarations en désastre* remains in force.

In Minories Finance Ltd -v- Arya Holdings Ltd (28th April, 1994) Jersey Unreported this Court had to consider questions arising as to a company declared *en désastre* before the 1990 Law came into force. It was there contended that the company was unable to take any steps to have the *déclaration en désastre* recalled because *(inter alia)* the directors were unable to act on its behalf, and accordingly causes of action in relation to the alleged wrongful placing *en désastre* were not barred by prescription. In my judgment (which was the judgment of this

Court) I decided that a company could immediately apply for the *désastre* to be recalled (referring to the case of d'Allain -v- de Gruchy (1890) Ex. 196) just as an individual could who had been declared *en désastre,* and that this right to apply is confirmed in Article 7 of the 1990 Law. I also stated (at page 14 lines 44-45) that:

> ***"The application could be made on the company's behalf by the directors or shareholders".***

In my judgment that conclusion is both binding in the present case and right. It would not accord with elementary requirements of justice if, when a company has wrongly been declared *en désastre,* the directors as the directing minds of the company could not take steps on behalf of the company in legal proceedings to have the wrongful *déclaration* recalled. In the present case the directors on Baltic's behalf have appealed against the Royal Court's order, as they are equally entitled to do. I do not accept Mr. Santos-Costa's submission that this involves the directors intermeddling with the company's property. On the contrary the directors are seeking to establish whether or not the property of the company has been correctly vested in the Viscount by virtue of the *déclaration en désastre.* I also do not accept his submission that the taking of this step by the directors is inconsistent with the provisions of the 1990 Law which I have mentioned.

Mr. Santos-Costa sought to distinguish (1) cases in which the *déclaration* is made *ex parte* (and in which he submitted the directors might still retain power to act) from (2) cases such as the present case in which the *déclaration* is made *inter partes* (and in which he submitted the directors would no longer have any power to act). In my judgment this distinction fails to take account of the common denominator as between an *ex parte* and an *inter partes* application, that the effect of the order would be the same in either case, the vesting of the property of the company in the Viscount.

The preconditions for a *déclaration en désastre*.

At common law the preconditions for such a *déclaration* were that (1) the creditor had a valid liquidated claim against the debtor; (2) the debtor to the best of the creditor's knowledge and belief was insolvent, but had realisable assets, and (3) the creditor verified these matters by affidavit (see page 3 of my judgment in the Minories case). Article 3 of the 1990 Law provides *(inter alia)* that an application for a *déclaration* 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. The creditor's claim will usually have been established by a judgment of a competent court, often a summary judgment. A judgment is not

a precondition. But if the creditor does not have a judgment in his favour, there must nevertheless be a liquidated sum undoubtedly due and payable by the debtor. The indebtedness must be certain, and not the subject of genuine dispute and arguable defence, set off or counterclaim. The indebtedness must be such as could form the basis of an immediate summary judgment.

The issues on this appeal have revolved round this precondition, and whether (1) Sparbank can meet the precondition, or (2) Baltic can show that the precondition has not been met.

With regard to defences of set off or compensation under Jersey Law, the requirements were stated by the Privy Council in Dyson & Anor. -v- Godfray (1884) 9 AC 726. It was there held that a claim by way of compensation or set off is admissible as a defence when it is for a demand which is termed "liquid". I quote the relevant passage at page 731:

> ***"According to these authorities, a claim by way of compensation is admissible when it is for a demand which is termed liquid. Perhaps the best definition of what may be called a liquid demand is found in Pothier, Obligations, 1st vol., part 3, chapter 4, paragraph 628: "Il faut que la dette qu'on oppose en compensation soit liquide. Une dette est liquide lorsqu'il est constant qu'il est dû, et combien il est dû, cum certum est an et quantum debeatur. Une dette contestée n'est donc pas liquide, il ne peut être opposée en compensation, à moins que celui, qui l'oppose, n'en ait la preuvre à la main, et ne soit en état de la justifier promptement et sommairement". The Courts of Jersey ought to have ascertained whether this was a liquid demand in that sense. If they had found that it was a demand made for the purpose of delaying payment of the sum sought in the action, that would be a good ground for dismissing it. On the other hand, if they thought that the objections to it were frivolous, that would be a ground for dismissing the objections. Again, if they came to the conclusion that, instead of being an admitted debt, or a debt capable of being readily proved, it raised a question which would give rise to serious litigation, it would not properly come under the head of a liquid demand".***

Another phrase used by the Privy Council (see page 732) is debts ***"incontestées ou du moins incontestables"***.

The test for a liquidated claim under Article 3 of the 1990 Law is no less rigorous.

Swedish law

As I have already indicated, all the relevant relationships in this case, whether contractual or delictual, are governed by Swedish law. Swedish law is, in the Courts of Jersey, a matter of fact, to be established in the first place by evidence on affidavit. We have the benefit of the pleadings of Baltic and Hengoed in the two Swedish actions, and two statements or affidavits of Mr. Stigare on behalf of Baltic and one of Mr. Vinge on behalf of Sparbank. What we have to decide is whether the matters set out in these pleadings, viewed in the light of the evidence of the Swedish lawyers, show that Baltic has an arguable defence, whether by way of set off or otherwise.

The defences put forward by Baltic

Prima facie the pleadings together with Mr. Stigare's evidence show that under Swedish law Baltic does have such defences. For example, looking at the grounds for the claims in the Swedish action against Sparbank and SE Bank (which I have already quoted) it is alleged by Baltic that Gamlestaden is in breach of contract against Baltic because Gamlestaden has failed to cover Baltic's deficits which are represented by the loans from the banks. This involves the question whether Baltic has a right to treat Gamlestaden as being in breach of a contractual obligation owed to Baltic, either directly or as a third party beneficiary, under the option agreement. In his second affidavit Mr. Stigare expresses the opinion that under Swedish law it could be successfully argued that there was a breach of such an obligation owed to Baltic. It is then alleged that by virtue of the control over Gamlestaden's affairs, which Sparbank as a member of the banking consortium owning the shares of Gamlestaden was able to exercise, Sparbank *"deliberately or negligently contributed to Gamlestaden's breach"*, and Baltic is able to claim, by way of set off and counterclaim against Sparbank, an amount equal to the debt owed by Baltic to Sparbank.

Mr. Santos-Costa vigorously submitted that Sparbank, holding only 19.8% of Gamlestaden's shares, obviously could not control Gamlestaden's conduct. It may ultimately be found that he was right. On the other hand it may ultimately be found that as a member of the banking consortium owning Gamlestaden's shares Sparbank could and did exercise a relevant degree of control either alone or with the other banks in the consortium in the respects relevant to Baltic's claim. At this stage, and on the evidence before the Royal Court and before this Court, this Court could not reach any conclusion as to which of these propositions is the correct one, or conclude that the proposition for which Baltic contend is so improbable as to be capable of being ignored. The issue as to control is one of mixed fact and Swedish law, and will fall to be determined by the Swedish Courts.

Another way in which a defence is put forward by way of claim by Baltic in the second Swedish action is that, because Sparbank

has failed to secure payment by Gamlestaden or even to request such payment (in circumstances in which Sparbank may be obliged to put Gamlestaden in the necessary funds), Sparbank has failed to minimise its loss, as required under Swedish law, and Sparbank's entitlement to repayment of its loan to Baltic has been forfeited under Swedish law. This approach is also described by Mr. Stigare in his second affidavit as one which could, in his opinion, be successfully argued in the Swedish action under Swedish law. I can see no way in which this Court, at this stage, on the evidence now before it, could conclude that Mr. Stigare is obviously wrong. This Court can only conclude on the evidence before it that the point is an arguable one under Swedish law.

Mr. Stigare in his second affidavit sets out other ways in which, in his opinion, under Swedish law Baltic can argue successfully that it is not bound to pay Sparbank. But in my judgment it is unnecessary to deal with each of these in addition to the defences pleaded by way of claim in the pleading in the second Swedish action.

Mr. Santos-Costa subjected the pleading and Mr. Stigare's affidavit to vigorous textual and other criticism. This might have carried more force if the pleading and the affidavit had not had to be prepared within a remarkably short time. But in my judgment none of the criticisms carried Mr. Santos-Costa's points far enough for him to make good his submission that this Court should reject the matters pleaded in the Swedish action, or expressed as Mr. Stigare's opinion, out of hand.

It is important in this connection to keep in mind that in the Swedish law affidavit on which Sparbank relied, that of Mr. Vinge:

(1) there is no suggestion that a Swedish Court would reject out of hand the matters relied on by Baltic under Swedish law;

(2) it is accepted that the extent of Gamlestaden's liability is subject to dispute "between the parties involved", which must include Baltic as a disputing party and Gamlestaden's potential liability to Baltic for breach of contract as a matter in dispute;

(3) the only firm expression of opinion is that Gamlestaden's liability under the agreements with Hengoed is no more than a liability of an indemnifier or guarantor, leaving Baltic liable as the principal debtor to Sparbank, but it is not suggested that the contrary is not reasonably arguable as Mr. Stigare indicates.

Mr. Santos-Costa's submission that any form of set off alleged to be available to Baltic is "spurious" under Swedish law is not supported by any Swedish law evidence placed before the Court. He may or may not ultimately be found to be right in this

submission. But on the evidence before this Court that submission is not made good.

Mr. Santos-Costa placed great weight (as did the Royal Court) on the terms of Baltic's letter to Sparbank of 18th April, 1995, (which I have already quoted in full) as an acknowledgment or acceptance or admission of liability to Sparbank. Under Jersey law that letter would not amount to more than a rebuttable admission, rebuttable for example by reliance on relevant causes of action or defences available under Swedish law after advice on Swedish law had been obtained from Mr. Stigare. This Court has to look at the letter in the context of all the evidence now before it, and in that context it cannot, in my judgment, be concluded from its terms that there is no arguable basis of defence.

Mr. Santos-Costa accepted that, if there is a *bona fide* dispute as to whether the debt is due and payable to Sparbank, then the precondition to the making of a *déclaration en désastre* is not satisfied. Accordingly he further submitted that the Swedish actions (and the affidavit of Mr. Stigare in support of these actions) are not *bona fide* and are a sham concocted in an attempt to prevent Sparbank putting the property of Baltic *en désastre*.

Allegations of fraud or dishonesty or lack of good faith are not to be made lightly in the Courts of Jersey. They are to be made only in specific and clear terms and with the support of credible evidence.

In this case the allegations of lack of good faith appeared in Sparbank's written case. They were there set out in general and not in specific terms. Use of words such as *"preposterous"* (in paragraph 5.2 of Sparbank's case) and *"a nonsense"* (in paragraph 5.9 of its case) does not assist. The evidence which I have already considered (with one exception) does not show a lack of good faith on the part of Baltic, and Mr. Santos-Costa expressly disclaimed any attack on the good faith of the directors of Baltic. The furthest that that evidence (such as the letter of 18th April, 1995) could be said to go is to indicate that Baltic's arguments <u>may</u> not ultimately succeed. But this Court cannot now conclude that Baltic's arguments are not reasonably arguable or that they cannot ultimately succeed.

The only evidence which I have not yet considered, and on which Mr. Santos-Costa placed perhaps the most reliance, is the report of D & T. But the matters set out in that provisional report, in so far as they provide material for attack by Sparbank, raise questions as to the conduct of Mr. Karlsten and Mr. Hansen, not that of Baltic acting by its directors, against whom no such attack is made, and who are not said to be controlled by Mr. Karlsten.

I now turn to the judgment of the Royal Court. As appears from what I have already said, I have concluded that the Royal Court reached the wrong conclusion that the precondition of an incontestable liquidated claim had been met. This appears to have flowed from the failure of that Court to appreciate that all the relevant relationships are governed by Swedish law and not by Jersey law. This led the Court to ignore all questions involving determination of the relevant Swedish law. The Royal Court at page 6 lines 26-28 said this:

> ***"We deliberately do not wish to involve ourselves in the complexities of the inter-company borrowing as explained to us by Mr. Yates*** [who was then appearing for Baltic], ***nor indeed in the refinements of Swedish or German law".***

The failure to appreciate that the Court was bound to involve itself in consideration of the relevant Swedish law (which, as I have said, is a matter of fact for the Courts of Jersey) was in my judgment one of the principal respects in which the Royal Court erred.

Another respect in which that Court erred was in placing undue weight on the letter of 18th April, 1995, from Baltic to Sparbank, and in failing to place that letter in the context of the other letter of the same date from Baltic to Gamlestaden, and of the Swedish actions and Mr. Stigare's affidavit.

The Royal Court placed considerable weight on the facts that the Swedish actions had only been commenced on 11th May, 1995, and, as the Court appears to have been told without any evidence being adduced, that the pleadings had not yet, by 22nd May, 1995, been served by the Gothenburg City Court on Gamlestaden, Sparbank and SE Bank. There is no evidence before this Court, in April, 1996, as to when the proceedings were served. In my judgment there is nothing in the point that the proceedings were not commenced by Baltic in Sweden until Baltic had been told that an application to have Baltic's property declared *en désastre* would be made in Jersey.

On page 7 of its judgment the Royal Court raised the question: ***"...by whom is the debt disputed?"***, and answered this question in this sentence (at lines 34-37):

> ***"Baltic have unequivocally acknowledged that the debt is due and shown us no indisputable evidence that they have assigned their obligation in law to a third party".***

This sentence is in my view erroneous in three respects:

(1) The acknowledgment in the letter of 18th April, 1995, cannot be viewed in isolation, and is in any event entirely consistent with at least the ways in which (a) Baltic puts its claim against Sparbank, the delictual claim under Swedish law that Sparbank induced a breach by Gamlestaden of its obligations to Baltic, and (b) Baltic contends that by failing to mitigate its loss Sparbank has forfeited its claim.

(2) It was not for Baltic to show "indisputable evidence". Once Sparbank had shown a debt *prima facie* due and payable by Baltic, it was for Baltic to show that it had a reasonably arguable defence whether by set off, counterclaim or otherwise. On the evidence before the Royal Court, Baltic showed that it had reasonably arguable defences, as to which Mr. Stigare expressed the opinion that they could be successfully argued in the Swedish Courts. It was then for Sparbank to show that Baltic's *prima facie* defences were in truth not reasonably arguable. This Sparbank did not even attempt to do. The short affidavit from Mr. Vinge does not constitute any such attempt, as I have already indicated. Sparbank chose not to seek to place before this Court any of the substantial body of evidence prepared since the hearing before the Royal Court. Accordingly this Court is not now in a position, as the Royal Court was not in May, 1995, in a position, to reject Baltic's defences under Swedish law as not reasonably arguable.

(3) The reference to an assignment by Baltic does not correctly reflect the nature of the defences which Baltic's Swedish lawyer has formulated.

I have also taken full account of the further Swedish law advice provided to the Viscount and of all the submissions by Mr. Santos-Costa directed to the proposition that Baltic's suggested defences are spurious, a sham, and effectively non-existent.

In summary, before an individual or a company is placed *en désastre*, the Jersey Courts must be satisfied that there is a clear liquidated claim to which there is no reasonably arguable defence. In the present case Sparbank has failed to adduce evidence, whether of fact or of Swedish law, which goes to show that the suggested defences are spurious.

Ultimately, Sparbank may well succeed. But at this stage Sparbank has not made out a sufficient case for a summary judgment or for the exercise of the even more draconian power to declare Baltic *en désastre*. In my judgment, therefore, on the evidence before this Court, which is (save for the D & T report and the judgment of the Royal Court of 30th October, 1995) the same as the evidence before the Royal Court:

(1) Sparbank did not and does not now have a liquidated claim sufficient for the purposes of causing Baltic's property to be declared *en désastre*.

(2) The Royal Court erred in concluding that there was a liquidated claim sufficient to justify declaring Baltic's property *en désastre*.

(3) The appeal of Baltic against the order of the Royal Court should be allowed, and the *déclaration en désastre* recalled.

COLLINS, J.A.: I agree.

NUTTING, J.A.: I agree.

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