



No. 314 & 316

In the Court of Appeal of Guernsey

(Civil Division)

The 5th day of July, 2002 before Sir John Grenfell Nutting, Bt, Q.C., presiding,
Christopher Simon Courtenay Stephenson Clarke, Q.C., and Patrick Stewart
Hodge, Q.C.

(Civil Appeal 314)

(1) SIMON REID

(2) JULIAN BRYSON

(3) JAMES SPICKERNELL

(Founders/Appellants)

V.

EUROPEAN INTERNET CAPITAL LIMITED

(EIC/Respondent)

(Civil Appeal 316)

SIMON DALE REID

(Appellant)

V

(1) EUROPEAN INTERNET CAPITAL LIMITED

(EIC/First Respondent)

(2) MITEM INTERNATIONAL LIMITED

(Second Respondent)

(3) MICHAEL TEMAN

(Third Respondent)

(4) JEREMY LEE-BARBER

(Fourth Respondent)

(5) PAUL MARTIN

(Fifth Respondent)

In the matter of the above appeals from the decisions of the Royal Court on 2nd and 3rd May, 2002, and on 31st May, 2002 respectively;

THE COURT, having on 3rd and 4th July, 2002 heard Advocate J. P. Greenfield and G. S. Dinning for the Appellants, N. J. Barnes for EIC and R.I.C.E Harris for the Second, Third, Fourth and Fifth Respondents, thereon, GAVE JUDGMENT in the terms attached hereto and

- (i) HELD that there was no excess of power, or impropriety, in the Board of EIC initiating the English proceedings and seeking an interlocutory injunction to prevent the removal of the existing directors;
 - (ii) UPON THE UNDERTAKING given by Advocate Barnes on behalf of EIC and its existing directors
 - (a) that the Board of EIC would appoint with all practicable speed as additional directors Mr. Laker and Ms Green;
 - (b) that the Board of EIC would also appoint with all practicable speed a third additional director who would be agreed by the parties, which failing be nominated by the Guernsey Financial Services Commission whom failing by the Royal Court and;
 - (c) that before perfecting the appointments, EIC will apply for the consent of the Guernsey Financial Services Commission to the appointment of the additional directors in order to comply with the conditions of its licence;
- PRONOUNCED an interim injunction against the Appellant Mr. Reid, C. L. Nominees Limited, Berdino International Limited and Lambrini Limited restraining them until further order of the Royal Court from convening a

general meeting of EIC with the purpose of removing Mr. Taureau or Mr. Pinot- Noack as directors of EIC; and

- iii) ORDERED that EIC pay the costs incurred by the Founders in relation to the hearings in the Royal Court on 2nd, 3rd and 31st May, 2002, such costs to be calculated on the ordinary basis, and FURTHER ORDERED otherwise that each party shall bear its own costs.



Registrar of the Court of Appeal

REID et al

V

EUROPEAN INTERNET CAPITAL LIMITED et al

Judgment in Civil Appeals 314 and 316 delivered on 5th July, 2002

HODGE JA:

The Appeals

1. These are two appeals relating to the company, European Internet Capital Limited ("EIC"), a Guernsey company which was incorporated on 3 March 2000 to invest in the then burgeoning internet business.
2. The first appeal is an appeal by Messrs Reid, Bryson and Spickernell ("the Founders") against judgments of the Lieutenant Bailiff dated 2 and 3 May 2002. In the first judgment, on an application by EIC, the Lieutenant Bailiff granted an interim injunction against the Founders from holding an extraordinary general meeting ("EGM") of EIC on 3 May but dismissed the application so far as it related to holding an EGM on any other date. In the second judgment the Lieutenant Bailiff refused the Founders' application to set aside the order of 2 May but varied the order to allow the EGM to be held solely for the purpose of adjourning it.
3. The second appeal is an appeal by Mr Reid, one of the Founders, against a decision of the Deputy Bailiff dated 31 May 2002 in which, on an application of EIC, he restrained certain shareholders of EIC, including Mr Reid, from convening an EGM of EIC on 6 June 2002. The Deputy Bailiff refused Mr Reid's application to appeal his decision. Before the hearing on 31 May the Deputy Bailiff also granted the application of four shareholders in EIC, Mitem International Limited ("Mitem"), Mr Teman, Mr Lee-Barber and Mr Martin ("Mr Lee-Barber and Others") to be joined as additional defendants in the second application.
4. On 17 June the Bailiff sitting as a Single Judge of the Court of Appeal granted Mr Reid leave to appeal the Deputy Bailiff's decision of 31 May to grant the interim injunction and directed that the first and second appeals be heard together.
5. A considerable number of affidavits and documents (including pleadings in an English litigation) have been produced in support of the parties' contentions in the appeals. But as the Court is dealing with interim injunctions, the evidence of fact has not been tested. The following factual summary therefore is derived from the affidavits and documents but contains statements which may be contested in future hearings.

Factual background

6. The story begins with the incorporation of EIC Services Limited ("Services") in England on 8 April 1999. Mr Spickernell and Mr Bryson were involved in the incorporation of Services or acquired the company shortly after incorporation and asked Mr Reid to become involved in the business plan for the development of that company. Mr Reid joined Mr Spickernell and Mr Bryson as a director of Services on 12 November 1999.
7. Services initially had two subscriber shares of £1 each but in July 1999 each of the £1 shares was divided into 100 ordinary shares of 1 penny each. Further ordinary shares with an aggregate nominal value of £1,103.20 were issued at par on 12 November 1999 ("the November 1999 shares") to persons including Mr Reid and two companies, Berdino International Limited and Okimax International Limited, which were associated respectively with Mr Spickernell and Mr Bryson. Following the issue of 27,035 shares of 1 penny each at a premium of £28.99 on 15 December 1999, Services capitalised the sum standing to the credit of its share premium account in paying up unissued shares and allotting them to all the shareholders in Services as a bonus issue ("the Bonus Shares"). The Bonus Shares were allotted in the proportion of 99 new Bonus Shares for every ordinary share of 1 penny each held in Services before the Bonus Issue.
8. Thereafter Services made further issues of shares between January and March 2000, including a private placement of 2,720,000 ordinary 1 penny shares in January 2000 at a price of £1.25 per share, yielding proceeds of £3,400,000 for Services ("the January share placement"). Further share placements and the issue of shares by commission resulted in Services raising over £17 million in equity by March 2000. Among the participants in the January share placement was Mr Lee-Barber, acting for himself and Mr Paul Martin, who subscribed for 2.5 million shares at a price of £1.25 per share.
9. On 9 April 2000 the shareholders of Services entered into an agreement with EIC ("the Share for Share Exchange") which resulted in each shareholder in Services transferring its shares in Services to EIC in exchange for shares in EIC. The Share for Share Exchange was in the ratio of 3 ordinary shares of 1 penny each in EIC for each one ordinary share of 1 penny in Services. Services became a wholly owned subsidiary of EIC. Thereafter EIC raised further sums pursuant to a licence dated 26 September 2000 granted by the Guernsey Financial Services Commission.
10. The hopes of the investors in EIC were not realised. EIC's and Services' investments in internet businesses did not prove successful as the values of such businesses fell sharply when the dot.com bubble burst. Following this mishap, EIC adopted a policy of attempting the systematic realisation of its investments with the aim of paying shareholders the proceeds of realisation. In May 2001 a reduction of EIC's capital by about £6,500,000 was approved by the Royal Court. Over £6,300,000 has been returned to shareholders.

11. Disputes have arisen among the shareholders of EIC. In particular Mr Lee-Barber, Mr Martin and certain other investors have challenged the entitlement of the Founders and their associated companies to the shares in Services which they received under the Bonus Issue of December 1999. In summary, the grounds of challenge are that under Services' Articles of Association (which incorporated among others Articles 104 and 110 of the 1985 Table A) (a) the capitalisation and Bonus Issue required to be authorised by an ordinary resolution of the company and (b) the Bonus Shares required to be distributed to shareholders as if they were a dividend and that in terms of Article 104 dividends were to be paid proportionately to the amounts paid up on the shares. The shareholders who challenge the entitlement of the Founders and the associated companies to the Bonus Issue allege that there was no ordinary resolution of Services authorising the Bonus Issue and that neither the subscriber shares nor the November 1999 shares had been paid up at the time of the Bonus Issue in December 1999.
12. As Mr Spickernell and Mr Bryson transferred their subscriber shares and the Bonus Shares, which they received by virtue of those subscriber shares, to their respective associated companies before the Share for Share Exchange, of the Founders only Mr Reid is a shareholder in EIC .
13. The Founders deny the assertion that they or their companies were not entitled to the Bonus Shares and therefore to their substantial shareholdings in EIC. They call into question the good faith of those who mount the challenge. In my opinion it is not for this Court to form a view as to the merits of that challenge. But the existence of a prima facie basis for the challenge is relevant both to the attempts by EIC to prevent an EGM being held and to the Founders' suggestion that the challenge by the shareholders is not in good faith. Without expressing any view on what actually occurred in relation to payment for the subscriber shares and the November 1999 shares, I observe that there appear to be conflicting accounts as to the payment which require to be resolved.
14. First, the Form 88(2) lodged by Services on 18 January 2000 suggests that the November 1999 shares were paid up in cash. On the other hand in a letter dated 16 February 2000 signed by Mr Bryson on behalf of Services (then known as European Internet Capital Limited) and by Mr Spickernell on behalf of a company called Enterprise Technology Development plc ("ETD"), it appears that 110,320 ordinary shares in Services were allotted to ETD's nominees for valuable consideration which was the satisfaction of a debt due by Services to ETD for a business plan relating to Services' incubator fund. The Founders also assert that the subscriber shares were paid for in about October 1999 by a waiver of claims by Mr Spickernell and Mr Bryson against Services for expenses incurred in establishing Services. Another account of the payment for the subscriber shares and the November 1999 shares is that they were paid by a cheque for £1,105.20 dated 22 March 2000 drawn on Mr Spickernell's bank account, but Mr Spickernell explains that he did this on the recommendation of PricewaterhouseCoopers who were unable to find documentary evidence of the payment of the £1,105.20 in Service's books and records. Whatever is the correct account, and I make no judgement on that, it cannot be said that it is clear that the Founders and their companies were entitled to the Bonus Shares. As a

- result there is an issue between the shareholders of EIC as to the entitlement of Mr Reid and the two companies associated with Mr Spickernell and Mr Bryson to their substantial shareholdings in EIC.
15. The dispute has ramifications for EIC which go wider than the present shareholding of the Founders and their companies. Shares in EIC which originated in the Bonus Share Issue by Services have been transferred to other shareholders. In addition the challenge to the Bonus Share Issue on the ground that it was not authorised by an ordinary resolution of Services may invalidate further shares in EIC. If the whole Bonus Issue were invalidated, and not just the Bonus Shares allotted in respect of shares which were allegedly not fully paid up, approximately 41 million of the 85,272,146 shares in EIC could be impugned.
 16. The dispute resulted in a split among the shareholders of EIC between those who supported the Founders and those who questioned their or their companies' entitlement to the substantial holdings which they held in EIC. The shareholders who have questioned the Founders' entitlement included Mitem and Mr Teman, who with Mr Lee-Barber and Mr Martin hold approximately one-third of EIC's share capital. The challenge to Service's Bonus Issue could affect over 18.8 million shares (approximately 22% of EIC's issued share capital) which were held by Mr Reid and the Founders' closest associates and approximately 4.65 million of the 27.7 million shares held by Mr Lee-Barber and Others. If the 41 million shares in EIC were invalidated, Mitem, Mr Lee-Barber and Mr Martin would hold the majority of the shares in EIC (approximately 23 million of the 44 million remaining shares).
 17. In July 2001 the directors of EIC were Mr Reid, Mr Taureau and Mr Pinot-Noack. The latter two directors reside in France. Mr Pinot-Noack represents Mitem's interest on the Board of EIC. Mr Reid ceased to be a director on 10 August 2001 when his co-directors resolved to remove him as a director after they had received a letter alleging that the Founders had been guilty of misrepresentation when they encouraged Mr Lee-Barber and Mr Martin to invest £3,125,000 in Services in the January 2000 private placement. By letter dated 21 September 2001 S J Berwin, solicitors, acting on behalf of Mr Lee-Barber and Mr Martin informed the directors of EIC of their clients' contention that the Bonus Shares should not have been issued to the Founders and called on the Board to launch an impartial investigation. Having regard to the date of the report which the directors obtained, to which I refer below, S J Berwin's letter cannot have been the first intimation of the problem to the directors of EIC.
 18. At the first Annual General Meeting on 24 September 2001 there appear to have been proxies from shareholders which opposed the re-election of Mr Taureau and Mr Pinot-Noack, but an issue as to the validity of shares in EIC held by the Founders and their companies was raised and the AGM was adjourned without dealing with the contentious business, including the re-election of directors.
 19. In September 2001 the Board of EIC, namely Mr Taureau and Mr Pinot-Noack, appointed Deloitte & Touche ("Deloittes") to prepare an independent report into the capital history and structure of EIC and Services. In that report, dated 21 September 2001, Deloittes stated that the documentation which they had seen suggested that the subscriber shares and the November 1999 shares had been paid for only on 29 March

2000 on receipt of the cheque dated 22 March 2000 and that they had not received a satisfactory explanation for the unusual way in which the share issues were settled.

20. On 24 September 2001 the Board of EIC appointed Mr Simon Thornton, a partner in Pannell Kerr Foster and a resident of Guernsey, a non-executive director. But on 12 October 2001 Mr Thornton resigned. As a result there are no residents of Guernsey on the Board of EIC.
21. On 18 December 2001 EIC and Services commenced proceedings for declaratory relief in the High Court of England and Wales against five shareholders in EIC whom EIC had selected as representatives of various categories of shareholders. In those proceedings EIC and Services asked the High Court to determine, among other questions, whether the subscriber shares and Bonus Shares were unpaid at the date of the Bonus Issue and what are now the respective shareholdings in EIC. Mr Lee-Barber, one of the Defendants, has lodged defences arguing that the issue of Bonus Shares to the Founders and their associated companies was invalid. Three other shareholders, whose costs in the litigation are being funded by the Founders, have lodged defences seeking to uphold the Bonus Issue to the Founders and their associated companies and thus the existing allocation of shareholdings in EIC. It is not clear from the pleadings whether EIC and Services propose to take an active part in the litigation or to leave it to the defendant shareholders to argue their respective cases.
22. The Founders have challenged the right of the Board of EIC to spend company funds on the English litigation and have objected to the Board's failure to hold a general meeting and to provide financial information on EIC to shareholders.
23. On 18 March 2002 fourteen shareholders of EIC exercised their right under section 70 of the Companies (Guernsey) Law, 1994 to requisition an extraordinary general meeting ("EGM") of EIC. There is no dispute as to the validity of the requisition which was signed by fourteen members holding in aggregate at least one tenth of the issued shares in EIC. The stated purpose of the EGM was to consider ordinary resolutions to remove Mr Taureau and Mr Pinot-Noack as directors of EIC and to appoint in their place Mr Kelvin Hudson and Ms Helen Green. Mr Hudson and Ms Green are residents of Guernsey, are chartered accountants and are respectively Managing Director and a director of a Saffery Champness trust administration company.
24. The directors declined to convene an EGM, asserting that the requisitionists did not have sufficient shares to require an EGM to be convened if the disputed shares were discounted and that the requisition was arguably invalid. The directors also asserted that any change in management required the consent of the Guernsey Financial Services Commission and that, as such consent had not been given, there was no purpose in holding the meeting. They also asserted that the requisition was an attempt to prevent the court resolving the proper shareholdings in EIC.
25. By letter dated 19 April 2002 the Guernsey Financial Services Commission reminded the directors of EIC that EIC required to obtain the consent of the Commission to any change of management or any change of director. That was a condition of a licence

to raise capital by share issues which the Commission had granted on 26 September 2000. By a further letter dated 26 April the Commission called for an early resolution of the shareholders' disputes. The Commission in that letter also stated its opinion that the directors of EIC must have experience of information technology in which the company had invested and expressed concern that EIC's company secretary and administrator, International Administration (Guernsey) Limited, had intimated that it would cease to act for the company from 1 May 2002. In fact, the company secretary did not resign on 1 May and continues to act.

26. Meanwhile by notice dated 17 April 2002, the Founders issued to members of EIC a notice of an EGM to be held in Guernsey on 3 May 2002 with the object of replacing Mr Taureau and Mr Pinot-Noack as directors with Mr Hudson and Ms Green. The notice which the Founders signed stated that they were acting "for and on behalf of the requisitionists". The fourteen requisitionists all signed instruments authorising the Founders to convene the EGM and ratifying the notice. Of these instruments, two were dated 17 April and the rest were undated or post-dated the notice of 17 April. The shares of Mr Reid and those of the two requisitionists who signed instruments on 17 April 2002 did not amount to ten per cent of the issued shares in EIC.
27. On 12 April 2002 EIC issued an application for an injunction restraining the Founders from convening the EGM. The application was served on the Founders on 18 April. At that time and at the date of the hearings before the Lieutenant Bailiff on 2 and 3 May EIC had not begun any substantive proceedings in Guernsey to rectify its share register or to seek another remedy.
28. On 2 and 3 May 2002 the Lieutenant Bailiff delivered the judgments to which I have referred in paragraph 2 above. Thereafter, on 10 May the Founders appealed against those judgments. On 17 May the requisitionists purported to give notice of an EGM to be held in Guernsey on 6 June. On 21 May EIC applied for an injunction to restrain the requisitionists from holding the EGM. The application for the interim injunction was served on Mr Reid and three requisitionists which were Guernsey companies. As a result of circumstances about which there was some contention, but which I do not need to narrate, EIC did not apply to the Royal court for authority to serve the application on the ten requisitionists resident outside Guernsey. EIC had not raised substantive proceedings in Guernsey at the date of application for injunction or when the application was heard by the Deputy Bailiff on 31 May, but EIC's advocate gave an undertaking in his affidavit to issue such proceedings should the Royal Court require the company to do so. The application led to the decision to which I referred in paragraph 3 above.
29. On 20 June 2002 the Bailiff granted Mr Reid leave to appeal the Deputy Bailiff's decision of 31 May.
30. On 26 June EIC issued proceedings in Guernsey against ninety-four of its shareholders seeking a declaration that its shares which originated out of the disputed Bonus Issue were invalidly issued and seeking repayment of capital or dividends distributed in respect of such shares.

31. Notwithstanding this flurry of activity in the court, advisers of the parties have corresponded to explore an informal resolution of their disagreement concerning the composition of the Board of EIC pending resolution of the dispute about the Bonus Issue. In particular Mr Barnes, who acts for EIC, wrote on 17 May stating that the Board wished to appoint Mr Laker and Mr Venn as additional members of the Board and proposing that one of Mr Hudson and Ms Green and one of Mr Laker and Mr Venn be appointed additional members of the Board. Miss Dinning, who acts for the Founders, by letter of 28 May proposed an independent Board of four persons comprising Mr Hudson, Ms Green, Mr Laker and Mr Venn be appointed in place of the present Board. Since then advocates representing the Board of EIC and advocates representing Mr Lee-Barber and Others have offered to accept Mr Laker and Ms Green as additional directors on the Board of EIC and on 20 June advocates representing the Founders accepted that offer. However by letter dated 21 June Advocate Barnes, on behalf of EIC, told Advocate Greenfield, who acts for the Founders, that he could not put the names of the additional directors to the Guernsey Financial Services Commission until the Founders undertook not to seek the removal of the existing Board.
32. As a result this attempted compromise has not resolved the differences between the parties: the Founders seek to establish the right of the existing majority of the shareholders of EIC to determine the composition of the Board.
33. In support of their attempts to replace the Board of EIC, the Founders allege that the existing Board is acting in the interests of shareholders who have an interest in undermining the Founders' claim to the Bonus Shares so as to increase their share of the proceeds of the realisation of EIC's investments. They allege that the Board has given Mr Taureau an excessive compensation package since Mr Reid's removal as director. They also allege that since Mr Reid's removal the Board has failed to pursue inquiries into EIC's investment in Tradecell Limited, a company controlled by Mr Lee-Barber and Mr Martin. Certain shareholders of EIC think that the investment was made on the basis of misleading information. The Founders have produced affidavits supporting these allegations.
34. The Board of EIC deny the Founders' allegations. They argue that it is not appropriate to hold an EGM until the dispute about the validity of the Bonus Shares is resolved as otherwise any business conducted at the EGM would be subject to claims of invalidity by the shareholders who contend that the Bonus Issue was invalid. The removal of directors and the appointment of others would, they suggest, result in disputes as to who are properly directors of EIC. They argue therefore that it would not be in the best interests of EIC to hold an EGM with contentious business until the English court has determined the validity of the Bonus Issue. They assert that EIC raised the English proceedings on legal advice and that many shareholders support the Board in their pursuit of those proceedings. The Board also have produced affidavits and documents in support of their contentions.

The Lieutenant Bailiff's judgments of 2 and 3 May 2002

35. The Founders in their appeal against the Lieutenant Bailiff's judgments pursued a large number of grounds of appeal. These grounds included:

- that the shareholders of EIC had a statutory right to meet and pass resolutions under reference to sections 70 and 72 of the Companies (Guernsey) Law, 1994 and EIC's articles of association;
- that the directors of EIC in seeking to prevent the holding of the EGM were acting ultra vires or in any event for the improper purpose of preventing the majority of shareholders from exercising their rights;
- that the directors of EIC were in breach of their fiduciary duties in spending company money on the English litigation, which was a dispute between shareholders, and in seeking an order to prevent the EGM;
- that the Lieutenant Bailiff should not have granted a free-standing injunction as the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987, section 1(7), requires there to be exceptional circumstances before the court grants an injunction in the absence of proceedings before it;
- that the Lieutenant Bailiff erred in determining that the Founders had not been validly authorised by the requisitionists to convene the EGM by notice dated 17 April;
- that the Lieutenant Bailiff misdirected himself in refusing to permit the Founders to adduce further evidence after he had delivered his judgment on 2 May but before he had drawn up and signed an order;
- that the Lieutenant Bailiff failed properly to apply the principles of law set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

36. EIC also issued a Respondents' notice stating that it would argue that the Lieutenant Bailiff's decision should be varied so as to restrain the company, its officers and shareholders from convening or holding any general meeting until further order of the Royal Court. EIC asserted that a general meeting should not be held until the High Court in England determines the challenge to the Bonus Issue. It also argued that the Lieutenant Bailiff should have taken account of the objections of the Guernsey Financial Services Commission and that he should have held that the notice of 17 April required to be signed by the requisitionists and not by agents on their behalf.

The Deputy Bailiff's judgment of 31 May 2002

37. Mr Reid by Notice dated 19 June 2002 applied for the judgment of the Deputy Bailiff to be set aside and for an order that the EGM convened for 6 June should take place at such place, date and time as the requisitionists notify to the shareholders of EIC. Again a large number of grounds of appeal were advanced which covered ground similar to those advanced against the Lieutenant Bailiff's judgments. In addition they included the following:

- that an order should not have been made *ex parte* against the thirteen requisitionists other than Mr Reid who were not present and had not been served with the proceedings;
- that the Deputy Bailiff placed excessive reliance on a clearly distinguishable case – *Re a Company No 002612 of 1984* [1984] 1 BCC 99,262;
- that the proceedings in England would not determine the true shareholdings in EIC if the High Court invalidated the Bonus Issue: the court could not alter Service's register of members without rectification proceedings (which must proceed as claims against individual shareholders and in which the court would have a discretion and would have regard to the equities). Thereafter it

would be necessary to rescind the contracts by which EIC issued its shares to former shareholders of Services. As a result the existing English proceedings were too remote from EIC to be exceptional circumstances which could justify an injunction; and

- that the Deputy Bailiff erred in that nothing which the Guernsey Financial Services Commission stated justified the injunction.

The principal issues in the appeals

38. Although the appeals raise many issues which have a bearing on the correctness of the decisions to grant interlocutory injunctions against holding EGMs on 3 May and 6 June respectively, there are, in my opinion, two principal issues which this court requires to address before dealing briefly with the detailed arguments in the two appeals against the interlocutory injunctions which have been pronounced.
39. The first issue is whether it is appropriate that EIC should have raised and persisted in the English court proceedings and that it should have raised the injunction proceedings in Guernsey. The second is whether pending the outcome of the English proceedings and the application in Guernsey there should be a meeting of the shareholders of EIC at which a contested resolution is passed to remove the existing directors. I deal with each in turn.

The company's involvement in the English proceedings and the Guernsey injunctions

40. The Founders' position is that the dispute about the Bonus Issue is a dispute between the shareholders of EIC and is not a matter in which the Board of EIC should be involved. They base their argument on *Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137. One of the issues in that case was whether the payment of the legal costs by the company in an application under section 459 of the Companies Act 1985 would be in the ordinary course of the company's business. Hoffmann J. stated:

"The company is a nominal party to the s 459 petition, but in substance the dispute is between the two shareholders. It is a general principle of company law that a company's money should not be expended on disputes between shareholders: see *Pickering v Stevenson* (1872) LR 14 Eq 322. ..."

The Founders characterise the proceedings before the English High Court as a shareholders' dispute and argue that EIC has no legitimate interest in initiating or continuing those proceedings nor any interest in seeking to obtain injunctions in Guernsey against the shareholders prohibiting them from exercising the powers which company law has given them. The Founders assert that the Board's pursuit of the actions demonstrates that they are acting improperly in the interests of one group of shareholders. In support of this contention, they refer the court to, amongst others, *Smith v Paringa Mines Limited* [1906] 2 Ch 193 and *Howard Smith v Ampol Petroleum Limited* [1974] AC 821.

41. EIC on the other hand assert that the dispute is one in which the company has a direct interest as it is essential for the proper working of EIC that the dispute as to the validity of substantial blocks of its shares should be determined. Mr Harris, for Mr Lee-Barber and Others, argues that a company such as EIC has a duty to keep an

accurate register of members – Companies (Guernsey) Law, 1994, s 55(1). He asserts that the Board of EIC in the exercise of their duty to the company required to take steps to correct the register where they had good grounds for the belief that an invalid issue of shares had purportedly conferred rights against the company which should not exist. He emphasises that the directors owe duties to the company and not to shareholders. While directors must avoid conflicts of interest, for example by profiting from a position of trust, they are entitled to be shareholders and can act in the interests of the company in any matter where their own interests are affected by what they do in their capacity as directors. He refers, among others, to *Re Chez Nico* [1992] BCLC 192, *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 3 All ER 1222 and *Mills v Mills* (1938) 60 CLR 150 (High Court of Australia).

42. It is necessary to consider two issues. The first is whether it is proper for EIC to initiate proceedings to establish the validity of shareholdings in Services and EIC and the extent to which EIC should take an active role in such proceedings. The second issue is whether EIC were entitled to seek an interim injunction prohibiting the holding of general meetings at which the removal and replacement of the existing directors was the proposed business.
43. I do not accept the Founders' assertion that the validity of the Bonus Shares is merely a shareholders' dispute. If the Bonus Issue were found to be invalid and if that eventually nullified the shares issued by EIC in consideration for the Bonus Shares in Services, the voting power of the different camps of shareholders in EIC would be radically altered. Mr Lee-Barber and Others (and those who support them) deny that the directors of Services had power to make the Bonus Issue. If the challenge succeeds, the Bonus Shares will be void and not voidable. If the shares issued by EIC were also held to be void, the decisions taken by shareholders in EIC on contested matters would be void. EIC therefore has an interest in seeing the challenge to the validity of the Bonus Shares speedily resolved to enable its shareholders to transact the business which company law requires to be carried out in general meetings.
44. A company is not absolutely prohibited from involving itself in legal proceedings which are primarily a dispute between shareholders, unless, as in *Pickering v Stephenson* [1872] LR 14 Eq 322, the expenditure of company funds is *ultra vires* of the particular company. But where directors use a company's money unnecessarily in a dispute which is substantially a dispute between shareholders, that may amount to misfeasance: *Re a company (No 004502 of 1988), ex parte Johnson* [1992] BCLC 701. There is a considerable body of case law in England in relation to petitions under section 459 of the Companies Act 1985. I need refer only to the decision of Lindsay J in *Re a company (No 1126 of 1992)* [1994] 2 BCLC 146, in which he usefully analyses those cases and concludes:
- “.. there is no rule that necessarily and in all cases such active participation and such expenditure is improper. Thirdly, ... the test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole... Fourthly, .. in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in

the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case.”

45. That statement is, of course, a statement concerning the involvement of a company in section 459 applications in the United Kingdom or, in Guernsey, section 75 applications, which are by their nature cases where one shareholder or group of shareholders is challenging the conduct of other shareholders who control the company. Also, the statement is merely a judicial dictum and not a statutory formulation. It is, nevertheless, a useful analysis and a reminder that one must take care to assess whether a dispute is truly merely a shareholders' dispute and whether there is a need or an expediency for involvement by the company.
46. It appears to me that EIC may be able to establish a case that it is expedient that the company should involve itself in the court proceedings to ensure that there is an expeditious determination of the challenge to the validity of the shares in EIC which have replaced the Bonus Shares in Services. That would in my view entitle EIC to commence proceedings in England for a declaration as to the validity of the Bonus Shares and certain consequential declarations. It would also entitle the company to raise rectification proceedings in Guernsey which will depend on the outcome of the English proceedings.
47. A separate issue is the extent to which it is either necessary or expedient for EIC to take an active role in those proceedings. Directors in performance of their fiduciary duties to the company must act fairly as between different classes or groups of shareholders. See *Mills v Mills* (1938) 60 CLR 150, 164, *Howard Smith v Ampol Petroleum* [1974] AC 821, 835, *Mutual Life Insurance Co Ltd of New York v Rank Organisation Ltd* [1985] BCLC 11, 21 and *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155, 251. At present there is an unresolved question as to the validity of the Bonus Issue. It may be that in the English proceedings the Founders will be able to demonstrate that the concerns of other shareholders are groundless. It may be that the concerns will be shown to be justified. As yet no-one can say. The question arose as a result of a complaint by Mr Lee-Barber and he has taken up the challenge to the Bonus Issue in the English action. I do not see why the issue raised in the English proceedings cannot be resolved principally by a contest between the Founders on the one hand and Mr Lee-Barber and Others on the other hand. EIC can assume the passive role as a neutral plaintiff which provides to each group of shareholders the information which it has on the issue in dispute. If the shareholders in EIC who have challenged the Bonus Issue were to waive their challenge, it is hard to see what interest EIC would have in pursuing the English proceedings. In my opinion, while it was probably expedient for EIC to raise the English proceedings in order to bring the dispute towards a judicial resolution, EIC will require very cogent arguments to justify more active involvement in those proceedings.
48. I note and am heartened by the record of the case management conference in the English proceedings dated 26 June, which shows that it is intended that representatives of different groups of shareholders, and not EIC, will advance the substantive arguments in those proceedings. Whatever may have been the position of the Board of EIC in recent months, it appears that they now seek to confine their role

to expediting the judicial determination of the dispute and not to take a position on the side of one or other of the groups of shareholders.

49. I also think that it was probably expedient for EIC to seek an interim injunction to restrain the Founders and the requisitionists from replacing the directors. The mischief which EIC is entitled to seek to avoid is the uncertainty which the exercise of majority power by shareholders to remove the existing directors would create if many of the shares which made up the majority were invalidated by the challenge to the Bonus Issue.
50. On the information available to me at this interim stage, I see no excess of power or impropriety in the Board of EIC initiating the English proceedings and seeking an interlocutory injunction to prevent the removal of the existing directors.

Whether EIC are entitled to an interim injunction

51. EIC now seeks an interim injunction to restrain Mr Reid and the three Guernsey companies (C.L. Nominees Limited, Berdino International Limited, and Lambrini International Limited) from convening a general meeting to remove the existing directors until a further order is obtained from the Royal Court.
52. I think that EIC has at the least an arguable case that the shareholders who support the removal of the existing directors rely for any majority which they can attain on shares in EIC which emanated from the disputed Bonus Issue by Services. The first limb of the test in *American Cyanamid Co v Ethicon Limited* [1975] AC 396 therefore is met. I do not accept the Founders' argument that damages would be a sufficient remedy if the challenge by Mr Lee-Barber and Others ultimately succeeds in depriving the Founders and parties linked to them of a substantial proportion of their shares in EIC. Damages would be of no relevance to the company which would be seriously disrupted if the removal of the directors and the actions of the replacement directors were to be invalidated.
53. The question therefore is the balance of convenience. I attach considerable weight to the concerns of the Founders that the existing Board is not manifestly impartial in the dispute between the Founders and Mr Lee-Barber and Others. Mr Taureau has a competing interest as a shareholder (although his shareholding is also impugned by the challenge to the Bonus Issue) and is alleged to be associated with Mr Teman. Mr Pinot-Noack is the representative on the Board of Mitem, which with Mr Teman is aligned with Mr Lee-Barber and Mr Martin in challenging the Bonus Issue. It is, as the Founders forcefully submit, a serious step to prohibit shareholders from removing the Board of their company even on an interim basis. There is a prospect that it may take a long time to obtain a final determination of the validity of the shares in EIC which were issued in consideration for the transfer of the Bonus Shares in Services.
54. I do not think that it would be appropriate to grant an interim injunction without taking steps to ensure that the Board of EIC was ultimately in the control of persons who were accepted as independent and impartial by each side to the dispute. I make no judgement that the existing directors have actually shown any partiality in the decisions which they have taken. At this stage I merely observe that it appears that

their connections with some of the shareholders who are challenging the Bonus Issue gives rise to the suspicion of partiality. To protect the interests of the Founders something requires to be done. It is competent for this court to require of an applicant for interim injunction undertakings as a condition of the grant of the injunction: section 1(3) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. In response to questions by the court and after two adjournments, Advocate Barnes undertook on behalf of EIC and its existing directors to procure (a) that the Board of EIC would appoint with all practicable speed as additional directors Mr Laker and Ms Green (b) that the Board of EIC would also appoint with all practicable speed a third additional director who would be agreed by the parties, which failing be nominated by the Guernsey Financial Services Commission, whom failing by the Royal Court and (c) that before perfecting the appointments, EIC will apply for the consent of the Guernsey Financial Services Commission to the appointment of the additional directors in order to comply with the conditions of its licence. This undertaking is to be recorded in writing and produced to the Greffier for preservation by the Royal Court in the text of the Act of Court. Subject to the question of competency to which I now turn, I think that is sufficient to tip the balance of convenience in favour of EIC and thus to justify the injunction sought.

55. Section 1(7) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 provides in relation to interim injunctions:

“An injunction may in exceptional circumstances be granted notwithstanding that proceedings have not been and are not to be instituted before the Court.”

56. The Founders argue that there are no exceptional circumstances which justify the grant of an interim injunction. I do not agree. I think that the mischief which section 1(7) is addressing is that the Guernsey court might issue injunctions on matters which do not relate to Guernsey and which may not otherwise come before it. That is not the case here. In order to determine the dispute about the Bonus Issue in Services which has a bearing on the validity of many shares in EIC, it is necessary or at least expedient that the dispute about the Bonus Issue be tried in the England, which is the jurisdiction in which Services was incorporated. Thereafter it may be necessary to determine the effect of any invalidity of the Bonus Shares on the shares in EIC issued in exchange for them. These issues will involve Services, EIC and all the relevant shareholders as parties to the proceedings. There may also require to be proceedings in Guernsey to annul shares in EIC and to rectify EIC's register of members. These amount to exceptional circumstances. In any event, EIC has recently instituted proceedings before the Royal Court in relation to the validity of its shares which are the product of the Bonus Shares in Services (paragraph 30 above).

57. I therefore propose that we should make an order against Mr Reid, C.L. Nominees Limited, Berdino International Limited and Lambrini Limited restraining them until further order of the Royal Court from convening a general meeting of EIC with the purpose of removing the existing directors of EIC.

58. It is not appropriate to injunct the other requisitionists on whom the application for interim injunction has not been served. No doubt they and other shareholders will learn of the injunction and EIC's undertaking and have regard to both when deciding

on any further action. I hope that the existing directors will be able to establish a co-operative relationship with the additional directors. If there is undue delay in appointing the additional directors or if the arrangement proves unsatisfactory in the future, shareholders have the right to apply to the Royal Court in terms of the order which I propose. They also have rights to petition the Royal Court under section 75 of the Companies (Guernsey) Law, 1994 for remedies against unfairly prejudicial conduct.

The existing interim injunctions

59. It is necessary to consider briefly the appeals against the orders of the Lieutenant Bailiff restraining the Founders from holding the EGM on 3 May (except for the purpose of adjournment) and the order of the Deputy Bailiff restraining the requisitionists from convening the EGM on 6 June. Because of the proposed order of this court, the previous interim injunctions can have no continuing significance except in relation to costs. This court therefore does not need to determine several of the issues which have been raised in the appeals.
60. The only ground upon which the Lieutenant Bailiff enjoined the Founders from holding the EGM on 3 May was the narrow ground that the Founders did not appear to have had the authority of the fourteen requisitionists at the date of the notice convening the meeting (17 April 2002).
61. Although the relevant provisions of the Companies (Guernsey) Law, 1994 (sections 70(1), (2) and (4) and 72(2)) are not as clear as the equivalent provisions in the UK Companies Act 1985 (section 368(1)–(5)) I think that an agent of all the requisitionists, who at the date of the notice convening the meeting had actually been given their authority to do so, could competently convene an EGM. While the requirement in section 70(3) that all requisitionists should sign the requisition is strictly enforced (see *Patentwood Keg Syndicate Limited v Pearce* [1906] WN 164), I am not persuaded that it would be incompetent for an agent to sign the notice convening the meeting. I think that Parliament in the United Kingdom and the States in Guernsey may have required the signature of the shareholders on the requisition in order to allow the company, on whom the requisition is served, to ascertain that the requisitionists are entitled to assume on its behalf the ministerial powers which the statutes give them if the directors do not timeously convene a meeting. As to the ministerial nature of the requisitionists' power, see *Re Ariadne Australia Limited* (1990) 2 ACSR 791, 794. Once the requisitionists have established their credentials with the company, I see no need for them all to sign the notice convening the meeting.
62. I incline towards the view that a notice issued by an agent of the requisitionists who, when he sent the notice to shareholders, did not have the actual authority of all the requisitionists to do so, would be invalid and could not be cured by ratification. It would be highly unsatisfactory if an agent, who had authority from some of the requisitionists to do so, were to convene an EGM in the hope that the other requisitionists would ratify his act and then discover that he could not obtain that ratification in time. Shareholders would be inconvenienced needlessly. In such circumstances ratification may be excluded. See *Bowstead & Reynolds on Agency*

(16th ed 1996) para 2-085ff. In my opinion therefore the Lieutenant Bailiff did not err in holding that the instruments from the requisitionists which purported to ratify the Founders' notice convening the EGM, were not effective to do so.

63. Nonetheless, the affidavits of the Founders dated 3 May which suggest that they had oral authority from all fourteen requisitionists to convene the EGM when they sent the notices on 17 April are powerful *prima facie* evidence that the EGM of 3 May was properly convened. Were it necessary to decide at this interim stage whether the 3 May EGM was properly convened, I would decide that it was.
64. In so deciding I make no criticism of the Lieutenant Bailiff who was faced with an application by the Founders in the evening of 2 May and after a one-and-a-half-day hearing to adduce further evidence after he had delivered his judgment.
65. The consequence of deciding that the EGM of 3 May was properly convened is that, but for the injunction which I propose that this court should pronounce, the requisitionists would now have been free to re-convene the adjourned EGM. It is unnecessary therefore to address the submissions relating to the EGM which the Founders purportedly convened for 6 June. In my opinion section 70 of the Companies (Guernsey) Law, 1994 empowers requisitionists to convene only one EGM after a requisition, although that EGM may be adjourned. As I have taken the view that the 3 May EGM was properly convened, it follows that I consider that the 6 June EGM was not.

Conclusion

- 66 An interim injunction should be pronounced against Mr Reid, C. L. Nominees Limited, Berdino International Limited and Lambrini Limited restraining them until further order of the Royal Court from convening a general meeting of EIC with the purpose of removing Mr Taureau or Mr Pinot- Noack as directors of EIC.

CLARKE JA: I agree. In circumstances such as these where what is in issue is whether a sizeable proportion of the company's issued shares is valid, damages are not an adequate remedy. There are at least three sets of shareholders to consider:

1. Those, in whose number are included the additional Defendants joined in the second application, who do not wish to unseat the existing board.
2. Those who make common cause with the Founders in their endeavour to replace the board; and-
3. Those whose wishes are not known and who may be undecided.

If there was a prospect that the resolutions to replace the board could be either passed or rejected by an indisputable majority, I would have regarded the proper course to be that of allowing a meeting to take place to see if such a result might occur, but on the figures which we have been given it seems plain that the resolutions in question cannot be passed without counting the votes attributable to a

large number of shares whose validity is in issue nor rejected if those votes are counted. If therefore we were to allow the proposed meeting to go ahead and the resolutions were to be passed, the likelihood is that we should be condemning the company to a prolonged period of uncertainty as to who its true directors are and to the prospect that the acts of those who purport to be its directors are subsequently declared invalid. This would not be in the interests of the company or the shareholders as a whole.

Like my brethren I would not have been prepared to grant injunctive relief if it had had the effect either of removing the present directors on the basis of shares whose validity is in issue, to the prejudice of those in the first and possibly the third set of shareholders, or of leaving them as the only members of the board, but in the light of the undertakings proffered, the board will be augmented by independent directors and any deadlock will be resolved by the vote of one of their number. In those circumstances the balance of convenience is decidedly in favour of granting the relief proposed.

HODGE JA I agree.

NUTTING JA I agree.