IN THE ROYAL COURT OF THE ISLAND OF JERSEY

85/1

28.1.85

Before: P.L. Crill, C.B.E., Deputy Bailiff
Jurat G.N. Simon
Jurat D.E. Le Boutillier

BETWEEN	Hotel Beau Rivage Company Limited	PLAINTIFF
AND	Careves Investments Limited	DEFENDANT

Advocate J. Clyde-Smith for the Plaintiff
Advocate J. Wheeler for the Defendant

The Company, Hotel Beau Rivage Limited, the Plaintiff, owns the Hotel Beau Rivage in St. Brelade. It has traded as Beau Rivage since about 1980. Careves Investments Limited, the Defendant, is part of a group called Suncrest Hotels Limited.

On the 10th January, 1984, the Plaintiff obtained judgment against the Defendant for its breach of a condition in a lease by the Plaintiff to the Defendant of the Hotel Beau Rivage, which began on the 1st January, 1981. Eventually the lease was cancelled by the Court, on the 16th March, 1984, but the issue of damages was agreed to be referred to the Judicial Greffier. The Plaintiff had a claim against the Defendant for costs, rent and damages. The costs have now been agreed at £12,309.76. The claim for damages was unliquidated, but eventually it was agreed during this hearing to be £85,000, and therefore to that extent it has been quantified but it is not yet agreed by the Defendant. Therefore, it cannot be said to be a liquidated sum.

The Plaintiff obtained a judgment in the Petty Debts Court for the arrears of rent on the 11th April, 1984, in the sum of £850.28. There are, therefore, two liquidated claims, excluding the claim for damages which would normally, if the Court was satisfied in the usual case, entitle the Plaintiff to declare the Defendant "en desastre". However, in this case, on the 11th March, 1984, Mr. R.E.G. Ireson, F.C.A., was appointed liquidator of the Defendant. Because Mr. Ireson was the group accountant, the Plaintiff took exception to his appointment, and after seeking the advice of his Institute of Chartered Accountants Ethical Committee, Mr. Ireson resigned. In the meantime, on the 7th June, 1984, he claimed in a letter to Advocate Clyde-Smith, on behalf of the Plaintiff, that the Company had no assets. He told Advocate Clyde-Smith of his intention to resign by letter of the 21st September, 1984. Mr. Clyde-Smith intended thereupon to apply to the Court to

declare the Defendant "en desastre". There was some delay, which he admitted was due to his own failure to act in time, and eventually on the 13th December, 1984, the Defendant appointed Mr. M. Forrest, F.C.A., as liquidator in place of Mr. Ireson. The appointment of Mr. Ireson by the Company was in the following terms - "THAT:

(1) The Company be wound up voluntarily; and

(2) Mr. Richard Ireson, F.C.A., of Mayne Ireson & Co., of 18 Parade Road, St. Helier, Jersey be appointed as Liquidator of the Company with the following powers (the same without prejudice to any other powers, duties or obligations that he might have by law):-

(a) to take such steps and to do such acts and things as may appear to him to be necessary to pursue, preserve, protect, realise and sell the Company's assets and interests of whatsoever nature;

(b) to pay, discharge or otherwise compromise all the liabilities of the Company;

(c) to distribute the Company's remaining assets, if any, to the members in accordance with their respective rights thereto either in specie or by way of transfer of all or part of its property whether movable or immovable;

(d) to witness by himself the affixing of the Common Seal of the Company to such deeds or instruments in writing as the Liquidator shall think fit;

and, in the exercise of such powers the said Liquidator may act as fully and effectually and with all such powers as are vested in the Directors of the Company pursuant to the Articles of Association of the Company;

(3) The said Liquidator shall be entitled to reasonable remuneration and to reimbursement of his expenses; and

(4) Forthwith following the Registration of this Special Resolution of all the Directors and the Secretary of the Company may be removed from office."

Mr. Forrest's terms of appointment were identical.

On the 14th December, 1984, the present application by the Plaintiff to declare the Defendant "en desastre" came before the Court. The Defendant, Mr. Forrest and the Shareholders were given leave to intervene and the application placed on the pending list, whilst it was agreed that the interveners were to file pleadings and the Special Resolution would not be registered. When the pleadings were filed before

the present hearing, it was apparent that Mr. Forrest had adopted those of the Defendant. That course was criticised by Mr. Clyde-Smith, as an indication that Mr. Forrest could not be regarded as an independent and unbiased liquidator. Mr. Forrest was given leave to substitute a second pleading in which he submitted himself to the "wisdom of the Court". It would have been preferable had Mr. Forrest been independently advised, rather than represented by the same advocate who appeared for the Defendant. As an alternative to an Act of desastre, the Plaintiff asked the Court to appoint the Viscount as a receiver. Although the appointment of the Viscount as a receiver under the Bankruptcy Act of 1914 is known when the Court assists an English Court, there is no other authority for the Viscount to act in this capacity. The term of receiver, apart from that Act, is not mentioned in our Companies Law and does not appear to have been invoked before. The Viscount, in a desastre, is in the position of a receiver in bankruptcy, although according to English Law, if he is appointed by the Court, he is an officer of the Court and derives his authority from the Court's order and if he is appointed out of Court, he is an agent and has such powers, duties and liabilities as are defined by the instrument or statute under which he is appointed. Even if the choice were between a liquidator and a receiver, it is doubtful whether either of these persons would be an officer of the company under Article 6 of our Companies Law. Mr. Clyde-Smith's main criticism of a liquidator is that he is not per se an officer of the Court (although if he were an advocate he could be). Nevertheless, we cannot supplement our statute to make good its deficiencies to the extent suggested. The appointment of a liquidator in this case is coupled with the intention, when the liquidation has been completed, to dissolve the Defendant Company. The effect will be the same as if the Defendant were declared 'en desastre'. The duties of the Viscount in a desastre are, in the words of the Court in the Brandaris case, (1966) 256 Ex.20, to get in and liquidate the estate for the benefit of the creditors (who prove their claims). So far as an unliquidated sum is concerned, which for the moment the claim for damages is, that problem, it would appear from the Brandaris case, has been resolved by the Court saying, at page 553:

"This does not mean that a creditor who has a right of action against a debtor for the recovery of an unliquidated sum loses his rights against the goods of his debtor if a desastre is declared. Such a creditor was always entitled to commence his action on the day fixed by the Court when the desastre was declared and at the present time such a creditor's rights are preserved by Rule 12 of the Royal Court ("Desastre") (Jersey) Rules, 1964".

Mr. Clyde-Smith argued, however, that the duty of the liquidator is towards the shareholders of the company. That may well be so, but in this case before the shareholders' interests can be considered at all, the debts have to be paid. The difficulty is that the principal shareholder might well be a debtor as well as a creditor. The liquidator cannot avoid investigating all the assets, including any claims by the Defendant against its parent company, if he is to fulfil his duties properly. There, therefore, seems little benefit in substituting the Viscount for a liquidator if, broadly speaking, their duties are the same. If there are grounds for suspecting that a liquidator is acting improperly, or is neglecting his duty, then the Court may interfere. See the Judgment in Wholesale Supplies (C.I.) Limited, 9th October, 1980. Mr. Clyde-Smith submitted that far from the Defendant having no assets and thus in such a case a declaration of desastre being fruitless, it had paid a dividend of £10,000 to its parent company shortly before the original case was heard and there were good grounds, he submitted, for claiming that payment should be returned to the Defendant. Moreover, although the parent company was prepared to credit the Defendant with that sum, that would be a way of obtaining preferential payment by offsetting it against the claim of the parent company against the Defendant. Secondly, whilst Suncrest Hotels had charged the Defendant Company a management fee for a number of years, that sum could not have been, as it was claimed by the parent company, the actual profits made by the Defendant in each year. Furthermore, he submitted that since the Defendant had been trading in an excellent position since 1970, it must have made substantial profits which did not properly reflect a true management fee chargeable and legally sustainable by the parent company. Thirdly, the shareholders of the Defendant might have an action against the Directors of Suncrest Hotels Limited.

As regards the second possible claim, before that could be made the liquidator ought to be able to have access not only to the Defendant's own accounts, but to the parent group's accounts from 1970 and not only during the three years of the lease which was cancelled. Certainly it seems to us that there are important matters which the Plaintiff is entitled to have investigated fully, and if necessary to have all proper claims by the Defendant against the parent company, if they are disputed, decided by the Court.

One of the grounds for urging that the Viscount should be appointed as a receiver, or indeed acting in his capacity as an Officer of the Court in the case of a desastre, is that he could commence an action against the parent company, if they were reluctant to release their figures to him and then obtain an order for discovery. However, that action could itself be undertaken by a liquidator, even though he was not appointed by the Court. We are not, however, saying that discovery would be ordered.

There is substance in what Mr. Clyde-Smith says of a possible conflict of interest arising from a liquidator appointed in the present circumstances but nevertheless we are not, at this stage, prepared to interfere with that appointment, but we are going to vary it to a limited extent.

We regard Mr. Forrest as an independent liquidator, but nevertheless we are going to order that he investigates the claims which have been notified to him by Mr. Clyde-Smith and report in the first instance to the Court. We will expect him to make recommendations and we will expect him to set out in detail either that he is pursuing a claim against the parent company, or his reasons for not doing so. We order the parent company to provide Mr. Forrest with all proper accounts and information to enable him to arrive at a decision as to whether there is a sustainable claim against it or not. In the meantime, whilst the Resolution appointing Mr. Forrest will be registered, no payment is to be made to any creditors and the company is to remain in being. We will reserve our decision as regards costs of this application until we have received Mr. Forrest's report.