5th February, 1987.

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COURT OF APPEAL

Before: Sir Godfray Le Quesne, Q C
Sir Charles Frossard
John Martin Collins Esq., Q C

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| Between | James Barker | Appellant |
| and | John Harold Vint and Mrs Barbara Myles, Autorisés de Justice | First Respondent |
| and | Ann Street Brewery Co Ltd | Second Respondent |
| and | Barclays Bank PLC | Third Respondent |
| and | Bois & Bois Perrier & Labesse | Fourth Respondent |
| and | Education Committee | Fifth Respondent |
| and | Jersey Refrigeration Services | Sixth Respondent |
| and | Lawrence Messer & Co | Seventh Respondent |
| and | V Le Neveu | Eighth Respondent |
| and | D E Le Quesne | Ninth Respondent |
| and | Ogier & Le Cornu | Tenth Respondent |
| and | Smith Joinery & Shopfitting Limited | Eleventh Respondent |

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Appeal by the Appellant from the Judgments of the Royal Court (Samedi Division) of the 4th and 29th December, 1986.

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Adv A P Begg for the Appellant
Adv F J Benest for the 1st Respondent
Adv T J Le Cocq for the 2nd & 4th Respondents
Adv G R Boxall for the 3rd Respondent
Adv S C Nicolle for the 5th Respondent
Mr A N Dupré representing the 6th Respondent
Adv M S D Yates for the 7th & 10th Respondents
Adv S C K Pallot for the 8th & 9th Respondents
Adv A Messervy for the 11th Respondent

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JUDGMENT

THE PRESIDENT: Mr Begg, can you please help us over one detail? The affidavit which your client swore in support of his original application to the Court set out his properties and the real properties were: the Wine Bar, 4 St Saviour's Crescent, Highbury, St Saviour, and Sunshine Cottage. Now, the Act of the Court of the 4th December refers to Wilton House, Five Oaks.

ADVOCATE BEGG: That is, Sir, the same as Highbury House.

PRESIDENT: Ah, it changed its name.

ADVOCATE BEGG: I'm afraid all these properties are named by several different names, Sir, and I think it's fortunate that the other ones haven't been (inter)

PRESIDENT: But, anyway, it's the same property.

ADVOCATE BEGG: Indeed, Sir.

PRESIDENT: Thank you. The earlier history of the financial troubles of Mr James Barker, the appellant, is related in the judgment delivered by this Court on the 25th September, 1985. The Court then rejected preliminary objections raised by one of the appellant's creditors to his application for permission 'de remettre son bien entre les mains de la Justice'.

After further proceedings, which it is not now necessary to describe, he was granted this permission by the Superior Number of the Royal Court from the 21st March, 1986. The original period of the 'remise' was six months; it was then extended for another four and then for another two so it will now continue until the 21st March, 1987.

The appellant is the owner of four pieces of real property - the Wine Bar in the High Street at St Aubin's, number 4 St Saviour's Crescent, a house variously known as Highbury or Wilton House in St Saviour's, and a cottage in Janvrin Road. He is also the sole owner of a company which itself owns St Julian's Hall at St Aubin's.

The claims filed in the 'remise', together with interest, amounted, at the 15th December, 1986, to just under £660,000. On the 14th November, 1986, the two Jurats who had been appointed by the Court to be 'Autorisés de Justice', presented to the Court a Representation, part of which read as follows:

"That Mr Barker has requested the Autorisés to sell the following properties - 4 High Street, St Aubin, and St Julian's Hall, Mont les Vaux, both situate in the Parish of St Brelade, and 4 St Saviour's Crescent, St Saviour's Road, and Wilton House, Five

Oaks, situate in the Parish of St Saviour, for a total sum of £725,000 to Mr G H Slous or his nominee companies.

2. That the Autorisés have advised Mr Barker against the proposed sale as they have obtained higher offers in respect of these properties but are minded to comply with Mr Barker's request in view of assurances given by the advocate acting for Mr Barker."

I go on to paragraph 5:

"That Mr Barker has indicated his intention to dispute a number of the said claims filed in the 'remise de bien' as listed in a letter dated the 24th October, 1986."

At the end of their Representation, the Jurats asked the Court to approve the proposed sale of the said properties for the sum of £725,000 and to give directions as to the application of the proceeds of sale and the procedure to be adopted for the settlement of the disputed claims.

When this Representation came before the Court, it was adjourned to the 26th November and on the 26th November, a letter was written by Mr Begg, acting for the appellant, to Mr Benest who was acting for the Jurats. That letter read:

"The Autorisés have indicated that they are minded to proceed with the sale of Mr Barker's properties to Mr Slous' companies provided, inter alia, that they receive an assurance from me, as Mr Barker's adviser, that I am satisfied with all the terms of the proposed sale and have advised Mr Barker accordingly. I regret that I am not in a position to advise Mr Barker that I am so satisfied and hence am unable to provide the Autorisés with the assurance that they require."

The Representation on the 26th November was adjourned again until the 4th December. When it came before the Court on the 4th December, the Autorisés informed the Court that they had decided they could no longer recommend or sanction the proposed sale to Mr Slous but had decided, instead, to proceed with the sale of St Aubin's Wine Bar and 4 St Saviour's Crescent as soon as possible. They also informed the Court that they did not propose to dispute certain of the claims which Mr Barker had been minded to dispute.

On that day, Mr Begg submitted to the Court that the Jurats ought to be restrained from proceeding with the intended sale of the Wine Bar and 4 St Saviour's Crescent because they had no discretion to sell in the manner which they proposed and, if they had such a discretion, they were proposing to exercise it

wrongfully, and he also submitted that the Autorisés had no power to settle disputed claims unless those claims had been proved. The Royal Court rejected all these submissions made on behalf of the appellant and it is from this decision that the present appeal is brought.

It will be convenient, first, to deal with the point concerning the power of the Jurats to sell the debtor's properties and to deal, secondly, with the argument about their power to settle disputed claims.

The rules governing 'remise de bien' were modified in important respects by a law passed by the States in 1839 and it is necessary, first, to refer to certain provisions of that law. I read, first, part of the preamble:

"Considérant que la Loi sur les remises de biens entre les mains de la Justice est défectueuse, d'autant ... que souvent les personnes qui ont obtenu cette indulgence refusent, au grand préjudice de leurs créanciers, de se guider par l'avis et conseil des autorisés de Justice."

Article 4:

"L'Acte qui accordera la remise de biens entre les mains de la Justice contiendra, de la part de celui qui obtient ladite permission, l'autorisation aux personnes nommées par la Cour pour l'examen desdits biens de bailler, vendre, aliéner, et autrement disposer desdits biens-meubles et héritages."

Article 5:

"Celui qui aura obtenu la permission de remettre ses biens entre les mains de la Justice ne pourra agir que d'après le conseil et avis des personnes autorisées de Justice pour l'examen dudit bien."

In accordance with the requirement of Article 4 of the law, the act of Court which granted permission to the appellant for the 'remise' stated that the appellant had authorised the Jurats appointed by the Court and I quote:

"To sell, alienate or otherwise dispose of the applicant's property, both moveable and immoveable."

Mr Begg, who appeared for the appellant, submitted to us that the Jurats could sell the debtor's property to the buyer of their choice against the debtor's wishes, only if the debtor was not co-operating with them and, consequently, the 'remise' was likely to fail. If the debtor was willing to sell to a buyer of his choice on terms which would allow payment of all his debts, the Jurats, so Mr Begg submitted, must consent to that sale.

These submissions appear to me to be impossible to reconcile with the plain terms of the Law of 1839. Article 4 of the Law requires the debtor who obtains a 'remise' to authorise the Jurats 'de bailler, vendre, aliéner, et autrement disposer desdits biens-meubles et héritages'. The authority which the law requires is not qualified in any way and, as I have just said, the appellant, in fact, gave, when he was given permission for the 'remise', the unqualified authority which Article 4 demands.

Furthermore, so far from requiring the Jurats to sell the debtor's property in accordance with his wishes, the Law in Article 5 prohibits the debtor from acting otherwise than 'd'après le conseil et avis' of the Jurats and the preamble makes it clear that one of the purposes of passing the law was precisely to prevent the abuse which was arising because debtors obtaining 'remises' were often refusing 'de se guider par l'avis et conseil des autorisés de Justice'.

The articles which I have quoted can only mean, in my judgment, that the Jurats have power to sell the debtor's property at their discretion. Not only is this the clear meaning of the Law, it is also the way in which it has been interpreted and operated ever since it came into operation. This can be seen, in the first place, from the evidence given to the Commissioners in 1859 by Mr Dupré. I quote three of his answers.

After describing the course taken by a remise, Mr Dupré said:

"The Jurats, appointed as already described, are empowered to dispose of the property by public sale or by private agreement as may be deemed most advantageous for the creditors as well as the debtors."

In answer to a later question, he said:

"They superintend the administration (that is, of the debtor's property) but they are empowered, also, to dispose of the property, even without the consent of the debtor."

A little later, Mr Dupré made the same point again when he said:

"They (which is the Jurats) have a very great power which is that of selling and disposing of the property, even against the will of the debtor."

It is worth pausing to point out what weight should be attached to these statements. Mr Dupré was the Attorney General; among the other witnesses attending on the same day was the future Sir Robert Marett, the Bailiff, the pre-eminent Jersey lawyer of his time. It is clear from the transcript that, when Mr Marett dis-

agreed with anything which was said by another witness, he did not hesitate to say so plainly, but he did not dissent in any way from the statements made by Mr Dupré which I have just quoted. The same thing can be seen in the writing of a more modern authority; I refer to Le Gros in his 'Traité' which was published in 1943. He says, at page 372:

"Aujourd'hui, le débiteur, en vertu de l'article 4 de la loi de 1839, autorise les Jurés-Justiciers à disposer de tous ses biens-meubles et héritages. S'il refuse subséquemment de consentir à la passation des contrats de bail et vente de ses héritages, les Jurés-Justiciers ont, en vertu de la loi, plein pouvoir de donner titre valable aux acquéreurs."

We were not referred to any authority or precedent for placing any narrow interpretation upon the Jurats' powers. This is not to say that, in exercising their powers, the Jurats cannot be controlled. I quote a passage from the judgment of the Royal Court under appeal:

"In our opinion, there are circumstances in which the Court has the power to interfere with the decision of the Autorisés in a 'remise' but these are limited to cases where the Autorisés exceed their authority, are wrong in law, deny the parties justice or reach a conclusion devoid of reason. In all such cases, the Court has an inherent jurisdiction to have put right that which is wrong. What the Court cannot do is to interfere with a decision which has been regularly made. A power of discretion, properly exercised by a person or a body having the legal authority to exercise it, is generally unassailable. That the Autorisés have the legal authority to exercise a very wide power of discretion under the 1839 Law is incontrovertible; they have a discretionary power to sell or otherwise dispose of the entire assets of the debtor, to deny him the right to act on his own behalf and to settle his debts."

With that statement, I respectfully agree. It is the primary responsibility of the Jurats to see that enough of the debtor's property is sold to pay all his debts. If a choice has to be made between the sale of this property or that, or between sales to this buyer or that, it is right that the Jurats should take the debtor's wishes into account, but they take them into account, not necessarily as a determining factor but simply as one factor to be weighed together with others. It is plain that the Jurats did that in this case because, at first, they did decide to act

in accordance with the debtor's wishes, though they thought it necessary to ask for the Court's approval before doing so, and then, when they heard from Mr Begg that he could not assure them that he was satisfied with the terms of the proposed sale, they changed their minds.

Mr Begg submitted, both in the Royal Court and here, that this change of mind on the part of the Jurats constituted a wrongful exercise of their discretion. He was in considerable difficulty in making this submission because the appellant had instructed him not to reveal to the Royal Court the terms of the proposed sale to Mr Slous. The Jurats had considered this sale, had ultimately, as they told the Royal Court, decided it was unconscionable and had preferred a different sale which they had been able to arrange, a sale of two properties only, for a higher price than Mr Barker was proposing to accept for all his real property.

It is quite impossible for the Court to hold that this decision of the Jurats was a wrongful exercise of discretion when the Court is not even told the terms of the proposed sale to Mr Slous. When the appellant lodged the documents for this appeal, he included in them a large bundle of minutes of meetings which had taken place during the 'remise' between the Jurats and the appellant and their respective legal advisers. From these minutes, something could be gathered about the terms of the proposed sale to Mr Slous. However, these minutes were not put before the Royal Court. They could not, therefore, be put before this Court unless permission was asked and obtained to put in further evidence. No such application was made; if it had been, it would have been difficult to support because the documents were obviously available to the appellant at the time of the hearing in the Royal Court. In these circumstances, the minutes should not have been included in the documents submitted for the appeal; we have reached our decision on the evidence which was considered by the Royal Court and have taken no account of these minutes.

I am, therefore, of the opinion that the Royal Court was right in rejecting the appellant's contentions that the Jurats had no discretion to sell his real property as they proposed and that, if they had such a discretion, they proposed to exercise it wrongfully.

I now turn to the question of the disputed claims. In the affidavit which the appellant swore in support of his original

application for the 'remise', he said that he disputed five of the claims of which he was then aware. After the claims in the 'remise' had all been filed, he said that he disputed eleven of them. Of these eleven, he subsequently admitted two and the Jurats decided that they would not dispute seven, these seven amounting in all to between £560,000 and £570,000.

Mr Begg submitted to us that the discretion of the Jurats to pay claims is limited by the requirement that they should observe the requirements of natural justice, especially the maxim 'audi alterem partem'. They should only pay claims, he submitted, which were established on a balance of probabalities and, in some cases, such as those depending on a decision on oral evidence, this could only be established by a decision of the Court. Where a claim was already the subject of litigation, the Jurats, Mr Begg submitted, must allow that litigation to proceed.

Here again, it does not seem to me possible to reconcile these submissions with the terms of the Law of 1839. Article 5 provides that the debtor is only to act 'd'après le conseil et avis des personnes autorisés de Justice'. To suggest that the Jurats cannot pay claims disputed by the debtor is to contradict this enactment by saying that the action of the Jurats is to be controlled by the debtor.

It is also necessary to refer to Article 6 of the Law. That reads as follows:

"Si les biens remis entre les mains de la Justice ne sont pas suffisans pour acquitter toutes les dettes et redevances, les autorisés de Justice pourront, si les héritages sont suffisans pour acquitter les rentes et hypothèques, faire vendre lesdits biens-meubles et héritages, et, après le paiement intégral des dettes privilégiées, en partager le produit entre les autres créanciers."

In relation to this article, the Royal Court, in its judgment, said the following:

"It is apparent, therefore, that where the assets are sufficient to satisfy all secured and preferential debts but insufficient, also, to satisfy, in their entirety, all other debts, the ordinary creditors are to receive a dividend from the Autorisés. Inevitably if the Autorisés are to carry out their duty to apportion the assets under Article 6, they must have the power to determine which of the debts have preference, the amounts due to secured and other privileged creditors and, finally, which of the ordinary

creditors are to be admitted in the division and the amount of their respective claims. It would be absurd to suggest that the legislature intended that the Autorisés should have such powers and responsibilities where there is a deficit and yet not have those powers and responsibilities where there is a surplus."
I respectfully agree with this passage.
It is interesting to refer to one old authority which supports this view. That is a passage in the statement of Hemery and Dumaresq in which they set out the mode of proceeding in the Royal Court of Jersey for the benefit of the Privy Council in 1789. In reference to the procedure of 'remise', they said this: "The Court appoints some persons, generally advocates or other officers of the Court, as Commissioners to examine into the state of this man's effects and debts and, if his possessions be found equal or superior to the amount of his debts, the Commissioners are empowered to dispose of so much as is necessary for the discharge of his debts or to compound with his creditors for the best advantage and relief of the debtor."
Apart from authority, it appears to me that the nature and purpose of the procedure by way of 'remise' would be defeated if the Jurats had no power to decide what claims were to be admitted. A person applies for a 'remise' if, though possibly not actually insolvent, he is having difficulty in satisfying his creditors. If the permission is granted, the creditors are deprived, temporarily, of their right to resort to his property or to sue him. In return for this advantage, or, as it is called in the preamble to the Law of 1839, this indulgence, the debtor is required to transfer the management of his property to those appointed for the purpose by the Court and, thereafter, they can manage it as fully as formerly he could manage it himself.
If the Jurats were obliged to leave the validity of any claim disputed by the debtor to be established by litigation and the 'remise' had to continue until all such litigation, including possible appeals, had been completed, the period of a year and a day would often be exceeded, and all the creditors would be deprived of any payment for whatever that extended period turned out to be.
It seems to me that consideration of natural justice is out of place in this context. The Jurats have a discretion in deciding what claims to admit as they have in deciding what properties are

to be sold. This discretion they must exercise properly, 'en bon père de famille'. If the debtor disputes some of the claims, they must consider the grounds which he puts forward for dispute. They must weigh the possible advantages of disputing the claims against the expense and risk of litigation. Having done so, they may decide to dispute a claim or to let it go to litigation or to admit it in whole or in part. If they exercise their discretion on wrongful grounds, they can be controlled by the Court but whatever their decision, the Court should not interfere with their judgment if it was reached on due consideration of all the relevant circumstances. It appears to me that, in this case, the Jurats did consider all the relevant circumstances properly when reaching their decisions about the disputed claims. I refer to some of them. There was a claim by the Ann Street Brewery Company which consisted largely of debts, not originally contracted by the debtor to the Ann Street Brewery Company, but contracted by him to other persons and subsequently assigned by those persons to the Ann Street Brewery. The appellant informed the Jurats that he wished to dispute this debt on the ground that such assignment was illegal. This point having been taken, the Autorisés took legal advice as to whether the assignment had been legal or not. They considered that advice and they also took account, quite correctly, as it appears to me, of the fact that, even if the assignments had been illegal, the debts would have remained payable to the original creditors and the only result of litigating on the ground suggested by the appellant would, therefore, have been that, instead of paying 'A', the Jurats might have found themselves obliged to pay 'B'. It seemsto me that, in these circumstances, the Jurats were perfectly entitled to reach the conclusion that they did to admit the claim.

In the case of Barclays Bank, which the appellant said that he disputed, there was not, in truth, any dispute of the bank's claim. What the appellant said was that he had a claim against the bank which would amount to a greater sum than that for which the bank had a claim against him. The Jurats pointed out that, if they paid the bank's claim, it would remain open to the appellant to pursue his own claim against the bank subsequentlyandit seems to me that there was no ground upon which the Jurats could have been required, in these circumstances, to dispute the claims of the bank.

I refer to two other cases simply in order to show the extent to which the Jurats considered the relevant circumstances. Two of

the smaller claims were those of Mr Le Neveu and Mr Le Quesne and the Jurats informed us that, having obtained sufficient particulars of these claims, which were for services which had been rendered to the appellant, they considered the reasons given by the appellant for disputing the claims and decided to pay the claims, having regard both to their merits and soundness.
The other claim which I mention is that of the Smith Joinery & Shopfitting Limited. I mention that because it was a case in which litigation was already pending and, after considering the matter and receiving an assurance that the case would be expedited, the Jurats decided to allow the litigation to continue.
These examples show, it seems to me, that the Jurats gave proper consideration to the relevant circumstances and acted upon proper consideration when they decided not to dispute the claims and I, therefore, consider that the Royal Court was right in rejecting the appellant's contentions concerning the powers of the Jurats to settle disputed claims.
I should add that there was one further argument which Mr Begg told us he wished to address us. This was an argument that the Jurats had been estopped from deciding to sell to the highest tenderers or to pay the disputed debts because, in the course of the 'remise', they had assured the appellant that only debts which had been proved would be paid and he would be entitled to sell his real property to a buyer of his own choosing if the sale would produce enough to pay all the debts.
Mr Begg admitted to us that this argument of estoppel had not been put to the Royal Court; in view of this, and of the obvious fact that if it had been addressed to the Royal Court, the Jurats would have wished to meet it by evidence, we did not consider that it was an argument which we should allow for the first time to be raised on appeal and we declined to consider it.
For these reasons, in my judgment, the decision of the Royal Court was correct and this appeal must be dismissed.

Sir [illegible] : I agree.

Mr Collins : I agree.