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ROYAL COURT
(Samedi Division) 121.

Before: The Deputy Bailiff

26th June, 1996

In the matter of the Representation of
Gebhard Santer and Jessie Santer née Werrin

Advocate R.J.F. Pirie for the Representors
Advocate C.M.B.Thacker for Sparta Investments Limited

JUDGMENT

THE DEPUTY BAILIFF: On 13th October, 1995, the Royal Court granted applications to both Mr. and Mrs. Gebhard Santer and to Superseconds Limited to *"remettre ses biens aux mains de Justice"*. There were bonds registered against the property of Superseconds in favour of a company called Sparta Investments Limited in the principal sum of £770,000. The bonds were registered in three tranches, the first charge being in the capital sum of £180,000, the second charge in the capital sum of £30,000 and the third charge in the capital sum of £560,000. Of those charges, the first and second charges were guaranteed by Mr. and Mrs. Santer jointly and severally against their own private property. There is also secured on their property another small mortgage which does not concern me today.

On 18th April, 1996, the Royal Court considered the question that had been troubling some practitioners for many years and ruled that the interest arising from the bonds is in fact secured albeit for three years. That was of great importance to the examination by the Jurats and tipped the balance against the possibility of a successful *remise* which was discharged on 7th June. Apparently, the papers were then remitted back to the applicants. That was explained to us. Because of the conflicting applications presented on 7th June (which was the afternoon of the public business of this Court) the argument was sent for a date to be fixed. The adjourned hearing is before me today.

I have in effect to deal with four applications. Superseconds wishes to make an application to declare itself *"en désastre"*. That application is resisted by Sparta which wishes to make an application for the adjudication of a renunciation of the real and personal property of Mr. and Mrs. Santer and Superseconds (a

"dégrèvement"). In turn, those latter applications are resisted by Superseconds and by Mr. and Mrs. Santer.

The argument of Advocate Thacker for Sparta is very clear and it is based on Article 5(1)(b) of the Bankruptcy (Désastre) (Jersey) Law, 1990 which states:

> ***"The Court shall refuse to make a declaration "..... (b) if the debtor has been permitted to make general cession (reçu à faire cession générale) of his property".***

That an application for *cession* apparently rides hand in glove with an application for a remise is shown, according to Advocate Thacker, by authority set out In the matter of the Remise des Biens of Barker (1987-88) JLR 4 at 16, where the Court in giving the reasons for its decision said this:

> ***"The prayer of the representation requests the court to grant such extension as may be deemed fit to the remise. In fact Mr. Begg urged us to stay the remise because the extension would go beyond March 21st, 1987, when the remise will have lasted a year. Because we cannot go beyond or supplement the prayer of a party (see (b) above), we cannot grant a stay of the remise. But we should not grant an extension of the remise beyond March 21st, 1987, against the will of the creditors, because a remise which has not been successfully concluded within a year operates, as a matter of law, as the personal cession and renunciation by the debtor of all his property to his creditors and a dégrèvement ensues".***

The case of Le Maistre v. du Feu is cited by C.S. Le Gros in his "Traité du Droit Coûtumier de l'Ile de Jersey", where he said at page 373-4:

> ***"Nous rapportons ici, in extenso, un jugement important qui tranche la question suivante: le débiteur, dont les biens ont été adjugés renoncés en conséquence de la non-réussite de la remise, est-il libéré de ses dettes et engagements? Ex. 1850, Juin 22. Mr. Philippe Du Feu contre Mr. Edouard Le Maistre subrogé au droit, lieu et place de Mr. Nathanael Westaway tenant après Décret aux héritages dudit Mr. Edouard Le Maistre.***
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> ***"Attendu qu'en remettant son bien entre les mains de la Justice, le débiteur en fait personnellement la cession à ces créanciers, s'il ne les satisfait point dans l'an et jour de la remise.***
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> ***Attendu que par l'acte qui lui accorde la remise, il donne aux Magistrats, autorisés pour l'examen dudit***

bien, pouvoir de bailler, vendre, aliéner ou autrement disposer desdits héritages, dont il ne peut rentrer en possession s'il ne moyenne accord avec ses créanciers.

Que l'article dix de la loi sur les Décrets, qui ne libère le cessionnaire que dans le cas où il fait cession personnelle, a évidemment été établi par le législateur parce que là celui dont les biens sont adjugés renoncés en son absence ne prête point serment qu'il n'a pas les moyens de satisfaire ses créanciers.

Que le débiteur dont les biens sont décrétés après une remise de biens ne rentre point dans ce dernier cas, puisqu'il présente un état de son bien appuyé de son serment avant d'être reçu à le remettre entre les mains de la Justice.

Que la cession conditionnelle du débiteur, dont les biens sont remis entre les mains de la Justice, doit être considérée une cession personnelle, cette remise de biens faisant disparaître toute présomption de fraude.

Que le défendeur doit donc être considéré libéré des dettes contractées avant l'adjudication de la renonciation de ses biens-meubles et héritages." v. aussi l'article 13 de la loi sur les Décrets".

The case of Le Maistre v. du Feu was decided in the context of the Loi (1832) sur les Décrets. It was decided in 1850, thirty years before the great reforms of Sir Robert Pipon Marett in the Loi (1880) sur la Propriété Foncière where the discumberment procedure effectively swept *décret* away. Although it remained open to apply to *propriété ancienne* it is impossible to conceive that another *décret* will take place in Jersey. The procedure for *cession* was not swept away, however, and Article 1(6) of the Bankruptcy (Désastre) (Jersey) Law 1990 specifically states that the law is in addition to and not in derogation of the Loi (1832) sur les décrets, the Loi (1839) sur les remises de biens, those provisions of the Loi (1880) sur la propriété foncière and (in a general mopping up exercise) "any other law relating to bankruptcy". Article 1(6) is subject to the provisions of Article 10 which is useful for the purpose of what I have to decide in that it clearly states a truism that once the debtor is locked into a course of bankruptcy procedure no alternative remedy should be available to a creditor. Although that Article is dealing with the *désastre* procedure it seems logical to assume that, if Advocate Thacker is right, and the *remise* having failed the placing of the property in the hands of the Court operates as a *cession* with the consequence of a *dégrèvement* and a *réalisation*

there would be no opportunity for a *désastre* even if Article 5(1)(b) did not apply. C.S. Le Gros writing in 1940 referred to the judgment in Le Maistre v. du Feu as *"un jugement important"*. The Barker judgment is only three years before the Désastre (Jersey) Law 1990, which surprisingly retains *dégrèvement* while including realty in the concept of a *désastre*. It is beyond peradventure to assume that those who drafted the law did not have that judgment under consideration at the time.

Can I ignore Le Maistre v. du Feu and say that a decision not to proceed with a *remise* brings matters back to where they were when the application was made?

In In Re Barker (1985-86) JLR 186 CofA, at 189 the Court of Appeal said:

> ***"Mr. Barker did not pay the debt or take any other action in regard to the notice. Accordingly on May 31st, 1985, Lazards proceeded in accordance with article 4 of the 1832 Law to obtain an order that the "Biens-meubles et héritages" of the debtor "seront reononcés". The order was obtained, we were told, ex parte by production of the Viscount's record of service of the notice under Rule 8(1) and evidence that the debt had not been satisfied".***

Under the old law, the effect of the order would have been that the estate declared to be *"renoncé"* would also have been, in the words of Article 4 of the 1832 law *"immédiatement décrété"* - that is to say, liable to be vested in a tenant under the *"décret"* procedure. The words *"immédiatement décrétés"* were, however, deleted by Article 48 of the Loi (1880) sur la propriété foncière which so far as real property was concerned substituted for the *"décret"* the procedure of *"dégrèvement"*.

The concept of *cession* has also been altered somewhat in recent years. In Telefitters (C.I.) Ltd. v. Young (1993) JLR N.2, the note says this:

> ***"A debtor may make an application for "cession générale" under the Loi (1832) sur les Décrets even though he is not in prison at the time of the application, provided that he is "malheureux" - i.e. a victim of commercial misfortune, acts in good faith and is at risk of imprisonment for debt".***

Let me first consider whether that part of the judgment in Barker *(supra)* that refers to Le Maistre v. du Feu is an authority that is binding upon me. Advocate Thacker argued strongly that the passage occurs in one of the main paragraphs in answer to a submission by counsel. The *ratio decidendi* of a case has been defined as the material facts of the case plus the decision

thereon (see: Goodhart "Determining the Ratio Decidendi of a case" (Essays in Jurisprudence and the Common Law (1931)). On 2nd August, 1995, in the Court of Appeal of Guernsey in Perkins v. The President of the States of Guernsey Housing Authority the learned President said ***"Having analysed the terms of the judgment I am satisfied that the passages referred to were essential to the decision and grounded the Order of the Court"***. If that part of the judgment in Barker, and I am sure that it is, is *obiter* then the passage still has great authority but need not be followed if I do not agree with it. The Court of Appeal, while affirming the judgment of the Royal Court did not deal with the statement that is, in my view, *obiter*.

I raised with Counsel the question raised by Le Gros on page 374 of his work where he says ***"lorsque la Cour refuse d'accorder la remise, le débiteur a le droit de demander d'être admis a faire cession générale de tous ses biens meubles et héritages. v Ex 1873 Août 30 Mr. Hélier de Gruchy"***. That case is distinguishable because there a *remise* was refused. In the present case a *remise* was accepted.

Advocate Pirie's concern and his continued resistance to the application by Sparta for a *dégrèvement* and a ***réalisation*** lies in the fact that he argues that under the *dégrèvement* procedure, it would be open to Sparta to renounce its second and third charges and take 9 Peter Street under its first charge and then in the *dégrèvement* of Mr. and Mrs. Santer take their property under the guarantee in respect of the bond which gave rise to the second charge. It would then, in the *réalisation* of Superseconds claim for all sums due under the bond that gave rise to the third charge. The "*dégrèvement* route" if I can use that expression would give Sparta a real possibility of gaining two properties (where only one would be available in the *désastre*) and preference over the unsecured creditors of Superseconds and Mr. and Mrs. Santer, again which preference would not be available in a *désastre*.

In brief it will be for Sparta to decide whether it will convene the guarantors to the *dégrèvement* or not convening and losing its recourse against them. Having summoned the guarantors Sparta can elect to renounce its claim against Superseconds but then the guarantors will have the right to become tenants of the property.

The wording of Article 5(1)(b) of the 1990 law is very precise. ***"The Court shall refuse to make a declaration if the debtor has been permitted to make general cession of his property"***. The *cession* that is set out in Le Maistre v du Feu is a *cession* which comes into effect by operation of law. But a *remise* and a *cession* came about in different sets of circumstances. In the first, a person finding himself temporarily embarrassed and against whom one or more judgments *à peine de prison* had been obtained or the arrest of his person confirmed might, in order to

avoid imprisonment or to liberate himself from prison, ask the Court for permission to hand over his property into the hands of the Court in order to give himself time to realise the same. In the second an unfortunate debtor who was (forgetting for the moment the Telefitters case) incarcerated for debt could liberate himself from prison, provided that he had either been reduced *"aux petits dépens"* or had intimated 14 days earlier his intention to make *cession*.

If, as we have seen, a *remise* was refused the debtor could then ask to make *cession*. Under the law the debtor had, of course, to take oath that it was because of insufficiency of means that he was unable to pay his debts. Of course, once the *cession* had been granted, the creditors by way of a *demande*, may ask for a *dégrèvement* and a *réalisation* of the debtor's real and personal property.

So it was that when a debtor had made *cession* or his property had been adjudged renounced a *demande* from one or more of the creditors could lead the Court under the 1904 law to order a *dégrèvement* of all the *propriété nouvelle*, the *réalisation* of all the moveable property and the appointment of an Attorney to conduct the proceedings.

Why should there be this automatic *cession* based on the 1850 case of Le Maistre v. du Feu? The case of Helier de Gruchy may be the key to the enigma although neither Counsel gave it more than a passing glance. A rapid examination of Actes of Court (none of which Counsel referred to me) may give a further help to solve a dilemma. By way of example, on 4th October, 1991, the Court was asked to examine the goods of "Les Catieaux Properties Limited". In the words of the Acte:

> ***"La Cour a jugé qu'il n'y a pas lieu d'accorder la demande de ladite Société en remise de biens".***

Then there was no *cession* but a pause while an acte *"Vicomte chargé d'écrire"* was obtained and then the *dégrèvement* was adopted.

We can distinguish that from the case of West Park Pavilion (1969) Limited where at the instance of Le Riches Stores Limited a *remise* was granted on 19th March, 1993, for a period of twelve months. The *remise* was discharged because of insufficiency of assets on 21st January, 1994. The Acte contains these words which remarkably image *"le jugement important"* of 1850.

> *"Qu'en conformité de la loi de cette Ile une remise de biens qui n'est pas conclue avec succès opère comme une cession personelle et renonciation par le débiteur de tous ses biens et héritages à ces créanciers".*

There are no doubt many other instances in the records of the Greffe where those words have been entered into actes of court in similar circumstances.

I am left with an uneasy feeling. Advocate Pirie pressed strongly upon me the words of Hoffman JA in In Re Barker *(supra)*:

> ***"If I may add an individual remark, coming as I do from a country in which the common law is the customary law of the Netherlands province of Holland before the Napoleonic Codes, I am conscious of the pride which the legal profession in this Island takes in its unique legal system but such pride can only be justified if the legal institutions are sufficiently adaptable to enable the court to do justice according to the notions of our own time. The court should not be left with the uneasy feeling that in following the old authorities, it might have perpetrated an injustice upon one of the litigants. I think that to accede to the appeal in this case would leave the court with such a feeling and I am glad that the medieval past casts no shadow upon the power of the court to endeavour to do justice today".***

We have a rule which has stood since 1850, which (as I have shown) was certainly followed in 1994, (four years after the Bankruptcy (Désastre) Jersey Law 1990) and which had been commented upon favourably by this Court in 1987. It may lead to an injustice although Advocate Thacker has urged upon me that the outcome is not as certain as his opponent would have it. That is as may be, although the careful analysis of Article 100 of the Loi (1880) sur la propriété foncière carried out by Advocate Thacker does not incline me to feel optimistic and in my view the outcome of a *cession* may well lead to Sparta Investments taking both the commercial property and the family home of the guarantors.

I cannot in the circumstances fly in the face of overwhelming precedent. I refuse the representation presented by Mr. and Mrs. Santer and decline to allow a *désastre* to be filed by Superseconds. It follows from my judgment that a *dégrèvement* of the property of Superseconds and of the property of Mr. and Mrs. Santer will follow. We so order. Do you wish for a *réalisation* Mr. Thacker, before or concurrent with or after the *dégrèvement?* Mr. Thacker says concurrent and I so order.

Authorities

Bankruptcy (Désastre) (Jersey) Law 1990: Articles 5(1)(b), 16.

In re Remise of James Barker (1987-88) JLR 4 at 16.

C.S. Le Gros: "Traité du Droit Coûtumier de l'Ile de Jersey": p.373.

In re Barker (1985-86) JLR 186 CofA.

Telefitters (C.I.) Ltd -v- Young (1993) JLR N.2.

Goodhart: "Determining the Ratio Decidendi of a case" (Essays in Jurisprudence and the Common Law [1931]).

Perkins -v- President of States of Guernsey Housing Authority (2nd August, 1995) Judgment of Court of Appeal of Guernsey.