10 pages.

COURT OF APPEAL

11th April, 1997. 67.

Before: J.M. Collins, Esq., Q.C., (President)
J.G. Nutting, Esq., Q.C., and
J.P.C. Sumption, Esq., Q.C.

In the matter of the Applications of
Sparta Investments Limited (THE RESPONDENT) for the
dégrèvement and *réalisation*
of the real and personal property of Superseconds Limited
(THE FIRST APPELLANT) and of Gebhard Santer and Jessie Santer
(née Werrin) (THE SECOND APPELLANTS).

And in the matter of the Application of Superseconds Limited
(THE FIRST APPELLANT) to declare itself *en désastre*.

And in the matter of the Representation of Gebhard Santer
and Jessie Santer (née Werrin) (THE SECOND APPELLANTS).

Appeal by the First and Second Appellants from the decision of the Royal Court (Samedi Division) of 26th June, 1996, whereby the court:

(1) held that the discharge of the First and Second Appellants' *Remise des Biens* brought into being, by operation of law, a *cession* of their real and personal property;

(2) held that in consequence of the said *cession*, and by virtue of the provisions of Article 5(1)(b) of the Bankruptcy (Désastre)(Jersey) Law 1990, the Royal Court could not consider the First Appellant's application to declare itself *en désastre*;

(3) dismissed the Representation of the Second Appellants; and

(4) ordered the *dégrèvements* and *réalisations* of the real and personal property of the First and Second Appellants to go ahead and appointed Attorneys for this purpose.

Advocate R.J.F. Pirie for the First and Second Appellants.
Advocate C.M.B. Thacker for the Respondent.

JUDGMENT

SUMPTION JA: Superseconds Ltd is a company controlled by Mr. and Mrs. Gebhard Santer which once carried on a number of businesses, mainly in the fields of retail clothing and property development. Between 1987 and 1992 it borrowed large sums of money from Sparta Investments Ltd which it has been unable to repay. The money was borrowed on three bonds which were registered in the Royal Court as judicial hypothecs against the company's immovable property. They created successive

charges ranking first, second and third. In addition to the security represented by the hypothecs, Sparta took personal guarantees from Mr. and Mrs. Santer in respect of the company's liabilities under the first two bonds, but not the third. Sparta has obtained judgment against both the company and its guarantors in respect of the first two bonds, which has so far remained largely unsatisfied. The question on this appeal is: Which of a number of very different insolvency regimes available in Jersey is to apply to the property of Superseconds?

Before explaining how this question arises, it is necessary to say something about the alternatives.

The Bankruptcy (Désastre) (Jersey) Law, 1990 introduced for the first time a comprehensive code of insolvency law in Jersey. There was a much older and more limited procedure under the customary law by which the personal property of an insolvent debtor could be treated as being *"en désastre"* and applied for the benefit of creditors. The Law of 1990 extended this remedy to real property. Article 6 of the Law empowers the Royal Court, on the application either of the debtor himself or of any of his creditors, to declare the debtor's real and personal property to be *"en désastre"*. The effect is to vest all the property and powers belonging beneficially to the debtor in the Viscount to be distributed among creditors in accordance with a coherent statutory scheme contained in the Law itself and in Rules of Court made under it. The scheme resembles in some ways the administration of insolvent estates in England under the Insolvency Act and Rules of 1986.

The Law of 1990 may eventually supersede other remedies available to insolvents and their creditors in practise, but it does not supersede them in point of law. Article 1(6) of the Law provides that its provisions are to be *"in addition to and not in derogation of"* the older law relating to bankruptcy and in particular to certain specified procedures made available by the customary law and by older enactments. Articles 5 and 10 are intended to prevent attempts to operate the old and the new law simultaneously. Article 5 provides that the debtor's property is not to be declared *en désastre* if one of the other procedures has already been initiated at the date when the application is made for a declaration under Article 6. However, once a declaration has been made, Article 10 provides that the creditor is to have no other remedy against the property or person of the debtor.

Article 5(1) is in the following terms:

"The Court shall refuse to make a declaration -

(a) if the court has made an order pursuant to Article 2 of the "Loi (1839) sur les remises de biens" granting permission to the debtor to place his property in the hands of the court and at the date of the application the order remains in force;

(b) if the debtor has been permitted to make general cession ("reçu à faire cession générale") of his property; or

(c) if the debtor's property has been adjudged renounced ("adjugée renoncée")."

It is convenient to start with the procedures referred to in (b) and (c), namely a general *cession* on the part of the debtor and a judgment that he has renounced his property. Both of these procedures are founded in the customary law of the Island, but in their modern form depend mainly on the provisions of the Loi (1832) sur les Décrets. A general *cession* is a method by which an insolvent debtor may obtain the assistance of the court in satisfying his debts. A meritorious debtor (i.e. one who has acted in good faith but has suffered some financial misfortune) may apply, on giving public notice of his intention, for the leave of the Court to surrender his real and personal property for the benefit of creditors. Alternatively the creditor may initiate the procedure himself by applying to the Court for an *Acte Vicomte chargé d'écrire*. This instrument is served on the debtor and calls on him to pay the debt within a limited period, generally two months. Failing this he will be treated as having renounced his property for the benefit of creditors. The effect of a *cession* on either basis is not to divest the debtor at once of his property but to set in train a process of execution which will ultimately lead to that result.

Originally, execution was by *décret*, an ancient procedure with certain practical disadvantages which I need not describe and which has become practically extinct. We have been told that the last recorded occasion on which it was used was in 1917. Today, the ordinary mode of execution against real property is by *dégrèvement*, a modified form of *décret* introduced by the Loi (1880) sur la Propriété Foncière. The procedure is that once the *cession* has been made, whether voluntarily on the application of the debtor or involuntarily at the instance of the creditor, the Court orders that the *dégrèvement* shall occur. Attorneys are appointed to take over the property. The Greffier prepares a list of creditors, including all secured creditors and any unsecured creditors who wish to be included. On the appointed day he goes through the list in reverse order of priority inviting each creditor in turn to elect whether to accept the tenancy of the property on condition of paying off all prior claims, or else to forfeit his interest. An accepting creditor becomes the *tenant* of the property free of all incumbrances. It is an important feature of procedure by way of *dégrèvement* that the creditor's election is essentially a speculation on his part. It is possible for a creditor who agrees to become the *tenant* of surrendered property to recover more than the value of his debt. The reason is that the debtor's renunciation is complete and final. Any surplus over the value of the debt and the cost of paying off prior creditors will belong to the creditor who becomes the *tenant après dégrèvement*. The latter has no obligation to account for that surplus to the debtor.

Article 10 of the Loi (1832) sur les Décrets provides that a debtor ***"qui aura personellement fait cession générale"*** is thereupon released from all his outstanding personal liabilities accrued before the *cession*. A creditor who ceded his property *"personellement"* was one who did it voluntarily by the leave of the Court. A creditor who was merely deemed to have renounced his property by virtue of his failure to comply with an *Acte Vicomte chargé d'écrire*, did not cede his property *"personellement"* and did not obtain his discharge. The reason as a matter of history was that a debtor who sought the leave of the Court to make a voluntary *cession* was always required to produce a statement of his assets, verified on oath. It was thought right to reserve the

privilege of a discharge to those who had had to submit themselves to this procedure.

The advantages of *dégrèvement* are that it is cheap and fast. And the fact that the *tenant après dégrèvement* may keep any surplus will not matter in a simple case where there is a substantial net deficiency and the debtor would lose the whole of his property under any method of realising his assets. It can, however, work serious injustice where the value of the property exceeds the debt or might do so if carefully sold on the open market. Moreover, its technicality and crudeness can work capricious results in a more complex case. Until the Law of 1990 opened up wider possibilities, the only practicable method by which an insolvent debtor could avoid a *dégrèvement* was to adopt the procedure referred to in paragraph (a) of Article 5(1) of the Law of 1990, and apply for leave to make a *"remise de biens"*. This remedy developed out of the ancient custom of Normandy which permitted debtors in certain circumstances a moratorium of up to a year and a day to enable them to sort out their affairs. Since the Loi (1839) sur les Remises de Biens the remedy has been wholly statutory in Jersey. The debtor applies to the Court for leave to deliver up his real and personal property to be administered and realised over a period of time specified in the order by commissioners appointed by the Court *("Autorisés de Justice")*. The debtor, however, remains the owner of the property in the hands of the Court while the *remise* is in progress, and is entitled to any surplus realised after discharging his liabilities. If, on the other hand, there is a deficiency when the *remise de biens* comes to an end, matters will proceed on the footing of a general *cession*. The debtor will be discharged, and assets still in the Court's hands at the end of the prescribed period will be subject to *dégrèvement*. The procedure by way of *"remise de biens"* is of course less favourable to the creditors, because it deprives them of the speculative possibilities of a *"dégrèvement"*. For this reason, Article 6 of the Loi (1839) sur les Remises de Biens provided that the *Autorisés de Justice* were empowered to sell the property only if the proceeds would be enough to pay the secured creditors in full. Moreover, it became the rule that the Court which was invited to make the original order allowing a *remise* had no jurisdiction to do so unless a valuation of the debtor's estate showed that there would be a surplus, however small, over the secured debts.

What happened in this case was that on 16th June, 1995, Sparta obtained from the Royal Court an *Acte Vicomte chargé d'écrire* against the company and the guarantors, founded on its judgment. They responded on 27th September, 1995, by applying for leave to make a *"remise de biens"*. Two Jurats were appointed to re-examine the applications. They obtained valuations and reported to the Court that if the property of the company and the guarantors were taken together, their value would exceed the amount secured by the three bonds, whether that amount was limited to the principal or extended to the interest as well. Accordingly the Court on 13th October, 1995, allowed a *"remise de biens"*, initially for a period of six months. This was later extended by another three months to 12th July, 1996. Unfortunately, the valuations obtained by the Jurats proved to be too optimistic. When offers were sought for the properties, it was found that the combined estate of the company and the guarantors was worth enough to satisfy their liability for the principal but not the interest. On 18th April, 1996, the Royal Court ruled that interest was secured as well as principal. It followed that the amount secured exceeded the value of

the property and that by virtue of Article 6 of the Loi (1839) sur les Remises de Biens, the *Autorisés de Justice* were not entitled to sell. They reported to the Court that in these circumstances *"no useful purpose would be served by continuing the remise de biens of the company"*. On 7th June, 1996, the Court *"discharged the remise de biens proceedings"* on their application and authorised them to restore the assets still in their hands to the company and the guarantors.

There were two competing views as to what should happen next.

The company, supported by the guarantors, applied for a declaration under Article 6 of the Law of 1990 that their property was *"en désastre"* so that it could be administered in accordance with the Law. This would have the advantage for the guarantors that the company's assets would be applied against the debts secured by the bonds in their order of priority, i.e. first, second, third. This follows from the terms of the contracts themselves and from Article 32(4) of the Law of 1990. The company's only immovable property was 9, Peter Street, St. Helier. A sale of that property had been agreed (subject to contract) at a price which would produce a sum net of expenses of £848,750. This would have been enough to discharge the whole of the debts secured by the first two bonds. The company would have been left with an outstanding debt under the third bond, but the guarantors would have had no liability since they had guaranteed only the first two. In theory, Sparta could have recovered against the guarantors on their guarantee in respect of the first two bonds before recovering against the company on those bonds. But they would not by doing this have increased their total recovery, because the guarantors would in that event have been subrogated to Sparta's charges under the first two bonds. They would have been entitled to enforce them against the property of the company in priority to Sparta's rights under the third bond.

The creditor, Sparta, on the other hand, contended that Article 5 of the Law of 1990 deprived the court of jurisdiction to declare the debtor's property *en désastre*, and that it was entitled to have the debtor's property adjudged renounced and submitted to the procedure of *"dégrèvement"*. The advantages which Sparta perceive in this course can be seen from an examination of the figures. If such an order were made, Sparta could renounce their second and third charges and take part in the *dégrèvement* on account of their first charge alone. The first charge secured a total amount by way of principal and interest of only £207,000, whereas the company's property at 9, Peter Street was worth more than four times that much. But because of the rather special feature of procedure by way of *dégrèvement* to which I have already referred, if Sparta became the *tenant après dégrèvement* it would be entitled to take 9, Peter Street and to realise its entire value for their own benefit, without allowing for that surplus against the outstanding debt due under the second or third bonds or otherwise accounting for it to the company. The undischarged liabilities under the second bond amounted to £34,200. Although the surplus realised on enforcing the security in respect of the first bond would more than cover that sum, it is at least arguable that the second bond would be treated as unsatisfied. Sparta could therefore proceed against the guarantors in respect of their guarantee of it, taking their home in a further *dégrèvement*. Their home has been valued at £170,000, some five times the amount outstanding under the second bond. So the overall result would be to enable Sparta to obtain property worth more than

£1,000,000 in respect of debts under the first two charges amounting to £241,200.

The law of 1990 is a modern statutory code offering a flexible means of dealing with an insolvent estate in the interests of both debtors and creditors, without the more technical and unsatisfactory features of the older procedures of which the facts of this case are a striking example. The law also enables the Court to deal much more comprehensively than the older statutes allowed with the more complex rights of creditors against an insolvent's property which arise from modern commercial practice. In the ordinary course, where a Court has a discretion to make a declaration treating a debtor's property as being *en désastre*, that course will be preferable to authorising one of the older procedures, unless it is shown to be in the interests of justice that the latter should be used. The Court is unlikely to be satisfied of this save in the simplest cases. The present case is far from simple. Procedure by way of *dégrèvement* against Superseconds' property would be a serious injustice to the guarantors. The substance (although not of course the legal analysis) of the transaction would be that Sparta would have succeeded in artificially re-arranging the order in which the company's assets are applied against its liabilities to the prejudice of its guarantors. In our judgment, we ought to make a declaration under Article 6 of the Law of 1990 if we can.

It is tolerably clear that the Deputy Bailiff took the same view. However, he held that Article 5 of the Law of 1990 prevented him from doing so. Manifestly, he was not prevented by Article 5(1)(a), for although an order had been made under Article 2 of the Law of 1839 it was no longer in force at the date of the application by the debtors to have their property declared *en désastre*". Nor was he prevented by Article 5(1)(c), for although Sparta had obtained their *Acte Vicomte chargé d'écrire*, the debtor's property had not yet been adjudged renounced. The argument was that he was prevented by Article 5(1)(b), because of the rule, to which I have already referred, that where if there is a deficiency at the end of the period allowed for the *remise*, the matter proceeds on the footing of a general *cession*. The Deputy Bailiff accepted this argument, and in our judgment he was right to accept it.

There are, we think, two distinct questions to be addressed. The first is whether the discharge of the order allowing a *remise de biens* gave rise to a general *cession*. The second is whether a *cession* occurring in that particular way falls within Article 5(1)(b) of the Law of 1990 on the proper construction of that provision.

On the first question, the Deputy Bailiff held that a general *cession* did follow from the discharge of the *remise* on 7th June, 1996. We agree with him. The only relevant authority is Le Maistre -v- Du Feu (1850) Ex 508, an important decision of the Royal Court in 1850. It is directly accessible only in the registers of the Greffe, but most of the record is quoted in Le Gros' Droit Coûtumier de l'Île de Jersey (1940) at pp.373-4. The case has long been treated as settling the question: what is the legal result of a *remise de biens* which comes to an end without discharging the secured debts? The issue was whether a debtor who had made a *remise de biens* was discharged from his outstanding liabilities in that event. The Court held that he was. For our purposes the relevant parts of the Act of Court are as follows:

"Attendu qu'en remettant son bien entre les mains de la Justice, le débiteur en fait personellement la cession à ses créanciers s'il ne les satisfait point dans l'un an et jour de la remise.

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 cessionaire que dans le cas où il fait cession personelle, 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'etre reçu à le remettre entre les mains de la Justice.

Que la cession conditionelle du débiteur, dont les biens sont remis entre les mains de la Justice, doit être consideré une cession personelle.

Que le défendeur doit être consideré libéré des dettes contractées avant l'adjudication de la renonciation de ses biens-meubles et héritages.

From this reasoning, it is clear that a *remise de biens* is viewed as a temporary respite from the processes of execution against the debtor's property which would otherwise be liable to occur at once. If it fails to achieve the payment of at least the secured debts after the time allowed (assumed to be a year and a day), then those processes will automatically follow. The juridical basis on which this happens is that by making a *remise de biens* the debtor is treated as implicitly making a conditional *cession* of his property. The condition is that there are still unsatisfied secured liabilities at the conclusion of the process. Because the *cession* is implicit in the voluntary act of the debtor in making the *remise*, he is taken to have made it voluntarily (*"personellement"*), and he gets his discharge under Article 10 of the Loi (1832) sur les Décrets.

Le Maistre -v- Du Feu is not strictly speaking binding on us, and Mr. Pirie submitted that it should no longer be treated as good law. He submitted that the rule that a voluntary general *cession* followed from a *remise* was unduly technical and unsatisfactory in modern conditions. We cannot follow him down that path. The procedure by way of *remise de biens* is expressly preserved by the Law of 1990. The rule that if it fails to achieve the payment of the secured debts a *cession* follows has stood for many years. It is not an expendable technicality which has attached itself to the remedy but is inherent in its whole juridical purpose, which is simply to postpone the customary processes of execution for a limited period while other solutions are attempted. Moreover, if we were to dispense with the rule that a *cession* follows on

a *remise*, we would also be dispensing with the only juridical basis on which the debtor can by making a *remise* obtain a discharge.

We were inclined to think, at one stage of the argument, that a case such as this, in which the order authorising the *remise* was discharged before its term, might differ from Le Maistre -v- Du Feu, in which secured debts were found still to be outstanding when the time allowed for the *remise* expired. Mr. Thacker has persuaded us that this instinct was mistaken. Although a *remise* should not be allowed unless the estate is believed at the time to be worth more than the secured debts, in the nature of things this belief will commonly turn out to be wrong. It is precisely for this reason that Article 6 of the Loi (1839) sur les Remises de Biens was enacted and that the rule in Le Maistre -v- Du Feu exists. We find it impossible to distinguish between cases where subsequent experience shows that the value of the estate was not high enough to justify making the order in the first place, and cases where subsequent events depress the value. Nor can it be right to distinguish the case where there is found to be a deficiency at the end of the period allowed for the *remise* and the case where because it is clear that there will be a deficiency the Court accepts defeat in advance. The law assumes that if the *remise* had never been allowed there would have been a *cession*, either voluntary or involuntary. It follows that if a *remise* is allowed, a *cession* should follow if it comes to an end leaving secured debts unsatisfied, at whatever stage that happens and for whatever reason. It is true that since 1990 a *cession* would not necessarily have followed if a *remise* had been refused, because the matter might have proceeded *"en désastre"*. But the legal incidents of the procedure for *remise de biens* which dates back to 1839, cannot be affected by the fact that the legislature has made a further remedy available since 1990.

We turn, therefore, to the second question, whether a *cession* following upon a *remise* falls within Article 5(1)(b) of the Law of 1990. It is not an easy question to answer, because the draftsman of Article 5 does not seem to have borne in mind as he set about his work all of the incidents of the ancient procedures to which he was referring. There are therefore practical difficulties in applying the Article to a case where there has been a *remise de biens* on any possible construction.

Paragraph (b) of Article 5(1) refers to any case in which the debtor has been "permitted" by the Court to make a general *cession*. The analysis of the procedure by way of *remise de biens* which was made by the Royal Court in Le Maistre -v- Du Feu demonstrates that this is what happens when the debtor appears before the Court to make his *remise*, albeit that it happens implicitly and conditionally. The real question is therefore whether it is possible to cut down the apparent generality of paragraph (b) so that it applies only to a general *cession* which the Court has authorised as a free-standing remedy, and not to one which arises as the incidental consequence of its having authorised a *remise* which later turns out to be unsuccessful. In our view paragraph (b) cannot be limited in this way. Once it is accepted, as it must be, that the termination of an unsuccessful *remise* brings about a general *cession*, it must follow that it also brought about a discharge of the debtor under Article 10 of the Loi (1832) sur les Décrets. On that footing the debtor would have no further personal liability in respect of debts dating from before the *cession* and would not be insolvent. There would be no basis for making a declaration placing his property *en*

désastre. The secured debts, however, would continue to be charged on the property, and the only way of disencumbering it would be by *dégrèvement*. In these circumstances, the draftsman of Article 5 cannot have envisaged that there would be a procedure *en désastre* if there was a general *cession*, whatever the juridical basis on which it happened.

Looking at Article 5(1) as a whole, it seems to us that its purpose is clear. It is to ensure that a declaration under the Law is not made if at the time of the application something has already happened to the property which makes it inappropriate or impossible to administer it *en désastre*. The three procedures described in paragraphs (a), (b) and (c) all have the common characteristic that the property is no longer at the disposal of the debtor. Paragraph (a) precludes the Court from declaring a company's property *en désastre* while a *remise de biens* is actually in progress and the property is being administered by the Court. This is the reason for the proviso that the order allowing the *remise* must still be "in force". Paragraphs (b) and (c) deal with legal procedures (namely *cession* and renunciation) which leave the debtor with what has been called a "precarious interest" in the property (see In re Barker [1985-86] JLR 186, 190-1), but are really the immediate preliminaries to execution by *dégrèvement*. In all three cases the debtor has the bare title to the property but no valuable interest which can be vested in the Viscount and distributed under the Law of 1990. It would therefore be inappropriate to declare it *en désastre*. In addition in the case of a general *cession*, administration *en désastre* would be impossible because the debtor has been discharged and is therefore solvent. These being the objects of Article 5(1), it is hard to see what purpose the legislature could sensibly be supposed to have in mind by distinguishing between a general *cession* arising out of a special application and one which arises from the unsuccessful conclusion of a *remise*. We hold that Article 5(1)(b) applies to both.

In order to make sense of Article 5(1)(b) in a case where the general *cession* arises out of a *remise*, one must suppose that the debtor is only treated as having been *"reçu à faire cession générale"* when the *remise* has terminated without success and the *cession* has become unconditional. But when that has happened, as it has here, the effect of Article 5 is that the property of the debtor may not be declared *en désastre*.

The Deputy Bailiff admitted to feeling some unease about this result, and so do we. But, pausing to examine why we feel uneasy, it is we think because of the arbitrary features of a form of execution which the legislature has decided to preserve notwithstanding the making of the Law of 1990, and the consequences for the guarantors of the company having chosen to proceed under the old law in October, 1995, when it decided to run the risks of a highly marginal *remise de biens* instead of placing itself there and then *en désastre*. This may have been the right decision for the company. But it has turned out to be bad for the guarantors.

The appeal will be dismissed.

Authorities

Insolvency Act 1986.

Bankruptcy (Désastre) (Jersey) Law, 1990.

Le Gros: "Traité du Droit Coûtumier de l'Île de Jersey (Jersey, 1943): p.373-4: (commentary on Le Maistre -v- Du Feu [1850] Ex 508).

In the matter of the dégrèvement of Immovable Property of Barker (1985-86) JLR 186.

Loi (1832) sur les Décrets.

Loi (1839) sur les Remises de Biens.

Loi (1880) sur la Propriété Foncière.

In the matter of the Immovable Property of Barker (1985-86) JLR 120.