14 pages.

COURT OF APPEAL.

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11th April, 1997.

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

In re the Bankruptcy (Désastre) (Jersey) Law, 1990.

In re Blue Horizon Holidays, Ltd., (the Appellant) *en désastre* on the application of St. Brelade's Bay Hotel, Ltd.

Appeal by the Appellant:

(1) from the Order of the Royal Court (Samedi Division) of 11th February, 1994, declaring it *en désastre*; and

(2) from the Judgments of the Royal Court of 14th, 18th February, and 4th March, 1994, refusing the applications of the Appellant, under Article 7 of the above Law to recall the said *déclaration en désastre*.

Mr. David Eves of behalf of the Appellant.
Advocate D.F. Le Quesne, convened at the Court's request as *Amicus Curiae*.
The Viscount, convened at the Court's request.

JUDGMENT

THE PRESIDENT: In February, 1994, St. Brelade's Bay Hotel Ltd, to which I will refer as "the Hotel" applied as a creditor for a declaration that the goods and effects of Blue Horizon Holidays Ltd, to which I will refer as "Blue Horizon", be declared *en désastre*, the application being supported by an affidavit from the Managing Director of the hotel company. Post-dated cheques had been proffered by Blue Horizon in respect of a long-standing debt and the affidavits deposed to the dishonouring of three of those four cheques in consequence of which it was attested that there was an indebtedness of £1,712.34 and that the debtor was insolvent in that it was unable to pay its debts as they fell due. Notice was given to the Bailiff's office, the Viscount, and the Judicial Greffier.

The matter came before the Inferior Number of the Royal Court, being the Court possessing the jurisdiction to make such a declaration and an *ex parte* declaration of *désastre* was made on 11th February, 1994. It is the practice of the Court in normal circumstances to make such a declaration *ex parte* on proper evidence, leaving it to the debtor to apply for the *désastre* to be recalled. This is a pattern well-known in Jersey to which I will revert later.

There then followed a series of five applications by Blue Horizon represented by Mr. Eves, a Director, to recall the declaration and in each case such application failed; the Court, in each case, giving a reasoned judgment.

By a notice of appeal dated 11th March, 1994, Blue Horizon sought to appeal to the Court of Appeal from the declaration described in the notice of appeal as a judgment and from the first three of the five refusals of the Royal Court to recall the *désastre*. Having served the notice of appeal the debtor company applied to the Royal Court for a stay of the *désastre* pending determination of that appeal.

Two hearings took place in the first of which on 18th May, 1994, the Royal Court held that there was an error in the Court of Appeal (Jersey) Law, 1961 and that in consequence there was a right of appeal from the Inferior Number in such matters but that this could only proceed with leave and that leave in respect of the original declaration had already been refused by the Bailiff. I consider that the Court misdirected itself both as to the basis of this Court's jurisdiction and, if there were jurisdiction, as to the need for leave. However this may be, the Royal Court in fact went on, on 19th May, 1994, to determine whether to grant a stay and refused the same laying stress on the consequences of such a stay.

The matter came before the Court of Appeal in September, 1994, with Mr. Eves representing his company, Blue Horizon, and with the assistance of Advocate Wheeler who had been appointed by the Attorney General as *Amicus Curiae* and who had made submissions indeed in that capacity on the application for a stay. It was on this occasion, on 28th September, 1994, that Mr. Eves, with the concurrence of the Viscount, applied for an adjournment and the Court granted the application in the circumstances alone that this would give no tactical advantage to Blue Horizon and so that efforts could be made by Mr. Eves to bring the company into the ambit of the recommendations for the possible future trading life of the debtor company in an accountant's report which had recommended very substantial capital injections into the company were it to be in a position to continue to trade.

In the course of expressing the Court's reasons for granting the adjournment, Sir David Calcutt expressed the view of the Court that there were the gravest doubts as to whether the Court of Appeal in any event had jurisdiction to deal with the matter, the same having been dealt with by the Inferior Number both in the making of the declaration and in the refusing of applications to recall it and indeed in hearing the applications for a stay.

The matter having come, after an interval of 2½ years, before us now in April, 1997, it was decided to deal first with the question of the jurisdiction of this Court in the absence of which jurisdiction the notice of appeal and its grounds would be of no effect.

The jurisdiction of the Court of Appeal in this Island is statutory, depending as it does on the provisions of Article 12 of the Court of Appeal (Jersey) Law, 1961 which provides as follows:

"JURISDICTION

> *(1) There shall be vested in the Court of Appeal all jurisdiction and powers hitherto vested in the Superior Number of the Royal Court when exercising appellate jurisdiction in any civil cause or matter.*
>
> *(2) Subject as otherwise provided in this Law and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the Superior Number of the Royal Court when exercising original jurisdiction in any civil cause or matter.*
>
> *(3) For all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the Royal Court, and shall have power, if it appears to the Court that a new trial ought to be had, to order that the verdict and judgment be set aside and that a new trial be had.*
>
> *(4) The Court of Appeal shall exercise such additional appellate jurisdiction as as may be conferred upon the Court by any enactment passed by the States and confirmed by Order of Her Majesty in Council.*
>
> *(5) This Part of this Law shall apply to "causes mixtes" as it applies to civil causes and matters".*

The Royal Court, in considering the jurisdiction of the Court of Appeal in the context of the application to stay the operation of the *désastre* and in its judgment of 18th May, 1994, expressed the view that there was an error in Article 12 sub-Article (2) and that for the words ***"Superior Number"*** there should be substituted ***"Inferior Number"***. Bearing in mind that this Law has been in force for over thirty years without any previous suggestion of such an error, and bearing in mind also the need to provide for appeals from the Superior Number, I can only express surprise that the Court permitted itself in effect to re-draw the provisions of the Law and to do so in so important an instance as the provision for the very jurisdiction of this Court. I therefore disapprove of the conclusion reached by the Royal Court in that particular instance. However, in the judgment of 19th May, 1994, in which it went on to consider the exercise of its discretion as to the grant of a stay, the Royal Court went on to express itself in these terms:

> *"We feel that* (that is to say the existence of a right of appeal) *must be so because there is a right for a person aggrieved to appeal under the Appeal Court Law in any civil cause or matter".*

Here the Royal Court was replacing the more precise wording of the Appeal Law which I have already quoted with its own paraphrase which, in very broad terms, can be taken to express the intention behind the provisions of the Appeal Law.

The structure of the procedure for a declaration of a *désastre* is now to be found in the provisions of the Bankruptcy (Désastre) (Jersey) Law, 1990, a Law passed, *inter alia*, to amend and extend the law

relating to the declaring of the property of a person to be *en désastre*. By Article (1) the "Court" is defined as meaning the Inferior Number of the Royal Court and a "debtor" is defined as being a person who is "insolvent", insolvency meaning "the inability of a debtor to pay his debts as they fall due". Subject to the provisions of Article 5, which do not have any application in the instant case, the Court has a discretion under Article 6(1) to make a declaration under an application made under Article 3 and supported by an affidavit as therein required. However, once the application has been granted and the declaration made, the debtor has two remedies, one relating to the point of time at which the declaration was made, and the other relating to the point of time when the debtor makes application to have the *désastre* recalled. These remedies are provided for in Article 6(3) and Article 7 of the Bankruptcy (Désastre) (Jersey) Law, 1990 respectively in the following terms:

"ARTICLE 6

....

(3) Where, as the result of an application made by a creditor a declaration is made and the person in respect of whose property it is made is, notwithstanding the declaration, at the date of the declaration not insolvent, that person shall have a right of action against the applicant to recover damages for or in respect of any loss sustained by him as a consequence of the declaration, unless the applicant, in making the application, acted reasonably and in good faith.

ARTICLE 7

Debtor's application to recall a declaration.

(1) The debtor may at any time during the course of the "désastre" apply to the court for an order recalling the declaration.

(2) The debtor shall give to the Viscount not less than forty-eight hours' notice of his intention to make an application under paragraph (1).

(3) The court shall refuse an application made under paragraph (1) where it is not satisfied that property of the debtor vested in the Viscount pursuant to Article 8 or Article 9 is at the time of such application sufficient to pay in full claims filed with the Viscount or claims which the Viscount has been advised will be filed within the prescribed time.

(4) In considering an application under paragraph (1) the court shall have regard to the interests of -

(a) creditors who have filed a statement of claim;

(b) creditors whose claims the Viscount has been advised will be filed within the prescribed time; and

(c) the debtor.

(5) Where the court makes an order under this Article it may make such order as to costs as it thinks fit.

(6) Where the court makes an order under this Article, the property of the debtor which is vested in the Viscount pursuant to Article 8 or Article 9 shall, with effect from the date of the order, vest in the debtor.

(7) An order made under this Article shall not prejudice the validity of any act of the Viscount relating to the property of the debtor between the date of the declaration and the date of the order".

It follows that although the making of the declaration is dependent upon incapacity to pay debts as they fall due, once the declaration has made the test changes. When the Court is asked to recall the *désastre*, the recall depends upon the balance between assets and liabilities. To put it more colloquially the test changes from a cash flow basis to a balance sheet basis.

Finally, I observe that by Article 8 of the Law the property of the debtor vests in the Viscount on the making of the declaration.

Prior to the coming into force of the Law of 1990, and in particular as the Law stood at the coming into force of the Court of Appeal (Jersey) Law, 1961, the Law as to *désastre* formed a part of the customary law of the Island being but one of the instruments by which the law as to insolvency was operated in this jurisdiction. It is stated in Matthews and Nicolle's "Jersey Property Law" to have been a novel creation on the part of the Jersey Customary Law, unlike other remedies which owed their origins either to French sources or to statutory provisions. It related, however, only to movable property and the old law was unclear as to whose property could be made the subject of a *désastre*. Under the old law there were provisions for an application for a recall and for claims for damages where a *désastre* ought not to have been given, although this appears to have been an absolute liability as distinct from being a liability dependent on an absence of care.

Prior to the coming into force of the Court of Appeal (Jersey) Law, 1961, the sole appellate jurisdiction within the Island was exercised by the Superior Number from which appeals lay to the Judicial Committee of the Privy Council. It was the intention of the Law of 1961 to provide an intermediate right of appeal and to attract to the new Court of Appeal the appellate functions of the Superior Number of the Royal Court which thereby ceased itself to be an Appellate Court. This right of appeal was comprehensive and applied to all judgments of the Inferior Number (petty cases apart). McMahon and Proberts -v- AG (1993) JLR 108 at 112 CofA. Furthermore no authority has been brought to our attention to indicate that there was no such right of an appeal in the case of a declaration of *désastre* made by the Inferior Number.

Mr. Wheeler, in his previous written submissions, drew our attention to a number of matters the presence of which were suggested to be counter indications of the existence of a right of appeal. Although Mr. Le Quesne, who appeared in Mr. Wheeler's place as *amicus curiae*, did

not seek to support Advocate Wheeler's reasoning, I deal shortly with it out of courtesy to Mr. Wheeler. By way of preface, however, I would be reluctant to infer that any part of the judicial process before the Court of a final nature is free of the right of appeal or ever has been, even if no trace can now be found of its exercise.

It was suggested, in relation to the Bankruptcy (Désastre) Law, 1990, first that the right to apply for a recall is inconsistent with the existence of a right of appeal. This is open to two objections: first, the same error which may have vitiated the legitimacy of the first order by the Inferior Number may just as easily vitiate the legitimacy of their refusal to recall the *désastre*. Secondly, the position of the debtor, as I have already mentioned, is not the same under the recall as in the making of the original order. A balance sheet test may be more difficult to comply with and thus may not be passed on the application to recall in a case in which in fact it turned out that there was no insolvency at the date of the making of the declaration.

It has further been submitted that the presence of a civil liability on the part of the applicant in the event of it being proved that the *désastre* ought not to have been given was a counter-indication of a right to appeal. This, however, ignores the fact that an applicant for a *désastre* may itself be in a poor financial state and it is also to be borne in mind that the right of action is dependent upon a want of care.

Finally it was suggested that the Bankruptcy (Désastre) (Jersey) Law, 1990, contains no provision for an appeal. For my part, I consider this to express the position the wrong way round; there is no exclusion of a right of appeal in a statute which affords a court a very far reaching power which it is to exercise judicially, with the result that if it makes an order it makes a declaration as well for the established form of judicial process.

Our attention, in addition, has been drawn to a recent decision of this Court in which jurisdiction was accepted, there having been no argument as to jurisdiction. The appeal is entitled Re Baltic Partners, *en désastre* (18th April, 1996) Jersey Unreported CofA and recalled a *déclaration en désastre*. It did so in circumstances in which it was clear to this Court that the applicant had failed to adduce evidence, whether of fact or of Swedish Law, that defences raised by the debtor company were not spurious and thus this Court held that there was no such clear liquidated claim as could properly form the basis for a valid *désastre*. There can, in my view, be no clearer example of the place which the appellate process can properly be expected to occupy. It was in part at least in the light of this decision that Mr. Le Quesne realistically took a contrary line to that previously adopted by Mr. Wheeler. We pay tribute to the care with which each of them has approached the duty which each accepted from the Attorney General in this case.

In summary, therefore, this was a judicial act of far-reaching effect which gives rise to the making of a declaration and in my judgment it would require the clearest words in a statute to exclude a right of appeal however administratively inconvenient that may be. In

the absence of any such words I conclude that this Court has the jurisdiction necessary to determine this appeal.

Having heard submissions as to jurisdiction we turned to consider the applications made by Mr. Eves on behalf of the company to call a number of witnesses. Coming as it does after five successive applications for a recall in 1994 and after an interval of 2½ years from the date when this Court was to sit to hear this appeal on the first occasion, these applications cannot be expected to find immediate favour. They related to nineteen witnesses in all. They fell, for the most part, into the categories which I go on now to express and in some cases they fell into more than one.

First, as to certain of the witnesses, Mr. Eves wished them to enter the witness box so that he could cross-examine them as to various matters, some of them far-reaching. This would not be a legitimate operation. When he put them in the witness box they would become his witnesses so that, as a matter of procedure and practice, he would be bound by their answers and he would not be permitted to cross-examine them.

Secondly, as to certain of the witnesses, Mr. Eves stated very frankly that he did not know what they would say. Again this cannot be a legitimate basis for the exercise of the Court's discretion to permit the calling of further evidence.

Thirdly, again as to a number of witnesses, Mr. Eves' intention was to ask questions as to the fact that he had not been notified of the making of an *ex parte* application and as to the reasons for this. It being common ground that Mr. Eves was not so notified and the legitimacy of an *ex parte* application being a matter of law, such evidence would not be relevant.

Fourthly, Mr. Eves wished to call members of his staff who had been employed by Blue Horizon so long ago as 1988 to speak as to its prosperity at that time. Whatever the date of their employment none of these employees was with the company in 1994, the Court being told that the staff had been slimmed down as a result of the drop in tourism in the Island consequent on the recession. On Mr. Eves' own account this had produced a marked decline on the prosperity of the business. This evidence is, on the face of it, therefore irrelevant. It would in fact be not only irrelevant but it would be of no assistance to Blue Horizon, merely tending to point to the decline in its fortunes.

I refer to three further witnesses specifically. First of all, there was a Mr. James Barker who had sworn an affidavit on 23rd May, 1995, to the effect that he had spoken to Mr. Colley of the hotel, after the *désastre* had been declared and asked him to lift it. He said, too, that he, Mr. Barker, would have paid the outstanding sum. Not only does this evidence come from an affidavit sworn over a year after the last of the Royal Court's decisions, but it is also of no relevance in that Mr. Colley's motives in making the application are irrelevant and of no account; indeed once the *désastre* had been declared, Mr. Colley or his company, would have had no power to recall it except in circumstances in which the liabilities of Blue Horizon were fully discharged. Also Mr. Eves wished to call his son, whom Mr. Eves said could have paid the

amount due. He produced some documentation in support of this, but again, this is of no relevance.

Finally, Mr. Eves wished to call a Mr. Boots of 'Cash Back' Ltd, who had written a letter to Mr. Eves on 1st November, 1996, stating that in his business as a debt collection agent he considered that he would only advise an application for a *désastre* as a last resort. This may well be a sensible approach but his views are not germane to this appeal.

Accordingly we declined to give leave to call any of the witnesses in respect of which Mr. Eves made his application.

Before turning to the grounds of appeal, I should say, by way of preface, that it is quite clear that Blue Horizon was a company in a hopeless financial state. It was living from hand to mouth and using advance payments to pay off past debts. Its cash flow was dependent on the chance of advance payments coming in to cover outstanding debts and it had virtually no assets. After making deductions for liabilities which were challenged or which were liabilities to Mr. and Mrs. Eves, or which were subject to a stay in respect of judgment, the liabilities were originally estimated at £34,000 but on the full enquiry made on the accountant's report obtained by the Viscount it became clear that there were undisputed liabilities of £79,000. It was an attitude of unreasonable commercial optimism which led Mr. Eves to believe that he could trade out of these difficulties. The day of reckoning was approaching and the result was, in my view, inevitable. At some stage he would have become at the mercy of his creditors.

I now turn to the specific grounds of appeal. The first ground set out in Mr. Eves' notice of 11th March, 1994, reads as follows:

> *"The désastre was declared without any notification being given to the debtor to appear in Court on the 11th February to defend the action".*

It is the case that no notice of the intention to apply for a declaration of a *désastre* was given to Blue Horizon and it is the case that the first that Mr. Eves heard about it was when the Viscount's officers arrived to take control of the company's premises and other assets. I find that this procedure was in accord with the rules and usual practice of the Royal Court. Rule 2, sub Rule (2) of the Bankruptcy (Désastre) (Jersey) Rules, 1991, provides that no application for a declaration of a *désastre* may be made unless notice is given at least 48 hours in advance to the Viscount. Rule 2(3) then prescribes the form of the application. The application must be accompanied by a short statement in a form annexed to the Rules setting out the name and assets of the debtor and the amount of the claim. Furthermore, an affidavit verifying that the creditor has a claim and that the debtor is insolvent but has realisable assets has to be lodged. For this purpose the definition of insolvency is that of inability to pay the debtor's debts as they fall due. This can be found in Article 1(1) of the Law. There is no requirement that the creditor should advertise his intention to make the application or give notice of it to anyone save the Viscount. The ordinary procedure under the Law of 1990 as under the previous Common Law equivalent is that the application is made *ex parte* in the Samedi Division of the Inferior Number. The only rights

expressly conferred by the Law of 1990 and the Rules on the debtor who is aggrieved by the making of the order are the two rights to which I have already referred, namely the right to claim damages from the creditor in the event that it turns out that the debtor was solvent so that the order should never have been made; and the right to make application to the Court for an order recalling the declaration of the *désastre*. By Article 7(3) of the Law the Court may not recall the declaration unless the debtor can prove that he has assets exceeding his liabilities. This, as I have already mentioned, is a different test of solvency from the one on the basis of which the creditor will have obtained the declaration and as I have already mentioned may be more difficult for the debtor to satisfy.

The Rules do not require an application for a declaration of *désastre* to be made *ex parte* but they do not forbid it. There is no reason why the rule-making body should not permit it. There may be good reasons for this, for example where there is a danger that assets may be spirited away or concealed if advance notice were to be given of the Viscount's arrival. The right to make an *ex parte* application is an exception to the ordinary rule that decisions are not made against a party in his absence or without hearing him. Moreover, it is a particularly significant exception in the case of applications for declarations of *désastre* which will ordinarily result in the immediate suspension of the debtor's business operations and in irreparable damage to his interests for which damages under Article 6(3) of the Law will not necessarily be adequate compensation. For these reasons it is important that practitioners whose clients choose to make their applications *ex parte* should be aware of the implications that this will have for the practice of the Courts.

In the light of this I have the following observations to make:

First, although there is no express provision for it in the law or in the rules, the Court has an inherent jurisdiction to rehear, *inter partes*, any application which it has dealt with *ex parte*. This is the only basis on which a power to decide matters *ex parte* can be reconciled with the rules of natural justice. It follows that a debtor is entitled not only to apply under Article 7 for the recall of the declaration, but to ask that the original application should be re-argued *inter partes*. If the debtor can show on the re-argument that the original declaration should not have been made, for example because he was not unable to pay his debts as they fell due, or because the creditor's claim was unfounded, he is entitled to have the order set aside even if he cannot satisfy the more stringent requirements which would apply on an application under Article 7.

The second observation I would make is this: an affidavit sworn in support of an *ex parte* application must make candid disclosure of all matters known to the creditor which are adverse to his application. Failure to observe this Rule may result in the declaration being set aside on that ground alone.

Thirdly, if on the *ex parte* application it appears to the judge that there are arguable grounds on which the making of the declaration may be resisted then, unless there is some reason for supposing that the creditor would be unjustly prejudiced by having to give notice, he

should in normal circumstances adjourn the application to enable notice to be given to the debtor and for the debtor to appear if he wishes.

However, none of the above considerations in my judgment affect the outcome of Blue Horizon's appeal. Mr. Eves' case is that he ought to have been given notice in order that he could pay the applicant's creditors' claim before the application was made. This I find to be a misconception. A debtor's duty is to seek out his creditor and to pay his debts on time. He is not entitled in law to be reminded that he is in breach of duty before steps are taken to enforce his obligations. Even if Blue Horizon were entitled under the rules to advance notice of an application to place it *en désastre*, which it was not, the purpose of the notice would be to enable him to resist the application and not just to pay the debt. Mr. Eves made no application to have the *ex parte* order re-argued *inter partes*. If he had done, given the financial condition of his company, he would inevitably have failed. Furthermore, there is no reason to regard the applicant's affidavit as lacking in candour in any relevant respect. The material before us suggests not even the shadow of a defence to the claims of the hotel, being the applicant creditor. The evidence that the company was unable to pay its debts as they fell due was overwhelming since the debts due to the hotel had been outstanding for a considerable time and in view of the fact, which I analyse in more detail later, that in spite of being given the indulgence of further time the company had dishonoured three of four post-dated cheques given to secure eventual payment.

It is quite possible that Mr. Eves might have satisfied the Court that Blue Horizon would be able to pay as they fell due those of its debts which were owed to creditors who went to the trouble of threatening him with a *désastre*, but it is most unlikely that he would have persuaded them that the company could have paid all its debts as they fell due. The Court would not have been impressed by the kind of material and arguments which we have examined on this appeal, particularly from a company which had filed no statutory accounts since its accounts for 1987. In fact, although Blue Horizon did not make application to have the matter re-argued *inter partes*, it did make an application under Article 7 in the course of which it became apparent that, as I have already stated, the company was irredeemably insolvent with a large balance sheet deficiency.

Taking the grounds chronologically rather than in the order set out in the notice I now turn to the following ground: it is contended that the affidavit sworn by Mr. Robert Colley was incorrect. Thus, it is contended that all necessary and proper facts were not included and it is said that Mr. Colley should have ensured that the criteria for the *désastre* application still existed at the time when the affidavit was presented to the Royal Court. This ground was amplified and explained by Mr. Eves by centering his attention on one act of dishonour out of several spoken to in Mr. Colley's affidavit. He complained that in the case of the representation of two cheques - as spoken to by Mr. Colley - the evidence was that there had been no dishonour of them as so described.

A detailed examination of the evidence which at various stages was before the Royal Court showed that there was no substance in this allegation. I insert at this stage a brief history as to how the cheques came to be drawn: a holiday booking was made with the hotel

through the agency of Blue Horizon by certain customers who were due to - and did - arrive for a stay in August, 1993. Blue Horizon collected first the deposit and then the price of the holiday. The guests arrived and they had their holiday. Blue Horizon kept the money. By the hotel's terms of trading, Blue Horizon should have paid this over thirty days before the start of the holiday. So it fell out that in early August Blue Horizon were invoiced with the sum of £2,278.08. Nothing had been paid by November, 1993 and Blue Horizon were pressed for payment by the hotel. They challenged a small part of the invoice but otherwise stated that they would not be in the position to satisfy the liability until the following January. In so stating they delivered four post-dated cheques payable on different dates in January, 1994. Information as to the fate of the four post-dated cheques drawn by Blue Horizon on Barclays Bank is to be taken from three sources, namely a letter from Midland Bank, that being the creditor's bank; a letter from Barclays Bank, being Blue Horizon's bank; and the formal representation put in by Mr. Eves on behalf of Blue Horizon on the first application to recall the *désastre*. The letter from the Midland Bank of 18th February which was at some stage before the Royal Court told a sorry story of the successive dishonour of the cheques. To take an example the first of the four cheques, each of them being for £570.78 was dishonoured on no less than four times prior to 28th January. The second of the cheques was dishonoured twice before the same date. Only one cheque was honoured, that dated 11th January, 1994. The three remaining cheques were clearly intended to be presented or represented on 28th January, 1994. Their fate was described in the letter from the Midland Bank dated 18th February, 1994, in these terms:

> *"We can confirm that on the 28th January, 1994, we specially presented cheque numbers* (they then give three numbers ending in the digits 13, 14 and 16). *These cheques were forwarded to Barclays Bank for re-presentation and we were advised by Barclays that these cheques were being returned to us unpaid. Barclays walked the cheques and the correspondence back to us".*

The point made by Mr. Eves was a very limited one in that it did not bear on any of the presentations earlier than that alleged as of 28th January. He drew attention to a letter from Barclays Bank of 17th February to the effect that they had no record in their books that the cheques had been dishonoured on 28th January, and he drew attention also to a pass sheet which showed no trace of the credit and debit in respect of the cheques which might be expected. This apparent inconsistency is, however, not difficult to resolve. Blue Horizon's own representation provides the explanation in its paragraph five. What is said in the Blue Horizon representation is this:

> *"The Representor's advocate, however, has been been informed by the advocates acting for St. Brelade's Bay Hotel Limited that on 28th January, 1994, three cheques drawn on the Representor's bank account, each in the sum of £570.78 and dated 4th January, 1994, 11th January, 1994, and 25th January, 1994, respectively, were delivered to the St. Brelade's branch of Midland Bank being the bank of St. Brelade's Bay Hotel Limited. The cheques were then delivered to the Library Place, St. Helier branch of Midland Bank. They were then "walked across" to Barclays Bank plc by an employee of Barclays Bank plc. Barclays Bank plc were asked whether the cheques would be honoured. An employee*

of Barclays Bank plc stated that the cheques would not be honoured".

The paying bank having thus indicated that there were not sufficient funds to meet the cheques it is clear that the formality of presentation was not gone through. The result was that the special presentation was aborted and the cheques were not put through the formal dance of being credited and debited with the result that there was no record in the pass sheet and with the result that the bank wrote as it did. This ground is therefore rejected, the point being both bad and unmeritorious. I mention further that Mr. Eves had criticised the advocate assigned to him on legal aid for not being prepared to argue that Mr. Colley's affidavit was false at the hearing of the representation of 18th February. The analysis set out above serves to justify the advocate's conduct. He was clearly not prepared to put up a case on Mr. Colley's affidavit which, on examination of the documents to which I have referred, would have proved groundless.

The next ground of the notice of appeal reads as follows:

"The Debtor banked more money (£1,742.00) on the 11th February, 1994, on the day the désastre was declared, than the amount claimed by the Plaintiff (£1,712.34)".

Mr. Eves accepted that this only told part of the story in that cheques had already been drawn in respect of other matters which, together with the cheques in question, would still have resulted in a deficit despite that credit. This is illustrated in the accountant's report prepared for the Viscount. On Mr. Eves' own submissions, therefore, the ground has no substance.

The next ground reads as follows:

"The Debtor approached the Plaintiff's Advocate on the afternoon of Friday, 11th February, to pay the said debt, which offer was refused".

Again this is without substance in that once the declaration had been made, Blue Horizon had no right to insist on paying the money. The *désastre* had been declared and the liabilities of the company far outstripped its exiguous resources. The matter ceased to affect only the original creditor and the debtor.

The next ground reads as follows:

"By letter dated the 1st March from the Advocates acting for the Plaintiff it was stated that they would be prepared to lift the désastre. This vital evidence was withheld from the Creditors' meeting on Thursday, 3rd March, and the Royal Court on Friday, 4th March, as it was not received by the Debtor until Saturday, 5th March".

This ground is similarly groundless, relying as it does on an offer from the hotel's advocate to lift the *désastre* on payment both of the sums owing and of the legal costs. Mr. Eves complains that he only received this after what was I think the fourth of his applications to recall the *désastre* but he could have raised it later or thought to

follow it up had he really had the means or been able to obtain the means to do so. Furthermore it is difficult to see how the *désastre* could have been lifted at the mere request of the hotel if there was not sufficient to satisfy the total balance of the balance sheet indebtedness and the company's current debts.

The next ground is expressed thus:

> *"Despite the agreement of the Plaintiff to lift the désastre the Royal Court of Jersey have refused to hear the application of the Debtor".*

This ground departs from reality. The Court showed very considerable indulgence to this debtor company which from the start was shown to be in a hopeless financial state and was prepared to listen to no less than five applications to recall the *désastre* and gave a full judgment in each case. Mr. Eves may not believe it but he has, in my view, been handsomely treated by the Royal Court throughout this long history.

Finally, I can take together three grounds under which it is contended that the *"application for the désastre was frivolous and vexatious"*; that it was *"an abuse of the process of the Court"*; and that it was *"for a wrongful predominant purpose and maliciously prosecuted"*.

The examination which I have made as to the circumstances of the debt outstanding to the hotel; the succession of dishonours of post-dated cheques; and, finally, the indication that none of the three cheques to which I have referred above, if presented, could be honoured on the then state of the account, deprives this ground of any substance.

Blue Horizon was in a hopeless state and the sooner it was put to an end as a trading entity the better. Accordingly, I would dismiss this appeal.

NUTTING, JA: I agree and have nothing to add.

SUMPTION, JA: I agree.

Authorities.

Re Baltic Partners, *en désastre* (18th April, 1996) Jersey Unreported CofA.

Rumasa -v- W H Trademarks (1985-86) JLR 308 @ pp. 323-4.

Bankruptcy (Désastre) (Jersey) Law, 1990.

Bankruptcy (Désastre) (Jersey) Rules, 1991.

Court of Appeal (Jersey) Law, 1961: Article 12.

Zuliani -v- Veira (1994) 1 WLR 1149.

McMahon and Proberts -v- AG (1993) JLR 108 at 112 CofA.