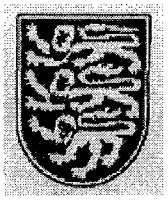
THE JERSEY LAW COMMISSION



CONSULTATION PAPER

BANKRUPTCY (DÉSASTRE) (JERSEY) LAW 1990

"SOCIAL DÉSASTRE"

JERSEY LAW COMMISSION **April 2010**
CONSULTATION PAPER No. 1/2010/CP

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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THE JERSEY LAW OF SOCIAL DÉSASTRE

1 INTRODUCTION

The Law Commission was asked by the Citizens Advice Bureau ("CAB") to examine the law on "désastre" and to make recommendations to alleviate, what CAB believe, are defects in the law. CAB originally approached the office of the Chief Minister and the matter was referred to the Law Commission by the Legislative Advisory Panel. CAB is concerned that many debtors who seek its assistance and are in such significant debt that they are unlikely ever to be able to repay (despite strenuous efforts so to do) are nevertheless unlikely to be granted a désastre because they have no "realisable assets". CAB informed the Law Commission that they are advising an increasing number of such debtors whose efforts to extricate themselves from the burden of debt are leading to illness and a physical inability to work, thus exacerbating the problem. We set out below certain statistics supplied by CAB.

2 THE CONCEPT OF DÉSASTRE

A *désastre* has been judicially defined as:

> "... a declaration of bankruptcy, the effect of which is to deprive an insolvent debtor of the possession of his movable estate and vest that position in Her Majesty's Viscount whose duty it is to get in and liquidate that estate for the benefit of the creditors who prove their claim" (re Désastre Overseas Insurance Brokers Limited (1966) JJ 547 at page 552.)

This definition precedes the statutory regime provided by the Bankruptcy (Désastre) (Jersey) Law 1990 (the "**1990 Law**") and the Bankruptcy (Désastre) Rules 2006 (the "**Désastre Rules**"), but continues nonetheless to prove a useful and succinct definition of *désastre*, save that since the 1990 Law the effect of a declaration is also to vest the debtor's immovable estate in the Viscount.

The granting of a *désastre* is in the discretion of the Royal Court (Article 6(1) of the 1990 Law). The Article does not guide the Court as to the exercise of this discretion - indeed, nowhere in the 1990 Law is any guidance to be found and the discretion is not defined. After considering the application and accompanying affidavit, the Court, "may make a declaration."

Subject to a statutory exception that need not concern us here, an application for a declaration of *désastre* must be accompanied by an affidavit deposing that:

where the application is made by a debtor, he is insolvent, but has realisable assets;

where the application is made by the creditor, he has a claim against the debtor and the debtor is insolvent, but has realisable assets.

Thus, for an application for a declaration of *désastre* to succeed, there are two essential prerequisites: first, the debtor must be insolvent (that is, unable to pay his debts as they fall due) and second, he must have realisable assets. If these are satisfied, the Court then has to exercise its discretion whether or not to grant the

application. Article 6(1) of the 1990 Law provides that "the Court, after considering an application ... may make a declaration" of *désastre*.

As indicated above, the role of the Viscount post a declaration of a *désastre* is to administer the property of the bankrupt. The Viscount also plays a pivotal role when an application for a *désastre* is made to the Royal Court. Rule 2(2) of the Désastre Rules provides that 48 hours notice of the intention to make the application for a *désastre* must be given to the Viscount. If this has not been done, the Court will only grant leave if it is satisfied that there were good reasons for not giving the notice, e.g. urgency. Under Article 5(2), in the case of an application by a creditor, the Court may require the creditor to indemnify the Viscount against the costs of the *désastre*. Although the reasons for requiring notice to be given to the Viscount of an intention to apply are not set out in the relevant statutes, in practice it would appear the Court will only make declaration of *désastre* if the Viscount agrees to act and this will depend either on there being sufficient assets in the bankrupt's estate from which the Viscount can meet his costs or on the Viscount receiving an indemnity for his costs from a creditor.

3 CONCEPT OF SOCIAL DÉSASTRE

Notwithstanding the statutory regime, in the case of The désastre of Mr C S Russell (5 August 1994 Jersey Unreported) the Royal Court introduced a category of declaration which has come to be known as a "social *désastre*". In that case, the Court permitted a debtor with negligible assets to declare himself *en désastre*, on the basis, it seems, that a debtor without assets should not be denied access to the bankruptcy system. It did so by adopting a wide interpretation of the term "realisable assets". In Russell the Court considered a report requested from the Viscount.

The Court revisited the concept of "social *désastre*" in The désastre of Roach and Lamy (2005) JLR 412. The Court held that it had the power to grant a *désastre* where an applicant had no immediately realisable assets: it took the view that future interests (including future income) could be viewed as a realisable asset sufficient for the "realisable asset" threshold to be met. It stated that a *désastre* would, however, only be granted in exceptional circumstances as the process was primarily intended to create equality between creditors through the realisation of a debtor's property, not to enable a debtor to avoid paying his debts. Creditors, it concluded, would be prejudiced by "social *désastre*" in which there would be no realisable assets, as not only would they not recover their debts, but also they would be unable thereafter to continue to pursue them. In addition, the Viscount would be unable to recover his costs.

The Court then proceeded to apply these principles to the facts of the two applicants. In the case of Roach, his income consisted of incapacity benefit and, it was anticipated in the near future, an old age pension. The Court concluded that he would never be able to repay his debts. Nonetheless, he was declared *en désastre* because he had behaved very responsibly in relation to his debts, which he had incurred as a result of redundancy, and had made every effort to repay them over a considerable period. He had not spent money on luxuries and was only unable to pay his debts because he had become medically unfit to work. In contrast, Lamy, in the Court's view, had not shown an appropriate attitude to her debts. On the contrary, she had used funds intended to reduce them for other purposes, taken holidays abroad and

generally failed to acknowledge the need to make a determined effort to reduce her debts by making regular payments in reduction of them. In addition, Lamy was aged 53 and still in active employment.

In this case the Court seems to have been prepared to view future income as a realisable asset capable of satisfying one of the prerequisites of a *désastre*, even though those assets would not actually be realised. It then chose to exercise its discretion as to whether or not to grant the *désastre* by applying that which in effect amounts, with respect, to a moral judgement on the debtor. The "responsible" debtor was rewarded with a *désastre*. The "irresponsible" debtor's application was refused.

See also in the matter of The désastre of Mr Anthony Frank Martin (24th November 2000).

4 THE POSITION IN ENGLAND

We have briefly considered the Insolvency Act 1986 and the Insolvency Rules 1986 to see whether any guidance is available under English law. It would appear that the only criterion to be satisfied by an individual wishing to declare himself bankrupt in England or Wales is that he is unable to pay his debts.

The CAB website provides the following link from which an individual may download the required forms to submit to the Court, namely a 6.27 Debtor's Bankruptcy Petition and 6.28 Statement of Affairs (Debtor's Petition): http://www.insolvency.gov.uk/forms/forms.htm.

In short, there does not appear to be any distinction in English law between bankruptcy in the general sense of the word and social bankruptcy; all a person needs to do is to complete the forms and satisfy the judge that he is unable to pay his debts.

English law also provides a range of alternative statutory debt relief and repayment procedures. As one commentator has recorded, the "*underpinning logic*" to the range is "*categorising debtors into "can't pays", "won't pays", "can pay nows" and "can pay laters", and providing matching procedures*".[1] The result however appears to be a somewhat bewildering choice for debtors.

In Jersey, notwithstanding the possibility of a "social *désastre*" the Court, in Roach and Lamy, stated that social *désastre* should be granted only in exceptional cases.

5 REMISE AND CESSION - A CONNECTION?

As the Court observed in the Re Overseas Insurance Brokers case "...*désastre* was invented to consolidate the claims of numerous creditors and to preserve a status of equality between them" and although the scope of the remedy has enlarged over the years and the Viscount's role has expanded, protection of the creditors was and remains the essential purpose of *désastre*.

Remise de Biens is an ancient common law procedure that affords an indulgence to a debtor who, though possibly not insolvent, is having difficulty satisfying his creditors. The value of his assets must exceed the value of the claims against him and the debtor

[1] Peter Joyce, A simple solution to debt? Cork revisited – again 2009 22 Insolvency Intelligence.

must own immovable property (which since In the application of Coralie June Taylor (10 December 1999) includes shares in a limited company itself owning immovable property). Whether or not to grant a Remise lies entirely within the discretion of the Court.

This procedure would not help an impoverished debtor without assets and neither would *cession générale*.

Cession générale is another ancient procedure involving the voluntary renunciation by a debtor of all his property, both movable and immovable, for the benefit of his creditors. It is only available to a debtor who has been, or is about to be, imprisoned for debt. Again it is entirely discretionary, being in effect a privilege that may be afforded to an embarrassed debtor on his own application.

Whilst all three remedies are discretionary, the essential difference between *désastre* on the one hand, and *remise* and *cession* on the other, is that the former is for the protection of the creditors and the latter for that of the debtor.

Notwithstanding that neither *remise* nor *cession* would, of themselves, help an impoverished debtor, in inventing the social *désastre*, the Court must surely have had in mind its debtor-protection-based discretion, as conferred upon it by both the *remise* and *cession* remedies. Indeed, in The désastre of Mr C S Russell, to which we have already referred, the applicant, Mr Russell, was applying to make cession; the Court declined the application, there being opposition from creditors, while acknowledging that it might not have been possible for a *désastre* to proceed due to want of assets. In the event, as we have seen, Mr Russell was nonetheless permitted to declare himself *en désastre*.

Dessain and Wilkins put it this way in the third edition of their work, *Jersey Insolvency and Asset Tracing*: "In this case the Court seems to have taken the view that access to the bankruptcy system should not be denied to debtors *in forma pauperis*: it should not be possible for one to be too poor to be declared bankrupt." But the learned authors coyly add in a footnote, "Though, of course, the obverse argument, namely that people should not be admitted to bankruptcy rather than pay their debts, should not be lost sight of." (page 100) Absent the possibility of a social *désastre*, there would therefore exist a paradoxical position. A debtor who has been reckless with his affairs and run up significant debts, will be permitted a *désastre*, regardless of whether ultimately his creditors will receive little by way of repayment. On the other hand, a debtor who through no real fault of his own finds himself insolvent, but without realisable assets, would not be able to avail himself of a *désastre* and instead will continue to owe his debts.

6 SUMMARY AND CONCLUSIONS

In our view there are two major difficulties in the concept of social *désastre*. First, and indeed by the Court's own admission, it serves to protect the debtor in the context of a remedy that exists to protect creditors. Secondly, it involves a fiction: the debtor is notionally credited with realisable assets that will in truth never be realised.

It is perhaps for these reasons additional to those that it has already pronounced that the Court has stated in terms that it will only grant such relief exceptionally. If the

relief is only to be granted exceptionally, it follows that social *désastre*, at any rate in the current state of development of the concept, is unlikely to allow a large number of debtors access to the bankruptcy system.

If it were thought desirable by the legislature that more debtors should have access to the bankruptcy system than do at present, one solution might be to introduce another form of personal bankruptcy process that departs from the current requirement of *cession*, *remise* and *désastre* that there be realisable assets, and to abandon the conceptually flawed concept of social *désastre*. If this were done, the Court could be given a wide discretion to make an order (on an application for bankruptcy) "in such terms as the Court thinks fit". This would enable the Court to consider not only the economic but also the social implications of the case. Such implications could include not only the prejudice caused to debtors who finds themselves in a never ending cycle of debt with no reasonable prospect of payment and also the genuine concern of society to ensure that all individuals take debt seriously.

If on the other hand the remedy of social *désastre* were to be retained with a view to its being invoked other than exceptionally, it would be helpful for the 1990 Law to be amended so as to enable the Court to grant a declaration *en désastre* even when there are no, or no significant, realisable assets. In such circumstances, another desirable amendment would be to define the Court's discretion as currently conferred by Article 6(1) of the 1990 Law and provide guidelines along which, or provide for circumstances in which, such discretion is to be exercised.

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Responses to this Consultation Paper should be made in writing by 30 June 2010 to:

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