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25/7/1985

Before: Sir Frank Ereaut, Bailiff

Jurat J.H. Vint

Jurat L.A. Picot

In the matter of the "Dégrèvement" of the Real Property

of James Barker

and

In the matter of the application by James Barker

under the "Loi (1839) sur les remises de biens".

By Act of the Royal Court dated 3rd August, 1984, Lazard Brothers & Co. (Jersey) Limited obtained judgment against Mr. James Barker for the sum of £215,562.98 and interest until payment, and was authorised to cause Mr. Barker's movables to be distrained on and sold. On the application of Lazard Brothers the Court also ordered that that Act be registered in the Public Registry.

Mr. Barker did not settle, with the result that on 11th January, 1985, Lazard Brothers obtained an Act of the Royal Court authorising the Viscount to notify Mr. Barker that if he should fail to pay the amount of that claim within two months from the date of service of the Notice, all his property, both real and personal, might be adjudged by the Court to be renounced and to be subject to "decret", "dégrèvement" or "réalisation", as the case might be. That notice was served on Mr. Barker on 8th February, 1985.

Mr. Barker still did not settle, and on 31st May, 1985, at the instance of Lazard Brothers, the Royal Court pronounced "l'adjudication de la renonciation" of all Mr. Barker's real and personal property, and ordered that a dégrèvement or dégrèvements should be conducted on his "héritages dégrèvables" concurrently with a "réalisation" of his goods. The Court further appointed Advocate Sinel

and Advocate Birt as Attornies to conduct the dégrèvement or dégrèvements and to effect the réalisation and charged the Judicial Greffier and the said Attornies to do all acts necessary to give effect to this order.

The date appointed for the dégrèvement to take place was 8th July, but on 5th July, Mr. Barker applied to the Royal Court "d'être recu à remettre ses biens entre les mains de la Justice" and to adjourn the dégrèvement or dégrèvements and the réalisation. Counsel for Ann Street Brewery Company Limited, one of the unsecured creditors of Mr. Barker who had filed their claim, had been informed of the intention of Mr. Barker to make that application and was present in Court to object to the right of Mr. Barker to make such an application. The matter was therefore adjourned until 10th July for argument, and the dégrèvement or dégrèvements and the réalisation were adjourned sine die pending the determination of the application and of the objection, both of which were maintained.

The point at issue, with which this judgment now deals, is whether, notwithstanding the Act of the Royal Court dated 31st May, 1985, which pronounced the "renonciation" of his real and personal property, ordered a dégrèvement and réalisation and appointed Attornies, Mr. Barker thereafter retained the necessary right, interest and status to make an application to the Royal Court "d'être recu à remettre ses biens entre les mains de la Justice", in accordance with the provisions of the "Loi (1839) sur les remises des biens". We emphasise that the issue is not concerned with the merits of Mr. Barker's application as judged by the tests and formalities for which the 1839 Law provides, but is whether he has the legal right to make such an application subsequent to the Act of the Royal Court of 31st May, 1985.

We begin by comparing the dégrèvement procedure with that of the remise de biens.

The definition of dégrèvement in Article 1 of the "Loi (1880) sur la propriété foncière" and the procedure provided by that Law shows that the purpose of

the proceedings is to dispose speedily of the property of a debtor and is not to ensure that his debts are settled equitably. The creditor (or creditors) who declares himself "tenant" takes the whole of the property, and the debtor is deprived of any equity in the property. To borrow a description used in the case of Birbeck and Midland Bank Limited (1981) J.J. 121, at 130, the dégrèvement procedure consists of an inherently speculative transaction which can result in the "tenant" making a profit at the expense of his debtor or other creditors. The procedure was described to us during the hearing as "draconian". We agree, and would add "archaic".

By contrast the procedure of "remise de biens" provided by the 1839 Law is positively enlightened. As Le Gros "Traité du Droit Coutumier de l'Ile de Jersey", states at page 371 -

> "La remise de biens a pour but d'accorder à un débiteur fondé en héritage, qui est hors d'état de payer ses dettes, une surséance des poursuites de ses créanciers afin de lui permettre de vendres ses biens pour l'avantage de ses créanciers.
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> La Loi sur la remise est basée sur un principe de justice et d'équité qui permet à un débiteur d'invoquer l'aide de la justice contre un créancier saissant en suspendant provisoirement l'exécution d'un acte de la Cour".
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> In the Commissioners' Report of 1860 Sir John Awdrey said, at 4593 -
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> "as far as I understand it, it is an indulgence to the debtor, with the intent, if possible, to obviate a hasty sale",
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> to which the Solicitor General added -
>
> "and to obviate a décret".

Thus the "Remise de Biens" procedure mitigates the harshness, and the inequity, of the dégrèvement procedure in those cases where the debtor can validly claim that the value of his assets, if time is given to realise them at their proper value, exceeds the amount of his debts. However, such a debtor must take the initiative in seeking the indulgence of the Court and if he does not do so the dégrèvement procedure is usually the only course open to the creditors.

We accept that the procedure of making Remise de Biens under the 1839 Law was intended to take place before the stage at which the debtor's estate was at risk of being "renoncé", and in order to avoid a dégrèvement. That Law does not itself state that. However, Article 4 of the "Loi (1832) sur les décrets" provides -

> "Les biens-meubles et héritages du prisonnier ou de l'absent, qui n'aura point satisfait son créancier ou ses créanciers, ou qui n'aura point remis son bien entre les mains de la Justice, dans le délai qui aura été accordé par la signification à lui faite en vertu de l'Article 2 ou 3, seront renoncés."

The reference to "prisonnier" is because the law required the debtor to be "saisi" before he could apply for a "remise de biens". The application was made by the debtor when he was brought before Court to witness the confirmation of the "saisie", and was made "afin d'éviter la prison" or "afin de libérer son corps de prison". It is not now usual for an applicant to have been "saisi".

Furthermore, in this case (in accordance with normal procedure) Mr. Barker was warned by the Viscount's Notice that if he failed to settle the judgment debt his property might be adjudged to be renounced and a dégrèvement ordered.

There is no question in our minds, therefore, that the intention was that a debtor whose assets exceeded his debts but who could not immediately realise sufficient of his assets to settle such debts could avoid a dégrèvement, under which he would lose the whole of his estate, (whether or not his total assets, given time to realise their real value, exceeded his debts), by applying beforehand for leave to make "remise de biens".

Mr. Barker claims to be such a debtor and in those circumstances he could and should have applied for leave to make "remise de biens" upon receiving the Viscount's Notice and within the time limit given by the Notice. We do not know why he did not do so, and we did not seek to find out. The fact remains that, on the eve of the date appointed for the dégrèvement, he has made application under the 1839 Law and so sought the indulgence of the Court.

There have been two previous cases where the Royal Court has granted an application for "remise de biens" after the applicant's property had been pronounced "renoncé" and a dégrèvement ordered.

In re Summers nee Grounds (1971) 259 Ex.189, the Court granted the application and, with the consent of the creditor at whose instance the previous order had been made and with the consent of the Attornies appointed to conduct the dégrèvement, cancelled that order.

In re Lewis (1984) the Court granted the application, the making of which was encouraged by the one secured creditor, and postponed the dégrèvement sine die.

In neither case did any creditor object and the present issue had therefore not been argued.

Advocate Bertram (for Mr. Barker), who was supported by Advocate Mourant, on behalf of one of the creditors, and by the Viscount, also a creditor, argued that the effect of the Royal Court adjudging a debtor's property to be renounced, ordering a dégrèvement and appointing Attornies was no more than to start a chain of procedural events which was designed eventually to lead to a change in title when a creditor took as "tenant". Until that final event there was merely a suspension of ownership, with the Attornies having the "soin" of the property vested in them. It was therefore open to the Court, at any time before the dégrèvement took place and the title had changed by a "tenant" taking the property, at its absolute discretion, to receive an application to make "remise de biens". It was a matter between the Court and the applicant.

Advocate Falle, for Ann Street Brewery Co. Ltd., submitted that, whatever the inequities of the system, and whatever hardship might be suffered by Mr. Barker as a result of his having failed to seek to make "remise de biens" before the Act of 31st May, the position was that the Court must apply the law. Mr. Barker had failed to make his application in time, the Court

had therefore made the Act of 31st May, and by that Act the Court had deprived Mr. Barker of the legal right to make the subsequent application and itself of the subsequent right to receive it.

Counsel ably put forward a number of arguments in support of that submission.

First, he pointed out that the 1880 Law sets out the procedure for a dégrèvement and provides a time-table by which the various steps have to be completed. There is no statutory provision for the discontinuance of that procedure once it has begun.

In fact there are several instances where a dégrèvement has been discontinued. We have cited two cases. There are at least two others: Re de Veulle, ex parte Le Feuvre (1888) 212 Ex. 367, and Re Le Brun, ex parte Voisin et au (1894) 216 Ex. 301. It is true that in the first discontinuance followed settlement, and in the second discontinuance followed an application by the Attornies because the procedure had proved abortive.

The real point made by counsel, therefore, is that once a dégrèvement has been ordered it cannot be discontinued except by consent of all the creditors. However, in the Lewis case the creditors were not formally convened to ascertain whether they objected. Moreover, in the 1839 Law there is no provision for convening creditors if the Court decides to accept provisionally, under Article 1, the application to make "remise de biens". It is only after two Jurats have presented their report on the application that, under Article 2, the creditors have a right to be heard.

Secondly, counsel argued that "renonciation", when adjudicated by the Courts, was an irrevocable and irreversible act, which could not be undone, except with the consent of all the creditors. He cited Dalloz, "Renonciation", Article 3, "Caractere irrevocable", at paras. 80 and 81, in support. The Court, by adjudicating the property of Mr. Barker "renoncé", had set in train a chain of events of which all creditors could avail themselves and which could

not be halted except by the consent of all the creditors.

We are not satisfied that the term "renonciation" has the meaning and effect attributed to it by Dalloz.

It is of interest that, in French bankruptcies, the word "rénonciation" is not used. In a "déclaration de faillite" there is a "dessaisissement" of the debtor's property; the debtor is "dessaisi de l'administration de ses biens", but the "dessaisissement" does not deprive the debtor of his property; "il reste proprietaire de ses biens. Aucune mutation n'en resulte" (Dalloz, "Faillite", paras. 161, 162, 169).

The position of the "attourné" and of the debtor respectively after the debtor's property had been adjudged "renoncé", a dégrèvement ordered and an "attourné" appointed, was considered at length in the case of "the Dégrèvement of Mr. and Mrs. C.L.L Bonn "(1971) J.J. 1771, at 1790-2. The conclusion reached by that Court, with which we agree, was that the "Attourné" has only the "possession" and "soin" of the property (to enable him to conduct the dégrèvement), whereas the debtor retained "la propriété" of the property until such time as a "tenant après dégrèvement" has been confirmed in the ownership of the property by the Court. The Court therefore found that the effect of the Act of the Court adjudging the property of the debtor renounced was merely to suspend his rights of ownership.

There was some discussion before us as to whether the "Attourné" in a dégrèvement acts on behalf of all the creditors or only on behalf of the creditor at whose instance the dégrèvement was ordered. This arose because, prior to Mr. Barker's application, Lazard Brothers had intended, if they had taken the property as "tenants", to pay all the creditors and remit any surplus to Mr. Barker.

The effect for Mr. Barker could have been similar to a "remise de biens". Accordingly, Lazard Brothers were at first prepared to support Mr. Barker's application. However, they had since been informed by Ann Street Brewery Company Limited that if they took as "tenants" they would also pay all creditors, but no mention had been made as to whether any surplus would be remitted to Mr. Barker. In the circumstances, Lazard Brothers desired to leave the matter "à la sagesse de la Cour".

That neutral stance led Advocate Falle to argue that an "Attourné" represented all the creditors and could not withdraw from his duty to conduct the dégrèvement merely because the creditor, at whose instance the Act appointing him had been made, was prepared to acquiesce in a bid to prevent the dégrèvement taking place. If he could so withdraw in such circumstances, then in order to avoid any such unwelcome development, each creditor might feel obliged to apply for a dégrèvement and for "Attournés" to be appointed, which would be ridiculous. He cited in support Pesnelle, "Executions par Décret", 731, and Le Geyt, "Manuscrit sur la constitution, les lois et les usages de Jersey", Tome II, Chapter 32 entitled "Si le Greffier peut conduire un décret", at page 409.

The position of an "attourné" was considered in the case of Voisin v Newman (1895) 76 Exs. 491 and 11 C.R. 137, where it was held on appeal that the effect of Article 55 of the "Loi sur la propriété foncière" was not to make "Attournés" the delegates of the Court. In the Bonn case, already cited, the conclusion was therefore reached that the "Attourné" was to be regarded as the agent of the creditor who had "provoked" the dégrèvement.

Notwithstanding that conclusion, Advocate Birt conceded that "Attournés" must have some duties and responsibilities towards all the creditors, because there was no certainty as to which creditor would take as "tenant".

Advocate Falle submitted that if the "Attournés" were acting for all the creditors in the conduct of the dégrèvement proceedings (which for the purpose of this case we accept) and having regard to the fact that the "cessionnaire" was not a party to the "adjudication de la renonciation", nor of course to the dégrèvement procedure, by what right could he be allowed suddenly to come out of the blue and claim to be heard in his application to seek permission to "remettre ses biens"?

We have concluded that a "cessionnaire" in that situation does have the right to be heard. He still remains for the time being the owner of the property. In our view, no irrevocable or irreversible act has yet occurred, for we consider that the Act of the Royal Court which orders "l'adjudication de la renonciation" of a debtor's property is but the first step in a chain of events designed to lead to the disposal of the property to the creditor who declares himself "tenant", but which the Court can halt at any time, without the consent of the creditors. The contrast between the respective effects of the dégrèvement procedure and of the "remise de biens" procedure can be so dramatic for a debtor whose assets do in fact exceed his debts that it would be entirely inequitable if the Royal Court were to hold that it had no right even to hear his application which seeks the indulgence of the Court, albeit that he seeks that indulgence very late in the day. We agree that at this stage it is a matter between the Court and the "cessionnaire". Moreover, it is difficult to see what genuine injustice is caused to the creditors of a "cessionnaire" who comes late with his application, other than that which may be caused by a very few weeks delay. If the grant of a "remise de biens" will in fact cause genuine injustice to the creditors, then they have the statutory right to be heard by the Court under Article 2 of the 1839 Law.

Our view is, therefore, that there is nothing in law which prevents the Court from receiving this application, and that in equity if Mr. Barker wishes to maintain his application then the Court should receive it in accordance with the provisions of the 1839 Law. ~~in which case the Court should annul the Act of 31st May, 1985, previously referred to.~~