85/98

25th September, 1985.

IN THE COURT OF APPEAL OF JERSEY

Before: The Hon. Mr. Justice Hoffman, President,

David Charles Calcutt, Esdq., Q.C.,

John Martin Collins, Esq., Q.C.,

IN THE MATTER OF THE DEGREVEMENT OF THE IMMOVEABLE PROPERTY OF JAMES BARKER

AND

IN THE MATTER OF THE APPLICATION BY JAMES BARKER UNDER THE "LOI (1839) SUR LES REMISES DE BIENS"

MR. JUSTICE HOFFMAN: Since the summer of last year, Mr. James Barker has been in serious financial difficulties. In August 1984, Lazard Brothers (Jersey) Limited obtained a judgment against him for over £215,000 and after this judgment had been registered, his goods were declared 'en désastre' on the application of Barclays Bank. Mr. Barker applied to discharge this order on the grounds that he was not insolvent because he owned real property of sufficient value to pay his debts within a reasonable time. The Deputy Bailiff at first adjourned this application for three months and it appears that, during that period, Mr. Barker, with the aid of the Viscount, was able to prepare a sufficiently coherent account of his affairs to persuade Barclays Bank to consent to a discharge of the 'désastre' order on the 13th December, 1984. This discharge proved to be only a temporary respite because the judgment debt to Lazard's remained unsatisfied. On the 11th January, 1985, Lazard's obtained an order 'Vicomte charge d'écrire' which was served on Mr. Barker on the 8th February, 1985. This order is served pursuant to Article 2 of the Loi (1832) sur les Décrets as modified by Rule 8(1) of the Royal Court Rules,1982. It notifies the debtor that he must satisfy his creditor within two months after service of the notice "sous peine....." in the words of Article 2, ".....que ses bien meubles et héritages seront adjugés renouncés".

Mr. Barker did not pay the debt or take any other action in regard to the notice. Accordingly, on the 31st May, 1985, Lazard's proceeded in accordance with Article 4 of the 1832 law to obtain an order that the 'biens meubles et héritages' of the debtor 'seront renoncés'. This order was obtained as we were told, ex parte by production of the Viscount's record of service of the notice under Rule 8(1) and

evidence that the debt had not been satisfied.

Under the old law, the effect of the order would have been that the estate declared to be 'renonce' would also have been, in the words of Article 4 of the 1832 law, 'immédiatement décrétés', that is to say, liable to be vested in a tenant under the 'décret' procedure. The words 'immédiatement décrétés' were, however, deleted by Article 48 of the Loi (1880) sur la Propriété Foncière' which, so far as real property was concerned, substituted for the 'décret' the procedure of 'dégrèvement'. Pursuant to this procedure, the Court in Mr. Barker's case appointed two advocates to be 'attournés' for the purpose of conducting a 'dégrèvement' of Mr. Barker's lands. The Greffier fixed the 8th July, 1985, as the date for the 'dégrèvement' and the statutory notices were duly given.

On the 5th July, Mr. Barker applied to the Royal Court, pursuant to Article 1 of the Loi (1839) sur les Remises de Biens for permission 'de remettre son bien entre les mains de la justice'. The procedure laid down by the statute is that, unless the application is, at that stage, summarily rejected, the Royal Court is to appoint two Jurats to examine the debtor's estate and report on whether it would be worth while to grant the 'remise'. The appellants, Ann Street Brewery Company Limited, who are unsecured creditors, appeared on this application and opposed Mr. Barker's application, contending that it should be summarily rejected. This contention took the form of a two-pronged argument. The first was that the 1839 Loi sur les Remises de Biens and the customary law upon which it is based contemplated that the debtor would seek leave 'de remettre son bien entre les mains de la justice' but in this case, it was said, the effect of the order that Mr. Barker's estate was 'adjugé renoncé' was irrevocably to divest him of all interest in his estate, therefore he could have no assets to offer into the hands of justice. The alternative submission was that the procedure contained in the 1832 Loi sur les Décrets and the 1880 Loi sur la Propriété Foncière was irreversible without the consent of all the creditors. Once an order for the 'dégrèvement' had been made, the body of creditors as a whole acquired a vested right to such 'dégrèvement' being conducted in accordance with the provisions of the law and this process could not be halted without their unanimous consent.

The Bailiff rejected these submissions and proposed to proceed to hear Mr. Barker's application, after the report of the Jurats, on its merits. From this ruling, the appellant appeals to this Court.

I shall first consider the question of whether the order that Mr. Barker's estate be 'adjugé renoncé' irrevocably divested him of all interest in his real estate. On this point, the main obstacle in the way of Mr. Falle, who appeared for the appellant

and to whose careful research and able submissions the Court is greatly indebted, is that in the case of re Bonn reported in 1971 Jersey Judgments, 1771, Sir Frank Ereaut, when Deputy Bailiff, expressed views directly contrary to his submission. At page 1792, the learned Deputy Bailiff summed up the effect of an earlier consideration of the statutory authorities by saying, "Our conclusion is that the effect of the act of the Court adjudging the property of the 'cessionaire' renounced is merely to suspend his rights of ownership until such time as a 'tenant après dégrèvement' has been confirmed in the ownership of the property by the Court or until the proceedings are earlier terminated."

If this is right, the debtor retains an admittedly precarious interest in the land until it is finally divested by the 'degrevement' or possibly the act of the Court which confirms the tenure of the creditor who has offered himself as tenant of the property 'dégrévé'. During this period, the estate of the 'cessionaire' is subject, of course, to the rights of his creditors and also to the rights of the 'attourné' of the creditor who initiated the 'dégrèvement' proceedings, who, under the statute, is given the 'soin' and 'possession' of the land. This does not, however, amount to a total divestment of the 'cessionnaire's' estate. Mr. Falle was, therefore, obliged to argue that on this point, re Bonn was wrongly decided. It is a decision by a judge well versed in the customary laws of this Island which has stood without criticism for fourteen years and, being a decision on title to land, may well have been relied upon by persons advising on title. I therefore say at once that, although it is not binding upon this Court, I would be reluctant to over-rule it unless we were satisfied that it was plainly contrary to earlier authority or that it was the cause of some practical injustice. Mr. Falle submitted that earlier authority showed that upon an order for the debtor's land to be 'adjugé renoncé', his estate therein was irrevocably terminated. He pointed first to the word 'renoncé' which, he said, was a strong expression and suggested an analogy with the Roman and civilian concept of 'derelictur'; it is clear from the civilian commentaries upon the Roman law that the effect of the abandonment of property is that it ceases to be in the ownership of the person who has abandoned it. I do not think, however, that it is permissible to draw these conclusions simply from the nomenclature which is used in the order. One has to look at the writing, the old authorities, to see what the practical consequences of such an order were. Mr. Falle says that upon such an order, the feudal Seigneur became entitled to take possession of the land and that the effect of such possession was to put an end to the debtor's estate. It seems to me, however, that the authorities which were cited by Mr. Falle on this point were, at best, equivocal. He relied, in particular, on a manuscript work of Poingdestre (which might perhaps be called the Codex

Falleticus, because Mr. Falle says that he is the owner of the original!); under the title of 'Décret', Poingdestre says, "Après la cession faite les héritages du cessionaire demeurent vacants et en cette qualité sont saisis par le Seigneur feodal duquel ils relevent qui enjouit jusques à ce qu'il y ait un Tenant....."

Mr. Falle says that the words 'demeurent vacants' mean that the debtor loses his estate in the land; it seems to us, however, that they simply mean that he goes out of possession and this construction may be supported by the description of the land as 'enjouit' by the Seigneur. The feudal law drew a clear distinction between the destruction of an estate - for example, by the re-entry of the Seigneur for breach of a feudal obligation - and the seigneurial right in certain circumstances to enjoy the possession or rents and profits of his vassal's land.

The latter right, for example, during wardship or for a period after a succession, did not disturb the existence of the vassal's estate but merely gave the Seigneur a right to possession. The rights of a Seigneur pending a 'décret' were, in our judgment of the same nature; when this right was abolished by the Seigneurial Rights (Abolition) (Jersey) Law, 1966, it was described as the right to the possession of the property and we consider this to have been a correct description. Equally, in the law of 1880 sur la Propriété Foncière, a clear distinction is drawn between the 'soin et possession' of property vested in the 'attourné' and the 'propriété' which is vested in the 'tenant' by the act of Court confirming his tenure pursuant to Article 96 of the law. This distinction is part of the scheme of the 1880 legislation which contains a number of references to the 'biens du cessionaire' after the judgment adjudging his goods and lands to be renounced.

It seems to us that the Jersey lawyers of the 19th century and, in particular, the draughtsmen such as Sir Robert Marett, of the reforming legislation in the second half of the century, were under the influence of civilian notions in this respect.

In the civil law, the position appears, on this question, to have been perfectly clear. We were referred to a passage in Domat - Les Lois Civiles, Book 4, Title 5, Section 6, which makes it clear that in civilian law, a 'cession' did not deprive the 'cessionaire' of the property in his lands until such time as they had been sold to satisfy his creditors; he retained his ownership and if he was able to pay the creditors, he would be entitled to resume their possession. There is a similar passage in Pothier.

In our judgment, this approach to the effect of the order that an estate is 'adjugé renoncé' has been accepted into the law of Jersey. It follows that at the time when he made his application, Mr. Barker did have interests in land which could be offered into the hands of justice and the submission to the contrary was rightly rejected.

Mr. Falle's other main point was that Article 4 of the Loi (1852) sur les Décrets shows that unless the debtor has satisfied his creditor or made a 'remise de biens' before the expiration of the two months provided in the Viscount's notice, his lands were liable to 'dégrèvement' and he lost all right to reverse the process.
We think that it must be borne in mind that the order declaring the debtor's estate 'adjugé renoncé' is made on an application ex parte in default of compliance by the debtor with the Viscount's notice. This does not, in our view, constitute a default judgment for the purposes of Rule 8/3 of the Royal Court Rules 1982, but there is, in our view, an analogy. The Courts are prima facie and in the absence of express statutory works to the contrary, reluctant to treat orders made ex parte and in default of some action on the part of the defendant as being incapable of further review. We were referred by Mr. Bertram for the respondent to a statement of Lord Atkin in the case of Evans and Bartlam, [1937] A.C. 473 at page 480, in which Lord Atkin said, "The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure". We do not say that those words fit exactly the situation which has here arisen, but it is the case that, so far as the Court knows today, all that can be said against Mr. Barker is that he has failed to observe the time limit of two months within which to make his application for 'remise' or satisfy his creditor, and that the Court has not yet considered, upon its merits, the question of whether he should be allowed to make a 'remise' or not.
In our judgment, there is nothing in the 1832 law which compels us to decide this question one way or the other. The terms of Article 4 are that in default of payment, the "biens-meubles et héritages" of the debtor 'seront renoncés'; it doesn't follow from that that the order must be irrevocable nor does it say what the consequences must be; those must be found elsewhere. There are some cases reported in which the Court has halted a 'dégrèvement' and discharged the order for renunciation.
It is true that, in those cases, the point which is now before the Court was not argued but it can, at least, be said that it did not occur to the learned judges who made those orders that there was no jurisdiction to do so without the unanimous consent of the creditors; indeed, it appears from at least one of them that there were other creditors who were not at all consulted about the making of the order.
As against that, we were referred to a case in the 19th century, re Cabot, in which the Royal Court had refused to give leave to proceed with a 'concordat' to a debtor who had been served with a notice by the Viscount to pay within two months and had not yet done so. Mr. Bertram has drawn attention to certain differences between the procedure for a 'remise de biens' and a 'concordat' but the main difficulty which

we have in attaching any significance to that order is that it appears simply to have been an exercise of the discretion on the particular facts of the case by the Royal Court. What is being submitted in this case is that the Court has no jurisdiction to exercise any discretion at all; it is said that by reason of Mr. Barker's failure to take any action within the two month period, he is entirely shut out from having his application for a 'remise de biens' considered on its merits. It is clear that, if upon such consideration, the Court were to decide to grant his application, it would have to discharge the order that his estate be 'adjugé renoncé' and the appointment of the 'attournés'. The procedure for 'remise de biens' cannot, in our judgment, co-exist with the rights of the 'attournés' to 'soin et possession' of the land; still less with the carrying out of a 'dégrèvement'.

Mr. Falle has argued that this would be unfair on the creditors; they have decided that their interests lie in pursuing the 'dégrèvement' procedure. Mr. Barker, by his inaction, has allowed that procedure to be followed almost to the point of consummation it is, therefore, unfair on the creditors that they should now be cast adrift on the doubtful waters of a 'remise de biens'.

Under Article 2 of the Loi (1839) sur les Remises de Biens, any creditor opposed to the grant is entitled to be heard; the Court then decides, in its discretion, whether to grant the application or not. In our judgment, all the questions of prejudice and unfairness, raised by Mr. Falle and which may turn out to have considerable merit, can be considered by the Court when dealing with the application under Article 2. What Mr. Falle is saying today is that the merits of the application should not be investigated at all. Even if the value of Mr. Barker's estate greatly exceeds his debts, and even if he has a perfectly reasonable excuse for having failed to comply with the notice of the Viscount within the stipulated time, he should be condemned to lose everything because of his default. We would be unwilling to lay down such a rule unless we were driven to do so. Of course, if a creditor can show that the debtor's application is frivolous or vexatious, that a 'remise' would have no hope of success and that the application has been made merely to gain time by postponing the 'dégrèvement', the Court would be entitled, as the law says, 'Rejetter sur-le-champ sa demande'. This may be either at the application under Article 1, if the objecting creditor happens to have notice of it and is heard, as was the case here; or at the application under Article 2. But no such contention was put to the learned Bailiff in this case and he was, therefore, in our judgment, entitled to say that he would proceed to deal with the application on its merits.

If I may add an individual remark, coming as I do from a country in which the common law is the customary law of the Netherlands province of Holland before the Napoleonic

codes, I am conscious of the pride which the legal profession in this Island takes in its unique legal system but such pride can only be justified if the legal institutions are sufficiently adaptable to enable the Court to do justice according to the notions of our own time. The Court should not be left with the uneasy feeling that in following the old authorities, it might have perpetrated an injustice upon one of the litigants. I think that to accede to the appeal in this case would leave the Court with such a feeling and I am glad that the medieval past casts no shadow upon the power of the Court to endeavour to do justice today.

The appeal will, therefore, be dismissed.

MR. CALCUTT: I agree.

MR. COLLINS: I agree.

heard, as was the case here; or at the application under Section 2. But no such contention was put to the learned Deputy Bailiff in this case and he was, therefore, in our judgment, entitled to say that he would proceed to deal with the application on its merits.

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The appeal will, therefore, be dismissed.

(The two other Judges agree)

ADVOCATE FALLE: May I make an application for my costs, Sir? I feel that perhaps this is an occasion when I ought to address the Court on the question of costs.

MR JUSTICE L HOFFMAN: Yes.

ADVOCATE FALLE: The Court has, quite properly, I think, denied counsel access to talking about the merits at all on the issues which have been before it for the past two days (tape recorder inadvertently switched off)

MR JUSTICE L HOFFMAN: ... assumptions which you may well be right about, about the general conduct of the debtor but aren't we really confined to the costs of this litigation?

ADVOCATE FALLE: But this is a ... this, Sir, with respect, is a case where a judgment ... judgments have been obtained and we ar in the process ... in the middle of their execution which we properly enjoy on debts which are not denied. It is my submission that an application which is made to take the ... to move out of a process which was already going quite legitimately forward should be met by the party which makes the application.

MR JUSTICE L HOFFMAN: You see, also, I mean, this is an appeal,

I mean, you weren't satisfied with the order of the Deputy Bailiff; you've come on appeal; we're only being asked to deal with costs of the appeal; now, the other side is asking us to (indistinct) the order for costs of appeal.

ADVOCATE BERTRAM: In fact, there was an order made by the Deputy Bailiff sitting as a Court with a single judge of the Court of Appeal ...

MR JUSTICE L HOFFMAN: Yes.

ADVOCATE BERTRAM: ... when my learned friend brought an application that the 'remise des biens' proceedings be stayed pending this hearing...

ME JUSTICE L HOFFMAN: Yes.

ADVOCATE BERTRAM: ... and an order was then made to the effect that costs, both for the hearing for the stay of execution and the prospective costs for this present hearing, should be paid to my firm (inter)

ADVOCATE FALLE: Dependent on the result of the appeal.

ADVOCATE BERTRAM: ... dependent on the result of the appeal.

ADVOCATE FALLE: (indistinct). That's on the (indistinct)

ADVOCATE BERTRAM: That's on the (inter)

MR JUSTICE L HOFFMAN: The costs in the appeal?

(Some discussion follows between the advocates and the Judge which is inaudible)

ADVOCATE FALLE: There is no order, I believe, in the case of the first judgment (inter)

MR JUSTICE L HOFFMAN: No order below.

ADVOCATE FALLE: No, Sir.

MR JUSTICE L HOFFMAN: No. So there it is. So, I mean, at that stage, if you'd been satisfied with that, there would have been no order of costs.

ADVOCATE FALLE: Am I then to understand, Sir, that if you hold against me, as would seem to be the case, (inter)

MR JUSTICE L HOFFMAN: Well, (indistinct) (inter)

ADVOCATE FALLE: ... that the order would be confined to this appeal?

MR JUSTICE L HOFFMAN: Oh, we're only dealing with the costs of this appeal. Yes, we think that Mr Bertram ought to have the costs of this appeal and that will carry with it the costs which the Deputy Bailiff on the stay application said were to go with the costs of the appeal, is that right?

ADVOCATE BERTRAM: I'm quite (inter) (indistinct)

MR JUSTICE L HOFFMAN: Right.