Decision given 4 December 1986
Judgment distributed 15 January 1987

ROYAL COURT (INFERIOR NUMBER)

179 (63)

Before: Mr. V.A. Tomes, Deputy Bailiff,
Jurat H. Perrée
Jurat G.H. Hamon

In the matter of the Remise de Biens of James Barker

In the matter of the Representation of the Autorisés de Justice appointed to conduct the Remise

Advocate F.J. Benest for Autorisés

Advocate A.P. Begg for Mr. Barker

Advocate R.A. Falle for Ann Street Brewery Co. Ltd.
and Messrs. Bois & Bois, Perrier and Labesse

Advocate G.R. Boxall for Barclays Bank plc.

Advocate Miss S.C. Nicolle for Education Committee of the States

Advocate M.S.D. Yates for Messrs. Lawrence Messer & Co.,
and Messrs. Ogier & Le Cornu

Advocate S.C.K. Pallot for Mr. V. le Neveu and Mr. D.E. Le Quesne

Advocate A. Messervy for Smith Joinery & Shopfitting Ltd.

Mr. A.N. Dupré represented his firm, Jersey Refrigeration Services

By Act of the 21st March, 1986, the Full Court granted a 'Remise de Biens' ("the Remise") to Mr. James Barker ("Mr. Barker") for a period of six months and appointed Jurats John Harold Vint and Mrs. Barbara Myles as Autorisés de Justice ("the Autorisés") for the purpose of the Remise. By Act of the 23rd September, 1986, the Court extended the duration of the Remise by a period of four months from the 21st September, 1986.

On the 14th November, 1986, the Autorisés represented to the Court that Mr. Barker had requested the Autorisés to sell four properties including 4, High Street, St. Aubin, in the Parish of St. Brelade, ("St. Aubin's Wine Bar") and 4, St. Saviour's Crescent, St. Saviour's Road, in the Parish of St. Saviour ("4, St. Saviour's Crescent") for a total sum of £725,000 to Mr. G.H. Slous ("Mr. Slous") or his nominee companies;

that the Autorisés had advised Mr. Barker against the proposed sale as they had obtained higher offers for the properties, but were minded to comply with Mr. Barker's request in view of assurances given by the advocate acting for Mr. Barker; that the proposed completion date for the sale of the properties was on or before the 5th December, 1986, and settlement of the consideration would therefore be effected on or before the 15th December, 1986; that as at the 15th December, 1986, the total claims filed in the Remise plus interest would amount to £656,885 approximately, in addition to which a mortgage of £35,000 and interest was due to be repaid in respect of one of the properties, plus costs in respect of the sales and arising in the course of the Remise; and that Mr. Barker had indicated his intention to dispute a number of the claims filed in the Remise listed in a letter, a copy of which was annexed. Wherefore, the Autorisés prayed that the Court should:- 1) approve the sale for £725,000; and 2) give directions as to the application of the proceeds of sale and the procedure to be adopted for the settlement of the disputed claims.

The Court 1) adjourned the further consideration of the Representation until the 26th November, 1986, and 2) ordered that a copy of the Representation be served on Mr. Barker, Ann Street Brewery Co. Ltd., Barclays Bank plc., Messrs. Bois & Bois, Perrier & Labesse, Ron. W. Burt, the Education Committee of the States, Jersey Refrigeration Services, Messrs. Lawrence Messer & Company, Mr. V. Le Neveu, Mr. D.E. Le Quesne, Messrs. Ogier & Le Cornu, and Smith Joinery and Shopfitting Limited, and that they be summoned to appear before the Court on that date.

In the event, Mr. Ron W. Burt could not be served as he was out of the Island, and he has taken no part in these proceedings.

On the 26th November, 1986, at the request of the Autorisés, and by consent, the hearing of the Representation was adjourned to the 4th December, 1986. However, Mr. Barker's objections to the payment of the accounts of Lawrence Messer and Company and the Education Committee of the States were withdrawn; accordingly the Court discharged both from further appearance in the proceedings and ordered that their reasonable costs, to be taxed in default of agreement, should be paid out of the assets in the Remise.

On the 4th December, 1986, Mr. Benest informed us that as the result of a meeting between the Autorisés, Mr. Barker and his advisers, the Autorisés had decided that they could no longer recommend, or sanction, the sale proposed by Mr. Barker; accordingly, the first limb of the prayer of the Representation was withdrawn. The Autorisés had decided to proceed with the sale of St. Aubin's Wine Bar and 4, St. Saviour's Crescent, to be completed as soon as possible.

As to the second limb of the prayer of the Representation, the Autorisés had made certain decisions; they did not propose to dispute the claim of Ann Street Brewery Co. Ltd., nor that of Barclays Bank plc. - Mr. Barker had started separate litigation against the Bank which it would be open to him to pursue after the close of the Remise; it was now agreed that the costs of Messrs. Bois & Bois, Perrier & Labesse should be taxed and they would be paid on that basis; the Autorisés would pay the claims of Jersey Refrigeration Services, Mr. Le Neveu and Mr. Le Quesne; it had been agreed that the claim of Messrs. Ogier & Le Cornu would be examined and taxed and to that extent there was no longer any dispute - the Autorisés did not propose to make any counter claim; in the case of Smith Joinery and Shopfitting Ltd., pleadings had already been filed, discovery was being proceeded with, and the claim would proceed to a conclusion within the Remise period - the Autorisés sought undertakings that the matter would be expedited, to ensure disposal within the period of the Remise.

However, Mr. Begg, notwithstanding the withdrawal of the first limb of the prayer of the Representation, asked the Court to restrain the Autorisés from proceeding with the intended sale of the St. Aubin's Wine Bar and 4, St. Saviour's Crescent and to allow Mr. Barker more time to conclude a sale to Mr. Slous; his main submission was that the Autorisés did not have a discretion to sell in the manner which they proposed; he also submitted that if they had such a discretion they were proposing to exercise it wrongfully; and he also submitted that the Autorisés had no power to settle disputed claims unless and until those claims had been proved.

Mr. Barker's case appeared to be that he had sufficient property to provide the means to pay all his debts; this was borne out by both a valuation and the tenders received. The debts, if all were proved, totalled approximately £700,000 against

tenders for the properties of approximately £1.1 million (4, St. Saviour's Crescent £426,000, St. Aubin's Wine Bar £560,000, St. Julian's £125,000 Wilton House £40,000 - total £1,151,000). Mr. Barker's complaint was that the Autorisés had taken the decision out of his hands; that if he had the money available he would dispute some of the claims and that the mere fact that he was under a Remise should not alter that situation. Mr. Begg submitted that the Remise did not enable the Autorisés to take decisions as to which debts were due.

Mr. Begg submitted that all that Mr. Barker needed was a little more time and that it was not fair or equitable that he should have to sell now; that the ordinary standard and burden of proof must apply to all claims against Mr. Barker; that he wished to have the opportunity to argue that a substantial part of the claim of Ann Street Brewery Co. Ltd., was unenforceable because it had been accumulated by a process of factoring of other creditors' claims, which was illegal. Mr. Begg also made submissions concerning the powers, duties and responsibilities of the Autorisés which, he argued, were restricted to protecting the interests of the creditors; they were not to take on a "paternal mantle" to look after the best interests of the debtor; providing the claims were satisfied that was all the Autorisés need worry about; Mr. Barker had come up with an alternative "deal" and he was satisfied with it and should be given time to proceed with it. Mr. Begg further submitted that there was no obligation to sell to the highest bidder, that Mr. Barker, for his own reasons that did not need to be disclosed, had negotiated an alternative sale and that, had the Autorisés consented, the sale could have proceeded.

Mr. Boxall questioned Mr. Barker's entitlement to be heard - his "locus standi" in the matter. In his submission if Mr. Barker wished to impeach the acts of the Autorisés he had to do much more than demonstrate a difference of opinion; at the very least he must allege improper behaviour, for example conduct contrary to natural justice or in bad faith or contrary to public policy; in fact the Autorisés were being criticised for acting in Mr. Barker's best interests. The submissions made by Mr. Boxall were supported by Counsel for other creditors. Mr. Messervy also undertook to expedite the claim of Smith Joinery and Shopfitting Ltd.

Mr. Benest informed the Court that Mr. Begg was appearing at the invitation of the Autorisés and he submitted that Mr. Barker did have "locus standi" in the matter; the Autorisés had a discretion to exercise properly and quasi-judicially; their actions were open to review and it was impossible to define the grounds or areas of review. Where the Autorisés exercised their discretion to sell against the will of the debtor, the latter might wish to have the decision reviewed; however Mr. Barker's submision was that the Autorisés had no discretion and must consent to the alternative sale proposed by him. If the submission was one of wrongful exercise of discretion then it would be necessary for Mr. Barker to disclose to the Court the terms of the proposed contract with Mr. Slous to enable the Court to review that exercise of discretion. He was not prepared to do so and, therefore, could not seek judicial review. The Autorisés, for very good reasons, had decided to sell. As to the payment of claims the Autorisés had considered the propriety of factoring which would not, in any event, affect the secured debts, and had taken a view. If the creditors were not paid, the Remise would fail.

The Court, after deliberation, announced the following decision:-

1) The Court rejected the submission that the Autorisés did not have a discretion to sell the properties in the manner which they proposed;

2) Mr. Begg had come nowhere near to persuading the Court that the Autorisés had made any wrongful exercise of their discretion;

3) The Court was satisfied that the Autorisés did have the same powers in relation to the settlement of claims as they had with regard to the sale of properties.

On those three matters the Court would give its reasons in writing in due course; it might be helpful for the future.

4) The Court noted all the acts intended to be carried out by the Autorisés; the Court did no more than note them because it held them to be the responsibility of the Autorisés.

5) The Court released Ann Street Brewery Company Limited, Barclays Bank plc., Jersey Refrigeration Services, Mr. Le Neveu, Mr. Le Quesne and Messrs. Ogier & Le Cornu from any further appearance in the matter and all of them would have their reasonable costs out of the assets in the Remise.

6) Finally, with regard to Smith Joinery and Shopfitting Limited the Court noted the undertakings given to expedite a hearing and to reappear at 48 hours' notice if necessary to seek further directions.

We now give our reasons for the first, second and third parts of our decision.

The Remise is a privilege or indulgence granted to a defaulting debtor to enable him to avoid a 'dégrèvement' (in former times to avoid incarceration and 'décret') and to afford him a breathing space during which the Autorisés may dispose of his assets on his behalf and satisfy his creditors in whole or in part (the secured debts having to be paid in full).

The preamble to the "Loi (1839) sur les Remises de Biens" (Recueil des Lois Tomes I to III, 1771-1881, page 77) ("the 1839 Law") contains the following:-

"Considérant que la loi sur les remises de biens entre les mains de la Justice est défectueuse, d'autant .... que souvent les personnes qui ont obtenu cette indulgence refusent, au grand préjudice de leurs créanciers, de se guider par l'avis et conseil des autorisés de Justice; ......"

It is apparent, therefore, that the Remise is an indulgence and that one of the purposes of the 1839 Law is to compel a debtor who has obtained that indulgence to act in accordance with the advice and counsel of the Autorisés.

Article 4 of the 1839 Law is in the following terms:-

"L'Acte qui accordera la remise de biens entre les mains de la Justice contiendra, de la part de celui qui obtient ladite permission, l'autorisation aux personnes nommées par la cour pour l'examen desdits biens de bailler, vendre, aliéner, et autrement disposer desdits bien-meubles et héritages".

It is apparent, therefore, that Mr. Barker, having obtained permission to make his Remise, had, by operation of law, authorised the Autorisés to dispose of his property, both real and personal, without restriction. He cannot afterwards withdraw, or detract from, that authority, which is unlimited.

Article 5 of the 1839 Law is in the following terms:-

"Celui qui aura obtenu la permission de remettre ses biens entre les mains de la Justice ne pourra agir que d'après le conseil et avis des personnes autorisées de Justice pour l'examen dudit bien".

It follows that Mr. Barker is prohibited by the Law from acting other than in accordance with the advice and counsel of the Autorisés. Thus, whilst the Autorisés may have authorised him to negotiate with Mr. Slous, he cannot, without their approval and authority, conclude any transaction with Mr. Slous. Nor can he act in any proceedings, whether as debtor or as creditor or by way of claim or counter claim, without the approval and the authority of the Autorisés.

Article 6 of the 1839 Law is in the following terms:-

"Si les biens remis entre les mains de la Justice ne sont pas suffisans pour acquitter toutes les dettes et redevances, les autorisés de Justice pourront, si les héritages sont suffisans pour acquitter les rentes et hypothèques, faire vendre lesdits bien-meubles et héritages et, après le paiement intégral des dettes privilégiées, en partager le produit entre les autres créanciers".

It is apparent, therefore, that where the assets are sufficient to satisfy all secured and preferential debts but insufficient also to satisfy in their entirety all other debts, the ordinary creditors are to receive a dividend from the Autorisés. Inevitably, if the Autorisés are to carry out their duty to apportion the assets under Article 6, they must have the power to determine which of the debts have preference, the

amounts due to secured and other privileged creditors, and, finally, which of the ordinary creditors are to be admitted in the division and the amount of their respective claims. It would be absurd to suggest that the legislature intended that the Autorisés should have such powers and responsibilities where there is a deficit and yet not have those powers and responsibilities where there is a surplus.

We must consider whether Mr. Barker has any "locus standi" to make the application which he makes to us. Mr. Begg failed to submit any authority in support of Mr. Barker's claim to be heard in this way; it appears that he relied on the fact that the Representation had been served upon Mr. Barker and that he had been convened. Mr. Boxall submitted that Mr. Barker had no "locus standi" unless, at the very least, he alleged improper conduct on the part of the Autorisés. And Mr. Benest appeared to suggest that judicial review was available 'at large'.

The 1839 Law contains no right of appeal. Insofar as the initial decision of the Court to grant or refuse a Remise is concerned, Article 2 specifically excludes a right of appeal, in the following words:- "La cour .... accordera ou refusera ladite permission. Cette decision sera finale et sans appel". Elsewhere, the 1839 Law is silent as to any right of appeal or review. The presumption must be against any general right, since the Autorisés are authorised to dispose of assets and settle claims, without any requirement to give notice, to allow delay, or to give reasons.

In our opinion there are circumstances in which the Court has the power to interfere with a decision of the Autorisés in a Remise but these are limited to cases where the Autorisés exceed their authority, are wrong in law, deny the parties justice or reach a conclusion devoid of reason. In all such cases the Court has an inherent jurisdiction to have put right that which is wrong. What the Court cannot do is to interfere with a decision which has been regularly made. A power of discretion properly exercised by a person or a body having the legal authority to exercise it is generally unassailable.

That the Autorisés have the legal authority to exercise a very wide power of discretion under the 1839 Law is incontrovertible. They have a discretionary power to sell or otherwise dispose of the entire assets of the debtor, to deny him the right to act on his own behalf, and to settle his debts.

We are satisfied that the Autorisés can exercise those powers against the will of the debtor.

C.S. Le Gros in his Droit Coutûmier de Jersey, at page 372, says this:-

"Aujourd'hui le débiteur, en vertu de l'Article 4 de la loi de 1839, autorise les Jurés-Justiciers à disposer de tous ses biens-meubles et héritages. S'il refuse subséquemment de consentir à la passation des contrats de bail et vente de ses héritages, les Jurés-Justiciers ont, en vertu de la loi, plein pouvoir de donner titre valable aux acquéreurs. D'après M. Dupré, Rapport des Commissaires Royaux de 1860, No. 10640: "They (les Jurés-Justiciers) have a very great power which is that of selling and disposing of the property, even against the will of the debtor." Cette exigence de la loi se comprend sans peine."

We agree that this provision of the 1839 Law is understandable without difficulty. It is a necessary provision, in order to compel Mr. Barker, in the words of the preamble, to accept the advice and counsel of the Autorisés. And the Court (in re. Charles Kipling 1882 November 6 (208 Ex. 130), upheld the view expressed that the Autorisés may sell the property and pass contracts without the participation of the debtor, in the following terms:-

"Vu l'Article IV de la Loi sur les Remises de Biens; vu aussi l'Acte de la Cour du 13 mai 1882, lequel, aux termes de ladite Loi, autorise lesdits Charles Gruchy et Clément Auguste De Quetteville Ecrs., Jurés Justiciers, de bailler, vendre et d'aliéner ou autrement disposer du bien dudit Sieur Kipling; la cour a jugé que lesdits Autorisés sont en droit d'aliéner ledit bien sans que ledit Sieur Kipling ne soit partie au contrat ou contrats d'aliénation".

A remise which succeeds liberates the debtor from his debts whatever the amount of the dividend paid to the ordinary creditors. (v. Report of the Royal Commissioners 10669-10675). However, in placing his assets in the hands of Justice, the debtor is personally making cession of them to his creditors, should the Remise fail (v. Le Maistre -v- du Feu 1850 June 22 - 171 Ex. 508). Effectively, therefore, Mr. Barker has

dispossessed himself of all his assets and has authorised the Autorisés to deal with them as they think best. It is only in the limited circumstances to which we have referred that he can be heard to complain of the actions of the Autorisés.

Two further cases demonstrate the considerable incapacity of a debtor during a Remise. A "reconnaissance" cannot be obtained against a debtor who has made a Remise, but solely against his surety. (Gallichan -v- Sullivan, Le Cornu caution, 1863, May 2 - 187 Ex. 8). "Loyal devis" cannot be requested whilst the property of one of the parties is subject to a Remise because the debtor cannot be actioned during the Remise (Le Cornu -v- Godfray et aus. 1867 May 9 - 49 Hge. 60).

We are satisfied that during the Remise the debtor is not a party capable of replying to an action, but the Autorisés alone can litigate on his behalf. The inability of the debtor to deal with his assets in any way is emphasised by the fact that the Autorisés are required to allow to the debtor for the duration of the Remise what is reasonable for the subsistence of the debtor and his family in accordance with his circumstances and station in life (selon son état et condition) (v. Code of 1771 and Aubin -v- Godfray 1885, May 23, - 76 Exs. 107 - and 1885 June 30 - 10 C.R. 216.)

In our opinion the term "avis et conseil" signifies something more than "advice and counsel" in that it does not enable the debtor, having taken into account the advice and counsel of the Autorisés, then to reject it and act alone. The term "advice and counsel" signifies control. For example curators under the common law took and guardians (tuteurs) take an oath of office including the words "que vous réglerez par le bon conseil et avis de vos Electeurs" and where a difference existed between, for example, a curator and his electors, the majority would prevail. Also, an application from a curator for consent to dispose of his interdict's real property would not be entertained by the Court unless it was supported by a majority of his electors. Thus, the "bon conseil et avis" of the majority of the electors would effectively control the actions of the curator. Mr. Boxall argued that a person who has been permitted to make a remise is in a position very similar to that of an interdict. We agree. A debtor allowed to make a Remise can be compared with a person who appoints General and Special Attorneys without whom he cannot transact in his affairs, both real and personal. By the law of Jersey a Procureur Général is invested with complete right of control over the property of the person

appointing him, who cannot transact any business without his sanction, or cancel his appointment except upon proof made before the Court of misappropriation or other misconduct (v. Report of Royal Commissioners 1860). In our view the position of the Autorisés is analagous to that of Special and General Attorneys. The appointment of the latter was often referred to as voluntary interdiction.

Mr. Begg argued that the Remise does not enable the Autorisés to take decisions as to which of Mr. Barker's debts are due; that they have no power to take decisions out of Mr. Barker's hands; that the sole duty and power of the Autorisés is to ensure that there are sufficient monies to pay those creditors who prove their claims; that the purpose of "avis et conseil" is merely to make sure that the debtor does not do something stupid - that if, for example, the debtor wished to sell his property at half its value the Autorisés would refuse to sanction it, only because there would be insufficient to meet the claims - and that it was only in such circumstances that the control of the Autorisés would come into play. However, he was unable to find authority to support his submissions and he conceded that the issues raised depended upon interpretation of the 1839 Law. We have no hesitation in rejecting those submissions.

For all the reasons we have given we are satisfied that the Autorisés have not exceeded their authority and have interpreted and applied the 1839 Law correctly.

Mr. Barker has failed to persuade us that he has been denied justice or that the decisions of the Autorisés are devoid of reason. In that respect Mr. Barker wished us to find that the Autorisés should have preferred the proposed sale to Mr. Slous but he declined to make the details of that transaction known to us. In those circumstances we understand fully that Mr. Benest felt inhibited from disclosing the details to us. But the burden of satisfying us that he had been denied justice or that the decisions of the Autorités were devoid of reason was wholly on Mr. Barker and he failed to discharge that burden. It is the duty of a litigant who seeks a remedy of this kind to come to the Court "with clean hands" and to make full and frank disclosures. Mr. Begg told us that the reason for non-disclosure was that Mr. Slous, the proposed purchaser, was unwilling to have the terms of the transaction disclosed to us. Be that as it may,

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faced with concealment of this kind, we accept the assurances of the Autorisés that for very good reasons they have decided to sell St. Aubin's Wine Bar and 4, St. Saviour's Crescent to the highest tenderers, which sale will enable them to settle all the claims against Mr. Barker and conclude the Remise.

The taxed costs of the Autorisés of and incidental to the Representation and Mr. Barker's application will be paid out of the assets in the Remise.

ROYAL COURT (INFERIOR NUMBER)

Decision given 29 December 1986
Judgment distributed 15 January 1987

Before Mr. V.A. Tomes, Deputy Bailiff
Jurat H. Perrée
Jurat G.H. Hamon

In the matter of the Remise de Biens of James Barker

In the matter of the Representation of James Barker

Advocate A.P. Begg for Mr. Barker

Advocate F.J. Benest for the Autorisés de Justice appointed to conduct the Remise, convened

Interveners [
Advocate R.A. Falle for Ann Street Brewery Co. Ltd.
Advocate G.R. Boxall for Barclays Bank plc.
Advocate S.C.K. Pallot for Mr. V. Le Neveu & Mr. D. Le Quesne
Advocate M.S.D. Yates for Messrs. Ogier & Le Cornu

The Representation of Mr. James Barker ("Mr. Barker") referred to the decision of this Court of the 4th December, 1986, set out in the foregoing Judgment, averred that by Article 13(d)(ii) of the Court of Appeal (Jersey) Law, 1961, Mr. Barker has a right of appeal to the Court of Appeal without leave, that Notice of Appeal had been duly served and that there was accordingly an Appeal pending against the Judgment of this Court delivered on the 4th December, 1986. The Representation went on to claim that in the event of Mr. Barker's Appeal being successful, such Appeal would be rendered nugatory if the Autorisés proceeded with the sale of St. Aubin's Wine Bar and

4, St. Saviour's Crescent, that furthermore the effect of the sale of the properties would leave Mr. Barker and his family homeless and his wife without a job, and that Mr. Barker verily feared that unless the Autorisés were restrained from proceeding with the sale, he would suffer a wrong. The prayer of the Representation sought an injunction restraining the Autorisés from (i) selling or otherwise disposing of the properties belonging to Mr. Barker and (ii) settling the claims of the creditors discharged by this Court, unless and until Mr. Barker's Appeal should have been heard, and, if deemed necessary, such extension as might be deemed fit to the Remise.

Having heard the arguments, this Court dismissed the prayer of the Representation and said that:- "Because the Court indicated, on the 4th December, 1986, that it would give its reasons for its decision in writing in due course, it will do the same with regard to its decision today, because there is bound to be some overlap between them. However, we can say now that in our opinion, Mr. Barker has only a very limited "locus standi" in these matters and we must emphasise a fact that appears not to be entirely clear to him, namely that the Remise de Biens is a privilege or indulgence granted to a debtor in exchange for which he gives up his rights and agrees to act only in accordance with the advice and counsel of the Autorisés". The Court also ordered that the taxed costs of the Autorisés and Interveners of and incidental to the Representation and the hearing would be paid out of the assets in the Remise.

We have already dealt with the question of "locus standi" and with the nature of the Remise at some length in the foregoing Judgment and we do not propose to repeat it here. But we shall deal with the arguments that were advanced in relation to a "stay of execution" of the Judgment of the 4th December, 1986, sought to be achieved by means of an injunction and a stay of the Remise itself.

Mr. Begg argued that whilst the application was for an injunction the "label" was not important, that the effect was what mattered, that an injunction was sought rather than a stay because the Judgment was declaratory, that in effect there was nothing to stay, that he had filed a notice of application for a stay with the Judicial Greffier who had advised that there was nothing before the Court of Appeal that could be stayed, nor any execution of this Court's decision to stay but that the form of the application

should not weigh heavily with the Court, and that the Autorisés should be halted until the Appeal had been heard.

Counsel went on to refer the Court to the Judgment of the Deputy Bailiff, sitting as a Single Judge of the Court of Appeal, in re. the Dégrèvement and Remise de Biens of Mr. Barker, when he considered an application by Ann Street Brewery Co. Ltd. for a stay of proceedings under Rule 15 of the Court of Appeal (Civil) (Jersey) Rules, 1964, and in which he said:-

"The law in Jersey does not appear to have been settled in this matter before, but it is clear that I have an unfettered discretion and because the Jersey Rules correspond to the English Rule, Rule 59 in the White Book, it is fair and proper that I should have regard to the authorities in the English jurisdiction. The first thing I have to say is that the appellant, the applicant in this case, has an unfettered right of appeal to the Court of Appeal; secondly, I am satisfied that it has to show special circumstances before I should exercise my discretion in its favour. Thirdly, I have to ask myself if no order of stay of execution is made, would the Appeal, if successful, be rendered nugatory, and I have answered the question by saying that I think it would .... Fourthly, the issue of the Appeal goes to the whole substratum of the very arguments which were raised in the Court below......"

Mr. Begg argued that 1) Mr. Barker had an unfettered right of appeal and had appealed; 2) that there were special circumstances in this case and that these were set out in the Notice of Appeal. Furthermore, there was the effect of a sale of St. Aubin's Wine Bar to the highest tenderer - this would mean that Mr. Barker would be removed from his home, that he would lose his job, and that his wife would lose her job in the Wine Bar; also that the two properties would be lost for ever; 3) that the Appeal would be rendered nugatory - to that extent a stay would be similar to an injunction because the status quo would be preserved; and 4) that the issues in the Appeal did go to the whole substratum of the very arguments which were before the Court on the 4th December, 1986.

Mr. Begg referred us to the Rules of the Supreme Court Order 59 Rule 13 and in particular, at page 842 of the "White Book", to part of paragraph 59/13/1, as follows:-

"The Court does not 'make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled' pending an Appeal (The Annot Lyle (1886) 11 P.D. 114, p.116, C.A.; Monk -v- Bartram (1891) 1 Q.B. 346); and this applies not merely to execution but to the prosecution of proceedings under the Judgment or Order appealed from - for example, inquiries (Shaw -v- Holland (1900) 2 Ch. 305) or an account of profits in a passing-off action (Coleman & Co. -v- Smith & Co. Ltd. (1911) 2 Ch. 572) or the trial of issues of fact under a Judgment on a preliminary question of law (Re. Palmer's Trade Mark (1883) 22 Ch. D. 88). But it has also been said that "when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the Appeal, if successful, is not nugatory". (Wilson -v- Church (No. 2) 12 Ch. D. 454, pp. 458, 459, C.A.). It is in the discretion of the Court to grant or refuse a stay (Becker -v- Earl's Court Ltd. (1911) 56 S.J. 206; The Ratata (1897) P. 118, p. 132; Att. Gen. -v- Emerson (1889) 24 Q.B.D. 56, pp. 58, 59) and the Court will grant it where the special circumstances of the case so require. "As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the Appeal succeeds" (Atkins -v- G.W. Ry. (1886) 2 T.L.R. 400, following Barker -v- Lavery (1885) 14 Q.B.D. 769 C.A.) and this rule applies equally to Admiralty cases".

Mr. Begg commented that the Autorisés would not be "deprived of the fruits of their litigation". We note that he said nothing about the effect on the creditors. He emphasised that the Appeal must not be rendered nugatory and argued that there should be a stay by whatever name called.

We were informed that Mr. Begg was still in correspondence with Mr. Benest about the alternative of a sale to Mr. Slous. The Autorisés were not happy with the present terms but Mr. Slous was anxious to proceed and willing to amend the terms to satisfy the Autorisés.

In this respect Mr. Begg referred us to the Rules of the Supreme Court Order 45 Rule 11, which is in the following terms:-

"Without prejudice to Order 47, Rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the Judgment or Order or other relief on the ground of matters which have occurred since the date of the Judgment or Order, and the Court may by order grant such relief, and on such terms, as it thinks just".

Mr. Begg went on to address us, without quoting authority, on the principles upon which injunctions are normally granted; he claimed that the balance of convenience favoured the status quo and that the damage to be suffered by Mr. Barker if the injunction was refused would be irreparable, whereas the creditors were assured of being paid both capital and interest in due course.

Finally, with regard to the term of the Remise, Mr. Begg referred us to the Judgment of the 23rd September, 1986, when the Court granted Mr. Barker's application for an extension of the original six month period by four months to a total of ten months to expire on the 21st January, 1987. In that Judgment the Court said this:-

"We propose, therefore, to make this distinction. After a year, the period would not be extended unless there were consent or very exceptional reasons. Before the year has expired, the period would be extended on the recommendation of the Jurats (Autorisés) unless there were very exceptional reasons".

Accordingly, the term could be extended to the 21st March, 1987. But Mr. Begg urged, the Remise itself should be stayed. A question of law had been raised and until it was resolved time should not run against Mr. Barker. The Court of Appeal might not sit, to hear this Appeal, for six months and it would be totally wrong if the Remise ran out. The Remise should be stayed pending the hearing of the Appeal.

We might interpose here to say that, in reaching its decision of the 23rd September, 1986, the Court said this:

"We have given some weight, in our consideration, to two undertakings given on Mr. Barker's behalf. The first is that he will co-operate fully with the Jurats (Autorisés) in every way from now onwards. That undertaking has been given to the Court and any breach of it would amount to contempt of Court".

Mr. Benest, for the Autorisés, said that the real question was whether there were very exceptional reasons for extending the Remise beyond one year. He conceded the question of prejudice to Mr. Barker. Also that the issue on appeal was fundamental to the whole question of the Appeal. But the question whether the Autorisés could sell the property when Mr. Barker had an alternative proposal was exhaustively canvassed on the 4th December, 1986. The law on Remises placed the property of the debtor in the hands of the Autorisés. Any disposal must require the exercise of discretion on the part of the Autorisés. The authorisation under Article 4 of the 1839 Law was paramount. This was an application for an injunction. He referred us to the leading case of American Cyanamid Co. -v- Ethicon Ltd. (1975) 1 All ER 504 at page 505:-

"The appeal would be allowed and the order ..... restored for the following reasons -

(i) The grant of interlocutory injunctions for infringement of patents was governed by the same principles as those in other actions. There was no rule of law that the Court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the Plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action. All that was necessary was that the Court should be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried ....

(ii) The affidavit evidence showed that there were serious questions to be tried and that it was therefore necessary that the balance of convenience should be considered ....."

Mr. Benest suggested that the Court might have regard to the question whether the Appeal raised a serious question to be tried.

He went on to refer to the proposed transaction with Mr. Slous. Mr. Begg was in some difficulty. He could not ask the Court to consider the wisdom, or the way, in which discretion was exercised. The quality of the proposed transaction with Mr. Slous was not a matter raised on appeal. The Autorisés had stated that there was a good reason for not approving that transaction. He could now say that in the view of the Autorisés the proposal was for an unconscionable agreement. The correspondence subsequent to Judgment had done nothing to alter the Autorisés' approach to it. And the terms of the proposed transaction had still not been disclosed to the Court.

Finally, Mr. Benest said that there was a real danger of the Remise failing. The Remise was to end on the 21st January, 1987. The Autorisés would have to seek a short extension in order to distribute the proceeds of sale. At present there were preliminary agreements of sale with completion on either the 9th or 16th January 1987. The consequences of the Remise failing would be very serious for the non-secured creditors. There was no point in extending the Remise for two months unless the Appeal could be disposed of within that time, which was unlikely. The alternative was to stay the Remise pending the Appeal but if the Appeal failed after a delay, the sales might well have been lost.

Mr. Falle, having, by consent, obtained leave to intervene and be heard on behalf of Ann Street Brewery Co. Ltd., said that the real question was whether the Remise was to be delayed indefinitely. The present application was an abuse of the process of the Court. Mr. Barker had continued to negotiate with Mr. Slous in flat contradiction of the provisions of Article 5 of the 1839 Law; he did not have that power and on his own admission the transaction with Mr. Slous was not yet concluded, whereas the Autorisés had agreed definite sales. It was difficult to see what prejudice Mr. Barker

was suffering - he merely wanted more time to negotiate on his own - he had had years in which to realize his estate independently of the Autorisés and had been begged by his creditors to do so. Mr. Barker appeared to be in breach of the undertaking given on the 23rd September, 1986, to co-operate in every way. Mr. Falle referred to paragraph 59/13/1 of the White Book (already cited) and emphasised the first line. The debts, properly due and payable, were equal to the fruits of litigation. There had been inordinate delays and Mr. Barker did not come to the Court "with clean hands". Clemency had been given to Mr. Barker by the Remise and there would be no serious prejudice if he failed in his present application. The Court must not lend itself to a spurious attempt to delay procedures.

Mr. Boxall, Mr. Pallot and Mr. Yates also obtained leave, by consent, to intervene on behalf of their respective clients and to be heard. Mr. Boxall strongly opposed the first part of the prayer of the Representation which would prevent any sale of the properties. Presumably, Mr. Barker intended to prevent any sale "except to the debtor's nominee". However, if Mr. Barker wished the Court sensibly to make a decision that would allow a sale only to Mr. Slous, it was incumbent on Mr. Barker to make the fullest and frankest disclosure. The Court could not possibly arrive at a decision in favour of Mr. Barker unless provided with the material upon which it could make a judgment. Mr. Barker sought equity, whatever the distinction in procedure between a stay and an injunction, and equitable principles applied. Mr. Begg had adopted the principles applying to injunctions because he had asked the Court to consider the balance of convenience. But Mr. Begg was not instructed to reveal details of the so-called "Slous deal". Barclays Bank plc. had not been informed of those terms and Mr. Benest had described them as unconscionable. A person who sought equity must "come with clean hands". In the circumstances of this case the requirement was not fulfilled and the application should be rejected. Mr. Begg had argued that Mr. Barker would lose his livelihood, which was an emotive point, but this whole matter concerned monies owed and the creditors who Mr. Barker had ignored or neglected over a period of years. The Autorisés proposed to sell two properties for upwards of £950,000 whereas Mr. Barker proposed to sell all his properties for some £725,000, a difference of £225,000. Mr. Barker claimed that all the liabilities could be settled out of £725,000; assuming that to be correct he would be left with £225,000 and three

properties of lesser value - it would not be impossible for Mr. Barker to acquire another source of livelihood of similar type.

The principles to be applied, urged Mr. Boxall, were those in American Cyanamid Co. -v- Ethicon Ltd. There was no serious question to be tried because the Court, on the 4th December, 1986, had said that Mr. Begg had "come nowhere near to persuading us" that there had been a wrongful exercise of discretion.

Mr. Boxall also sought to argue that the Appeal would not be rendered nugatory if the Court were to distinguish between the sale of the properties and the distribution of the proceeds, other than the secured claims.

Finally, on the question of balance of convenience there were strong reservations whether the proposed transaction with Mr. Slous, to the extent that the terms were known, would produce sufficient to satisfy the claims of all the creditors. It was most significant that, with an indefinite stay of the Remise, the most favourable sales negotiated by the Autorisés could be lost, to the grave prejudice of the creditors. These were excellent sales and should not be allowed to evaporate.

Mr. Pallot urged that Mr. Barker's application was vexatious because, in effect, he sought to revoke his own authority given under Article 4 of the 1839 Law, to which there was no qualification, and which extended to "choses in action" and, therefore, to the settlement or disposal of unsecured debts.

Mr. Yates submitted that the prejudice to creditors caused by delay was not fully compensated by the payment of interest; creditors were being denied the use of their capital for other purposes. In the absence of full disclosure of the other transaction it was impossible for the creditors to support it, or even to give it consideration.

Mr. Begg, in reply, said that the Autorisés had empowered Mr. Barker to propose alternative financing and submitted that the actual terms of alternative transactions were irrelevant, because the only concern of the Autorisés was the payment of the creditors. On the face of the Notice of Appeal there was a serious issue to be tried. Whilst it was conceded that the terms of the proposed transaction with Mr. Slous were not entirely in Mr. Barker's favour and that there was an element of risk which Mr. Barker accepted, the terms were not unconscionable and there was no risk to the creditors. There was no doubt that the tender for the St. Aubin's Wine Bar would remain in existence and that, if necessary, an alternative tenderer could be found for 4, St. Saviour's Crescent. The discretion of the Autorisés had been exercised wrongfully. One of the matters under appeal was whether the claims should be litigated or whether the Autorisés could settle them "commercially". But if the claims were litigated and found not to be due there might be no necessity to sell the properties.

On the question of non-disclosure, Mr. Begg reiterated that Mr. Slous declined to disclose but, he claimed, this was of no consequence provided the Autorisés could be satisfied that the claims would be settled. He could not see how the terms of the transaction with Mr. Slous could have any effect on the order now sought. It was not a relevant consideration.

On the question of balance of convenience the only criterion was the question who would suffer most prejudice. If the full terms were to be disclosed, the Court would see that Mr. Barker stood to gain £1.1 million from the "Slous deal". (This was challenged by Mr. Benest and Mr. Begg conceded that it was only a possiblity and that Mr. Barker would accept an "element of risk").

We now proceed to set out the reasons for our decision:-

1) By Article 4 of the 1839 Law Mr. Barker gave an unrestricted authority to the Autorisés to sell or otherwise dispose of the whole of his assets. On the 23rd September, 1986, in support of his application for an extension of the Remise against the will of opposing creditors, Mr. Barker gave an undertaking that he would co-operate fully with the Jurats (Autorisés) in every way from then onwards. In our Judgment that

co-operation must include an acceptance by him of the decision of the Autorisés to sell St. Aubin's Wine Bar and 4, St. Saviour's Crescent to the highest tenderers, in accordance with the authority vested in the Autorisés by Article 4. Mr. Barker's persistence in attempting to compel the Autorisés to sell the properties to Mr. Slous is in itself a breach of that undertaking.

2) The prayer of the Representation seeks an injunction restraining the Autorisés from selling or otherwise disposing of the properties belonging to Mr. Barker unless and until his Appeal shall have been heard. It is a well established principle of Jersey Law that the Court cannot go beyond or supplement the prayer of a party (v. Golder -v- Société des Magasins Concorde Limited 1967-1969 J.J. 721 at p.735). The grant of an injunction in the terms sought would preclude a sale, even to Mr. Slous, for an indefinite period, to the prejudice of Mr. Barker's creditors.

3) The prayer of the Representation requests the Court to grant such extension as may be deemed fit to the Remise. In fact Mr. Begg urged us to stay the Remise because the extension would go beyond the 21st March, 1987, when the Remise will have lasted a year. Because we cannot go beyond or supplement the prayer of a party (v. 2 above) we cannot grant a stay of the Remise. But we should not grant an extension of the Remise beyond the 21st March, 1987, against the will of the creditors, because a Remise which has not been successfully concluded within a year operates, as a matter of law, as the personal cession and renunciation by the debtor of all his property to his creditors and a "dégrèvement" ensues. (v. Le Maistre -v- du Feu 1850 June 22, ~~Ex.~~ - 171 Ex. 508).

4) If we are to consider this application as one for a stay of proceedings we have an unfettered discretion to grant or refuse a stay. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking-up funds to which prima facie he is entitled". We agree with Mr. Falle that the debts, properly due and payable by Mr. Barker to his creditors, are equal to the fruits of litigation and we should not grant an application which would have for its effect the locking-up of funds to which the creditors are entitled. Because we have a discretion to exercise, we have to weigh up all the factors that have to be taken into account,

including the fact that the Appeal may be rendered nugatory. Because the Remise is a privilege or indulgence, because of the authority vested in the Autorisés by the 1839 Law, because of the undertaking given by Mr. Barker, and because the Remise should be concluded as soon as possible and within the one year period, we give greater weight, in the exercise of our discretion, to the desirability that a sale should proceed forthwith, as decided upon by the Autorisés, and that the proceeds, to which the creditors are undoubtedly entitled, should be distributed.

5) If we are to consider this application as one for an injunction, rather than one for a stay of proceedings, several criteria apply:-

(a) Paragraph 59/13/1 of the White Book, beyond the passage cited to us, continues:-

"Execution might be stayed, for example, where the Judgment is in favour of a person resident out of, or about to leave, the jurisdiction (see Wootton -v- Sievier (1913) 30 T.L.R. 165, C.A.). And if under an order of a Court, money is to be paid out of a fund and distributed among a large number of persons resident abroad, an injunction may even be granted, restraining dealings with the fund pending an Appeal (Wilson -v- Church (No.1) (1879) 11 Ch. D. 576 C.A.; Wilson -v- Church (No. 2) (1879) 12 Ch. D. 454, pp. 458, 459; Polini -v- Gray (1879) 12 Ch. D. 438, C.A.; and see Bradford -v- Young (1884) 28 Ch. D. 18). Where an action has been dismissed in the Court below, quaere whether that Court has jurisdiction e.g. to restrain a Defendant from parting with a trust fund pending an Appeal; the application for that injunction must be made to the Court of Appeal (Wilson -v- Church (No. 1); cf. Orion Property Trust Ltd. -v- Du Cane Court Ltd. (1962) 1 W.L.A. 1085; (1962) 3 All E.R. 466)".

We have examined the latter case, in which Pennycuick, J, did grant an injunction. We quote from his Judgment:-

"Counsel for the Defendants has contended in this Court (the Chancery Division) there is no jurisdiction to make the injunction which is sought in the old action (under appeal). In support of that contention he relied on Wilson -v- Church. In that case,

Fry, J. had dismissed an action absolutely, and an application was made direct to the Court of Appeal to restrain the successful party from parting with property till the hearing of an Appeal against the decision of Fry, J. Sir George Jessel, M.R., dealt with the matter extremely shortly in these terms:

"The action having been absolutely dismissed by Fry, J., he had no jurisdiction to stay the proceedings pending the Appeal, and this application for an injunction was properly made to the Court of Appeal",

and the other two Lords Justices concurred.

That decision is cited in the Annual Practice, 1962, at p. 1693 in a note under R.S.C. Ord. 58 r. 12, in these terms:

"Where an action has been dismissed in the Court below, that Court has no jurisdiction e.g. to restrain a Defendant from parting with a trust fund pending an Appeal: the application for that injunction must be made to the Court of Appeal". However, in two other cases the Court of Appeal appear to have expressed the position as to the jurisdiction of the Court appealed from in wider terms.

In Polini -v- Gray, Sturla -v- Freccia, one party had failed in the Court of first instance and in the Court of Appeal on a claim to be entitled to a share in a certain estate, and was now prosecuting an Appeal to the House of Lords. The party concerned sought an order restraining the distribution of the fund meanwhile. Cotton L.J., stated the principle to be applied in the Court of Appeal in the following terms:

"The only question we have to consider is, whether or not the Court has jurisdiction in a proper case to stay all dealings with a fund pending an Appeal to the House of Lords although the Court has decided against the title of the Plaintiff and dismissed the action. I see no difference in principle between staying the distribution of a fund to which the Court has held the Plaintiff not to be entitled, and staying the execution of an order by which the Court has decided that a Plaintiff is entitled to a fund. In that case, as in this case, the Court, pending an Appeal to the House of

Lords, suspends what it has declared to be the right of one of the litigant parties. On what principle does it do so? It does so on this ground, that when there is an Appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree or the distribution of the fund would make the Appeal nugatory, that is to say, would deprive the appellant, if successful, of the results of the Appeal, then it is the duty of the Court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights. That applies, in my opinion, just as much to the case where the action has been dismissed, as to the case where a decree has been made establishing the Plaintiff's title".

I find that passage extremely difficult to reconcile with the brief statement made in Wilson -v- Church shortly before, and it seems to me that I am entitled to accept and apply the considered statement of principle laid down in that passage. The principle laid down must, I think, apply equally as regards Appeals from Courts of first instance to the Court of Appeal as it does to Appeals from the Court of Appeal to the House of Lords; and all the convenience and reason of the matter appears to be in accordance with that passage.

There is a report of another application in Wilson -v- Church (No. 2). I will read a few lines from the Judgment of Cotton, L.J., in that case:

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the Appeal, if successful, is not nugatory; and, acting on that principle, when there was an Appeal to this Court from the Judgment of Fry, J, dismissing the Plaintiff's action altogether, and it was urged therefore that this Court had no jurisdiction to stay the execution of the order, we were of the opinion that we ought to stay the execution of a Judgment in another action made by Fry, J, ordering the fund to be dealt with - that is to say, by granting an injunction against the trustees to restrain them from parting with any portion of the fund in their hands till the Appeal was disposed of. That possibly was rather novel, but it was right, in my opinion, to make that order to prevent the Appeal, if successful, from being nugatory. Acting on the same principle, I am of the opinion that we ought

to take care that if the House of Lords should reverse our decision (and we must recognize that it may be reversed), the Appeal ought not to be rendered nugatory".

The effect of applying the same principle seems to be that in the case of an Appeal from a Court of first instance to the Court of Appeal, the Court of first instance has jurisdiction to make an order preserving the subject-matter of the action in the Appeal, even though the action has wholly failed.

I shall only refer, in conclusion, to a short judgment in Otto -v- Lindford (1881) 18 Ch. D. 394 in which action Sir George Jessel, M.R., made a reference to Wilson -v- Church in which he said this:

"That (that is Wilson -v- Church) was a case of an entirely different description. The Plaintiffs there were asking for an injunction to restrain the trustees from parting with the trust funds pending the Appeal. That was not an application to stay proceedings under the order appealed from, for that order did not give any directions for dealing with the funds ....." I have found considerable difficulty in reconciling entirely what is said in the four cases which I have cited, and it may be that only the Court of Appeal itself can give an authoritative statement as to the principle to be applied in these cases. So far as I am concerned here, I think that it would be right for me to adopt and apply the statement of principle by Cotton, L.J., in Polini -v- Gray. I propose, accordingly to treat myself as having jurisdiction to entertain the application in the old action; and, as I have said, if I have jurisdiction, then I think it is right for me to make the injunction as asked".

We too, have found considerable difficulty in reconciling what is said in the cases cited. On the one hand, we think that the present application is very similar to that in Wilson -v- Church. In that case the Plaintiffs were asking for an injunction to restrain the trustees from parting with the trust funds. In this case the Representor (Plaintiff) is asking for an injunction to restrain the Autorisés (trustees) from parting with the properties and/or the proceeds of sale (the trust funds). In Wilson -v- Church it was not an application to stay proceedings under the order appealed from, for that order did not give any directions for dealing with the funds. In the instant case we noted the intentions of the Autorisés but, as in Wilson -v- Church our order did not give any directions for dealing with the assets in the Remise. On the other hand it

Gray) or to restrain the Autorisés from parting with any portion of a fund in their hands (Wilson -v- Church (No. 2) - the fund being the assets in the Remise, or merely to stay proceedings (Otto -v- Lindford) being the proceedings in the Remise.

We prefer the former view, consistent with the White Book, and doubt we had jurisdiction to grant the injunction prayed for, even if we had thought it right to do so. Unfortunately, the question of jurisdiction was not taken before us and like Pennycuick, J, in Orion Property Trust Ltd. -v- Du Cane Court Ltd., we should treat ourselves as having jurisdiction and resolve the further matters argued before us "if we have jurisdiction".

(b) An applicant for an injunction owes a duty of good faith and must be prepared to make a full and frank disclosure of all relevant matters. Whilst an affidavit is not essential to the obtention of an injunction (v. Walters & ors. -v- Bingham 22 December 1986 - as yet unreported) the person seeking an injunction must answer all relevant questions and there must be no deliberate concealment, or any element of 'bad faith'. As was said in the present case the applicant must come before the Court "with clean hands". Ground of Appeal (v) in the Notice of Appeal is "that the Court erred in law in concluding that the Jurats had a discretion as to whom to sell the appellant's properties in the present circumstances where there are two conflicting offers both of which would provide sufficient monies to settle the present claims of the creditors, if proved". But the terms of the conflicting offer from Mr. Slous, described by Mr. Benest as "unconscionable", were not disclosed to the Court on the 4th December, 1986, and, more importantly, were not disclosed to the Court when the injunction was sought on the 29th December, 1986. Paragraph 29/1/13 of the White Book states that ".... All the facts must be laid before the Court and nothing suppressed ....." Whilst the position with regard to injunctions in Jersey is not as refined as that in England (v. Walters & ors. -v- Bingham supra.) we have no doubt that the deliberate suppression of matters in the knowledge of the applicant which are material for the court to know is, of itself, a sufficient ground for the refusal of an injunction, and that, in such circumstances, the Court is under no duty to go on to consider the application on its merits.

(c) If the Court were under a duty to consider the application on its merits, we would apply the principles laid down in American Cyanamid Co. -v- Ethicon Ltd. and ask ourselves whether there was a serious question to be tried in Mr. Barker's Appeal. We have to answer that question in the negative. It is to be noted that it is not in every case that the Court will grant an injunction or stay to prevent an Appeal being made nugatory. In Polini -v- Gray, Cotton, L.J., referred to jurisdiction to stay "in a proper case", and said that: "..... if there is a reasonable ground of appeal, and if not making the order to stay ..... would make the Appeal nugatory ..... then it is the duty of the Court to interfere and suspend ......".

In our Judgment, there is no reasonable ground of appeal in this case. The Appeal flies in the face of the 1839 Law. On the 4th December, 1986, and again on the 29th December, 1986, Mr. Begg failed to produce any, or any persuasive, authority for the interpretation that he sought to put on the provisions of the 1839 Law. We are satisfied that Mr. Barker's Appeal does not raise a serious question to be tried and accordingly, in the exercise of our discretion, we would, if the application reached this stage, refuse it.

(d) Finally, if there were a serious question to be tried, we would have to go on to consider the balance of convenience. In the exercise of our discretion, we consider that the balance of convenience lies in favour of refusing the injunction asked for. On the one hand, if the injunction is refused and the two properties sold, Mr. Barker will receive some £225,000 and will remain possessed of the property known as St. Julian's Hall (£125,000) Wilton House, (£40,000) and one further property for which no tender was received. All his liabilities will have been discharged. Thus, he will have more than sufficient assets to overcome the loss of his home and business at St. Aubin's Wine Bar. He will be in a position to purchase a home and a new business. On the other hand, if the injunction is granted it is very likely that the Remise will fail by effluxion of time and, whether or not it fails, that the creditors, who have had to be more than patient already, will suffer considerable prejudice. We have no doubt that the balance of convenience lies in favour of the Remise, an indulgence which Mr. Barker sought and obtained to protect him from his creditors, being completed within the period of one year and that this requires that the Autorisés should remain unrestrained in their ability

to sell such properties as are necessary in the best interests of both the creditors and Mr. Barker, who has, after all, given an undertaking to the Court to co-operate fully in every way. Therefore, although in our judgment consideration of the balance of convenience does not arise because the Representation fails on other grounds, if it did arise we would exercise our discretion to refuse an injunction.