

ROYAL COURT

3rd September, 1992

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**Before: The Bailiff, and
Jurats Coutanche and Rumfitt**

Representation of Seale Street Developments seeking cancellation of a contract lease against David Henry Chapman and Marguerite Ann Chapman, née Godel; Representation of Guys of Georgetown, Ltd applying to raise a *déclaration en désastre* against the property of Mr. and Mrs. Chapman.

Advocate G. Le V. Fiott for Seale St. Developments, Ltd.

Advocate R.G.S. Fielding for Guys of Georgetown, Ltd. and Mrs. Chapman.

Advocate A.J. Olsen for the Bristol and West Building Society.

Advocate M.S.D. Yates for La Collette Cold Store, Ltd.

Advocate S. Slater for J.S. Olver, Ltd and the Department of Social Security.

JUDGMENT

THE BAILIFF: Mr. and Mrs. M. A. Chapman are the tenants, under a contract lease, of 30 Sand Street, St. Helier. The lease runs for twenty-one years from the 5th October, 1984. Included in the deed are the following clauses:-

"3. *QUE lesdits Preneurs seront tenus de maintenir lesdites prémisses présentement baillées à termage closes et étanches, d'en faire toutes réparations quelconques qui pourraient devenir nécessaires auxdites prémisses et de maintenir, remplacer, et réparer, toutes les fenêtres desdites prémisses pendant la durée du présent Bail.*

6. *QUE lesdits Preneurs ne pourront en aucun temps pendant la durée du présent Bail à Termage, céder ni transporter à qui que ce soit leurs droits au présent Bail, sous-louer lesdites prémisses en tout ou en partie, ou quitter la possession de l'entier desdites prémisses, ou partie d'icelles, sans avoir au préalable obtenu le consentement exprès et par écrit dudit Bailleur, lequel ne pourra pas refuser ladite permission dans le cas où le cessionnaire ou*

sous-locataire soit une personne ou société de solvabilité et respectabilité reconnues et à laquelle on ne puisse raisonnablement objecter; lesdits Preneurs en cas de sous-location, resteront néanmoins responsable du paiement régulier dudit loyer ci-devant mentionné ainsi que de l'accomplissement des autres conditions du présent Bail et dans le cas de transport du présent Bail, ledit Bailleur sera partie au contrat de transport pour y consentir. Et dans le cas où le cessionnaire ou sous-locataire soit une Société à responsabilité limitée, il sera permis audit Bailleur de demander que deux des Directeurs d'icelle seraient parties au contrat de cession ou sous-location comme garants au paiement du loyer et à l'accomplissement des termes de ce présent bail. Lesdits Preneurs étant toujours responsables à rembourser audit Bailleur les frais occasionnés à ce dernier par raison de tel transport ou sous-location.

9. QUE si ledit loyer des prémisses présentement baillées à termage resterait impayé pour une période de vingt-et-un jours après qu'il est devenu dû et exigible, ledit Bailleur aura le droit de notifier par écrit auxdits Preneurs que le Bail sera déterminé à l'expiration de quatorze jours de la date de telle notification et dans le cas où ledit loyer restera impayé après l'expiration de tel délai, le Bail sera annulé de plein droit.

11. ETANT de plus entendu et accordé que si le présent Bail à Termage serait annulé de plein droit comme sus est dit, ledit Bailleur aura le droit de faire une déclaration "ex parte" devant la Cour Royale que ledit Bail à Termage est annulé et pourra en même temps demander que l'Acte résultant de telle déclaration soit enregistré au Registre Public de cette Ile et tel enregistrement aura tous les effets légaux d'un contrat dûment passé devant Justice par lesdites parties."

Mrs. Chapman ran a catering business from the premises, as well as from a shop in Midvale Road. The profits from these two businesses contributed towards the payment of the rent to the Landlord Company, now Seale Street Developments Limited. There is a history of dishonoured cheques (seven), and delayed payments of rent - one as long as three months. On 1st June, 1992, La Collette Coldstores Limited took out an *Ordre Provisoire* against Mr. and Mrs. Chapman in the sum of £23,045.68. In an affidavit of Mrs. Chapman of 23rd June, 1992, she alleged that that sum was incorrect for a number of reasons which we are not called upon to deal with today.

On 25th June, 1992, the Landlord Company took out an *Ordre Provisoire* against the same defendants in the sums of (a) £2,976.22 for the June to September quarter's rent, and (b) six months 'assurance' of £5,952.44, a total of £8,928.66. The

Landlord Company filed a supporting statement of claim to which Mr. Chapman replied in an "answer" which, likewise, we are not called upon to deal with. Nevertheless, we note two matters common to the allegations of Mr. and Mrs. Chapman: 1. Both the affidavit of Mrs. Chapman and the "answer" of Mr. Chapman suggest a deliberate attempt by the Landlord Company to obtain possession in order to develop the property; and 2. both Mr. and Mrs. Chapman allege a conspiracy between the Landlord Company, Advocate Morris, then advising Mr. and Mrs. Chapman, and a firm of accountants Messrs. BDO Carnaby Barrett, who had been the financial advisers of Mr. and Mrs. Chapman, and it was alleged, also, of the Landlord Company. These allegations are denied in affidavits of Advocate Morris and Mr. J. A. de la Cloche, a director of the Landlord Company.

On the 21st of June, 1992, Mrs. Chapman wrote to Mr. M. J. Cotterill of BDO Carnaby Barrett, dismissing his firm. During the hearing of the two representations which I shall mention in a moment, Mr. Cotterill denied receiving this letter. It was in the bundle submitted by Mr. Flott on behalf of the Landlord Company.

On the 26th June, 1992, in pursuance of the *Ordre Provisoire* of the 25th June, the Viscount's Department arrested the goods of Mr. and Mrs. Chapman and warned them to attend here on the 10th July, 1992. On the 26th June, Mrs. Chapman declared herself *en désastre*. Her supporting affidavit was as follows.

"I, Marguerite Ann Chapman, née Godel, of "Le Soleil Couchant", Route de Faunois, St. Brelade, Jersey MAKE OATH AND SAY AS FOLLOWS:-

1. THAT I make this Affidavit in support of my application to the Royal Court to declare my goods *en désastre*.

2. THAT I am the proprietor of a business, Speedy Spuds, which has been operating from premises in Midvale Road and Sand Street, St. Helier.

3. THAT I am not aware of the exact amount of money which I owe my unsecured creditors but I believe it is in excess of £80,000.00.

4. THAT several Judgments have been granted against me by my creditors and in particular La Collette Cold Store Limited, was granted an *Ordre Provisoire* last week in the sum of £23,048.68. That company, I am informed by my Advocate, will be seeking confirmation of its *Ordre Provisoire* tomorrow, Friday, 26th June, 1992.

5. THAT I have realisable assets which include the stock and equipment at the two premises from which I operated my business. I am also the joint owner, with my husband, of a

house, "Le Soleil Couchant", St. Brelade. I verily believe that it is worth in the region of £170,000.00. There is owing on the property approximately £140,000.00.

6. THAT I am insolvent.

7. THAT the above statements are true to the best of my knowledge and belief."

The two representations I have referred to above are (1) a representation by Guys of Georgetown Limited, a creditor of Mrs. Chapman, to have the *désastre* lifted and, (2) an application by the Landlord Company to have the contract lease cancelled, because the tenants had failed to pay the rent due on the June quarter day.

The Court had to decide which representation to consider first. It decided to hear Mr. Flott for the Landlord Company because, if the lease were cancelled, there would be little point in lifting the *désastre*. Nevertheless, whilst the lease was in the names of Mr. and Mrs. Chapman, it was Mrs. Chapman's business which had failed, and therefore, that business was linked, inevitably, to the lease of the Sand Street premises. Accordingly, we decided to take into account the representation to lift the *désastre* in deciding whether the lease should be cancelled. We have no doubt that Mrs. Chapman's affairs certainly appeared to the Royal Court on 26th June, 1992, to be in an insolvent condition. There can be no doubt about this. Her affidavit is unequivocal on this point. Since the affidavit is dated 25th June, we assume that the decision to declare herself *en désastre* was taken before the service on her, (and on Mr. Chapman), of the *Ordre Provisoire* for rent and assurance.

Mrs. Chapman has sworn another affidavit, dated the 21st August, 1992, in support of her application to lift the *désastre*. Again, she alleges that she was persuaded to make the *déclaration en désastre* by Advocate Morris. It is worth setting out the main parts of that affidavit. These are paragraphs 2, 3, and 4 which read as follows:-

"2. THAT on 24th June 1992 my Counsel, Advocate R. G. Morris, called a creditors' meeting at Fort Regent in order that I might obtain my creditors' consent to attempt to trade out of my financial difficulties. Although only 14 creditors attended the said meeting, it appeared that they were in agreement that I should be allowed to attempt to trade out of my difficulties under the supervision of Advocate Morris and/or Messrs. BDO Carnaby Barrett. Now produced and shown to me marked "MAC 2" is a copy of a typical letter sent by Advocate Morris to creditors, which is self-explanatory.

3. **THAT** unbeknown to me, and at the same time as the said meeting was held, my landlords at 30 Sand Street, Seale Street Developments Limited, caused their surveyor or agent to inspect the premises, 30 Sand Street, and prepare a schedule of dilapidation for which I might be liable under the lease. I am advised and verily believe that an agent of Seale Street Developments Limited thereafter informed my then Advocate, Advocate R. G. Morris, that I was immediately liable for between £35,000.00 - £50,000.00 worth of repairs to the premises. Advocate Morris attended at the said trading premises at approximately 8.00 p.m. in the evening of Wednesday 24th June 1992 and informed me of the same, and asked me to attend at his offices the following day where he would have an Affidavit ready for me to swear and also one for my husband, as we had little alternative but to make an application to the Court for a *déclaration en désastre*. I was persuaded to make the application for a *déclaration en désastre* on the basis that I was liable to expend, immediately, between £35,000.00 - £50,000.00 on repairs to the premises.

4. **THAT** I duly swore the Affidavit, a true copy whereof is now produced and shown to me marked "MAC 3". It would appear that a statement in accordance with Rule 2 of the Bankruptcy (*Désastre*) (Jersey) Rules 1991 was annexed to the Affidavit although I verily believe that I never saw the said statement at the time. I first saw the said statement when the Viscount sent it to me after the Court had declared me *en désastre* and when I was amazed to discover that the "estimated liabilities to creditors" had been put at "£220,000.00", a figure with which I do not agree".

Even if we qualify her affidavit in support of her application to be declared *en désastre*, in the manner she suggests the Court ought to have done at the time, because she had been misled both as to her affidavit and as to the declaration, we need look no further than the Statement of Affairs prepared by the Viscount's Department. This shows total debts of £170,180.77 including one of £69,758.45 to the Bristol & West Building Society which may be discounted in as much as it is a secured debt on other real property of Mr. and Mrs. Chapman. Even so, this leaves creditors owed over £100,000. The net assets, including a possible sale of the Midvale Road lease, and equipment, and the Sand Street lease, are estimated at just over £15,000. Thus, today, the Court is quite satisfied that Mrs. Chapman's affairs are irredeemably *en désastre* as matters now stand.

Mr. Fielding, who has followed up the efforts of Mr. Morris to help Mrs. Chapman, and has presented his case with cogency and persuasiveness, has asked the Court to lift the *désastre*. He submitted that: 1. as regards a percentage of the total debt, there was an outstanding agreement among those creditors to whom

that percentage was due, to allow Mrs. Chapman to resume trading. That appears to be true, except it may be inferred that their agreement was, we think, linked to the business being under professional supervision. (Although Mr. Cotterill had supervised the business for some ten days before the *désastre*, during which the shop takings reached £1,528.88 at Sand Street, and Mrs. Chapman, through Mr. Fielding said her letter of dismissal had been withdrawn, Mr. Cotterill decided, and so informed the Court last week, that he would no longer act for Mrs. Chapman); 2. The claims for dilapidations were disputed. Moreover, Mrs. Chapman had spent some £25,000 on the Sand Street property since 1985; 3. Mr. Fielding held a cheque for £3,000 arising from a proposed sale of Mrs. Chapman's motor car. That cheque would be handed over to Mr. Fiott to pay the June quarter's rent if the *désastre* were lifted; and 4. The dividend of about 6.94p in the pound would be reduced to some 2p or 3p in the pound if the lease were cancelled, as the Viscount could not sell the lease for £12,000. The Viscount's officer has informed the Court that he has an offer at that figure from someone who knows that there could be a claim for dilapidations by the Landlord Company. In reply to these submissions, Mr. Fiott referred us to an unsatisfied judgment in favour of Normans Limited for £2,124.64 (less £300 on account). The parties, he said, had entered into the contract lease quite freely, and he cited the well-known maxim "*la convention fait la loi des parties*". There is no evidence of any of those matters which, Pothier says, "*limit the effect of that maxim*", e.g. some agreement contrary to the laws and good morals of the country. The question of the cancellation of the lease, he said, was separate from the *désastre*. (We have ruled that this was not so in our view). Mr. Fiott drew our attention to the provisions of Clause 6 of the lease. It was not likely, he said, that consent to transfer the lease would be given as long as the question of the dilapidations was outstanding.

Mr. Slater, for the Social Security Department invited the Court to take a practical view. Good faith was essential, and Mrs. Chapman had not shown that in her dealings with the Social Security Department. Promises to pay the arrears by weekly amounts of £200 had not been met. Where was the cash flow to come from if the business had to be re-started? The projection of profit prepared by Mr. Cotterill, when he was still helping Mrs. Chapman, was unreliable, and the mechanics of the operation would be too difficult. The Viscount had about £1,300 available which would be insufficient to pay the judgment debt of J. S. Olver Limited as a preferential claim, i.e. £1,536.55, if the *désastre* were lifted, which would be a condition of that creditor's assenting to it. As regards the Social Security claim, that was in respect of the employees' contributions and, presumably, a deduction had been made from the staff's wages.

There is one further matter which we should mention. It seems unlikely that the Tourism Committee would be prepared to

licence the Sand Street premises under the Places of Refreshment (Jersey) Law, 1967. The business at Sand Street opened without the knowledge of the Community Health Service of the Public Health Committee. The latest letter from the Environmental Health Officer of the 29th June, says, inter alia: "It is likely therefore, that the Department of Tourism will not allow a refreshment licence to be granted and the premises re-opened until suitable sanitary accommodation is provided." The sanitary accommodation referred to would be for the staff.

The draft accounts which were made available to us and which covered the eleven months of 1991 cannot be said to be encouraging. They show an amount to be transferred to the capital account for that period of nearly £31,000, but no allowance has been made for taxation, nor for drawings of the owner. There is, however, a figure in the capital account of nearly £40,000 representing drawings, leaving as at 31st December, the small total of £5,426 in the capital account. The explanation offered to us by Mr. Fielding was that a good proportion of these drawings had been in order to pay off debts arising from other businesses.

I have referred to the representation of Guys Limited on behalf of Mrs. Chapman. Advocate Fielding admitted that, had the representation been made, as it was originally by Mrs. Chapman, it could not be received by the Court because of the provisions of Article 7(3) of the Bankruptcy (Désastre) (Jersey) Law, 1990. That provision is as follows:

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

Nevertheless, the preamble to the Law reads:-

"A LAW to amend and extend the law relating to the declaring of the property of a person to be "en désastre"; to make provision for the disqualification and personal liability of persons involved in the management of companies; to abolish certain customary law concepts; and for connected purposes...."

It follows, as Advocate Fielding has submitted, that the 1990 Law is ancillary to, and not in substitution for, the common law governing *désastre* proceedings. But, on the other hand, the legislature provided expressly that there would have to be sufficient funds to pay all the creditors before a debtor could apply to have the *désastre* lifted. Is then the Court prevented from receiving an application from a creditor who is not a debtor

In person? There are many cases in the table, where a creditor was applied to have the *désastre* lifted, and it seems to us that the 1990 Law does not prevent that. Where such an application has been made, the consent of all the creditors has been obtained; that much is clear from the cases. Yet it is interesting to note the provisions in the Loi (1867) au sujet des débiteurs et créanciers, which was repealed by the 1990 Law, which allowed for a proportion of the total creditors to suffice. The repeal of that Law, taken with Article 7(3) of the 1990 Law, could be taken to mean that the legislature intended to remove the power of a majority of creditors to persuade the Court to lift a *désastre* against the will of a minority. In the case of Mrs. Chapman, not only is there a substantial majority of the creditors in favour of lifting the *désastre*, subject to professional guidance (as we have said) but the total amount of the debts - even if held by a minority of the creditors, which is not the case - is substantially in excess of those debts due to the objecting creditors.

In the application of Hill Street Trustees Limited re Arya Holdings Limited (8th March, 1988) Jersey Unreported, the Court said this: **"There is ample authority for the raising of a *désastre*. It seems that historically the raising of a *désastre* was effected only on the application of the person who had declared it. However in the case of INCAT (Jersey) Limited, 29th May, 1987, a *désastre* declared by a Miss Lynne Housley Evans, was raised on the application of the company en *désastre*. We see no reason why an application to raise a *désastre* should be limited to the original declarant provided the Court is satisfied that the original declarant has reached an agreement with that person declared en *désastre*."** In the instant case the application would, but for the provisions of Article 7(3) of the 1990 Law, have been made by Mrs. Chapman. We can see no reason why Guys Limited should not make the application and invite the Court to apply the customary law provisions to the lifting of a *désastre*.

It is not necessary for the Court to decide whether: (1) the debtor, in common law, must be in a position to pay all the debts before a *désastre* can be lifted; or (2) even if he or she is not, the majority, either numerically of the creditors, or quantitatively of the debts, even if held by a minority of creditors, would suffice.

When we adjourned last week, at the request of Mr. Fielding, we did so because we were told that Mrs. Chapman wished to see whether it was possible to instruct another firm of accountants to assist her in the manner which her previous advisers had been prepared to do. Notwithstanding, that she has so found a firm, and in fact given certain written undertakings, we think, not only that the prospects of continuing business successfully, by Mrs. Chapman, in the future would be remote, but that her present financial position would not, by itself, justify our refusing the

cancellation of the lease, although it is a matter which we must take properly into consideration. The grounds upon which a lease of this nature can be cancelled were examined very fully by the Court in the case of the Fort Regent Development Committee -v- the Regency Suite Discothèque and Restaurant Limited (4th December, 1990) Jersey Unreported. In that case there were complaints about the cleanliness of the premises over three years. The Court asked itself whether these breaches were sufficiently grave to warrant what they called, quite correctly, **"the draconian step of cancelling the lease"**. The Court also said at page 2, **"On one matter both parties are agreed, if the Court is to cancel the lease, particularly a long lease such as the one before us, then there must be more than a technical breach. The substance of the breach must prejudice the lessor in a real way."** On pages 3 and 4, the Court also cited two passages, one from Hamon -v- Fisher's Grocery Stores (1962) 253 Ex 415, which is as follows:- **"La Cour n'est pas tenue de prononcer immédiatement la résiliation; elle peut accorder au défendeur un délai pour s'exécuter, et apprécier si l'inexécution est suffisamment grave pour entraîner la résolution, ou si elle ne justifie que des dommages-intérêts"**. The other case was Bailhache née Hubert -v- Williams née Lewis and another (1968) JJ 1067 @ page 1079, there the Court said **"Circumstances can well be such that it is just and equitable to order the cancellation of the lease but it is unjust and inequitable where the effect of making such an order is to impose an excessive penalty."**

The history of these premises and the way in which there have been constant delays in the payment of the rent and the financial difficulties in which Mrs. Chapman has found herself for a considerable time have to be balanced against the Landlord's being denied the use of his premises by a tenant who persistently, over a period of time, has been in arrears with her rent. Even if the payment of the June quarter rent were paid out of the £3,000 to be received by Mrs. Chapman from the sale of her car, we doubt very much whether sufficient monies would be available for the payment of the September quarter and 'assurance' which the Landlord Company is entitled to ask for in view of the history of the tenants' behaviour in relation to the payment of rent, as we have already mentioned. Mr. Flott pointed out that there is a mortgage on the premises and that the Landlord Company relies on the rent to service the interest on that mortgage. Accordingly, balancing all the facts that we have referred to, we order that the lease be cancelled and the Viscount be authorised to place the plaintiff company in possession.

Authorities

Le Gros: Traité du Droit Coutûmier de L'Ile de Jersey: Du Bail à Termage: p.317 at' p.p. 327-9.

Bankruptcy (Désastre) (Jersey) Law, 1990: Articles 7, 32.

Loi (1867) au sujet des débiteurs et créanciers.

Places of Refreshment (Jersey) Law, 1967.

Representation of Hill St. Trustees re Arya Holdings Ltd (8th March, 1988) Jersey Unreported.

Fort Regent Development Committee -v- Regency Suite Discothèque and Restaurant, Ltd (4th December, 1990) Jersey Unreported.

Charing Cross Investments Ltd re Wykes (1966) 256 Ex 27.

Big Deal Carpets Ltd -v- Baylee Aircraft Services Ltd (1978) 265 Ex 256.

Ferbrache -v- Bisson (1981) JJ 103 at 108.