10 pages.

ROYAL COURT
(Samedi Division) 103.

19th May, 1994

Before: F.C. Hamon, Esq., Commissioner, and Jurats Orchard and Herbert.

In re the Bankruptcy (Désastre) (Jersey) Law, 1990.

In re Blue Horizon Holidays, Ltd., *en désastre* on the application of St. Brelade's Bay Hotel, Ltd.

Application by Blue Horizon Holidays, Ltd., under Rule 15 of the Court of Appeal (Civil)(Jersey) Rules, 1964, for a stay of the *Désastre* proceedings, pending determination of the appeal..

Mr. David Eves of behalf of Blue Horizon Holidays, Ltd.
The Viscount.
Advocate J.G.P Wheeler, *Amicus Curiae*.

JUDGMENT

THE COMMISSIONER: We have, in a Judgment delivered in this case earlier, decided somewhat hesitantly that we have the power to grant a stay because there appears to be a right of appeal to the
5 Court of Appeal. We feel that must be so because there is a right for a person aggrieved to appeal under the Appeal Court Law in any civil cause or matter.

Having made that decision we must now proceed to decide
10 whether we should, in fact, exercise our discretion to grant a stay as requested by the applicant. Rule 15 of the Court of Appeal (Civil) (Jersey) Rules, 1964 simply states that:

(1) Except so far as the court below or the Court may otherwise direct -

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal."

Fortunately the principles governing the power of this Court to grant a stay of execution are set out by the Court of Appeal in Seale Street Developments Ltd -v- Chapman (3rd December, 1992) Jersey Unreported. Because the matter is so germane to what we have to decide we are going to read the whole of the part of the relevant Judgment from p.7:

"Principles governing the power to stay

There can be no doubt that the power of a court to stay execution of a judgment is a discretionary power. It is conferred on the court by Article 15(1) of the Court of Appeal (Civil) (Jersey) Rules, 1964 and this Court may determine an application for a stay notwithstanding that application has not first been made to the Court below (Sloan -v- Sloan [1987-88] JLR 651). No argument to the contrary was advanced before us.

The relevant Article does not limit the discretion to order a stay, but certain guidelines have been established, both by the English and the Jersey Courts. The English provision dealing with the stay of execution (Order 59 r.13(1) of the R.S.C.) is in terms not materially different from the Jersey rule, and decisions upon the operation of the English rule are clearly pertinent to the exercise of discretion under the Law of Jersey, as indeed this Court decided in In Re Barker [1987-88] JLR 1.

We were referred to a useful conspectus of the authorities to be found in the notes to the English Order 59 r.13 at 59/13/1, and to a number of the relevant authorities. We take the general rule applying to the discretion whether to grant a stay from the judgment of the English Court of Appeal (Cotton, Brett and James, LJJ) in Wilson -v- Church (No. 2) (1879) 12 Ch. 454. In that case, bond holders of a railway company had claimed against the company that their money should be returned to them, instead of being applied in the undertaking. The Court of Appeal pronounced judgment in favour of the bond holders and ordered that funds in the hands of trustees for the bond holders should be returned to them. The Defendants proposed to appeal to the House of Lords and applied to

the Court of Appeal for a stay. The Court of Appeal granted a stay. In his judgment, Cotton L.J. (p.458) said

> "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 he took into account the fact that if the trustees were to part with the funds, they would be distributed among a great number of persons, so that there would be very great difficulty in recovering them should the House of Lords reverse the decision of the Court of Appeal.

Brett L.J, at p.459, applied the same principle

> ".... where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory".

He said that the order must be acted upon "unless this is an exceptional case"; he did not consider that it was such a case.

James, L.J. dissented, but not on the general principle; he took the view (p.460) that the case was indeed a very exceptional one.

Within three weeks of its decision in Wilson -v- Church (No. 2) the Court of Appeal gave judgment Polini -v- Gray (1879) 12 Ch. 438. The Court was on this occasion composed of Jessel, MR and James, Brett and Cotton LJJ. An action had been brought to determine the right of claimants to a fund. The plaintiffs failed in the Court of first instance and also on appeal, but desired to appeal to the House of Lords. They sought an interim order preserving the fund pending the appeal. The order was sought under the then Order 52 r.3, which gave the Court power to make an order for the preservation of property the subject of an action. The application was not, therefore, one seeking of stay of execution, and alone of the Judges, Cotton L.J. equiparated it with such an application, saying (p.446) that he saw no difference in principle between staying the distribution of a fund to which the Court had held a plaintiff not to be entitled, and staying the execution of an order by which the Court had decided that the plaintiff was entitled to a fund. In both cases, the Court suspended what it had declared to be the right of one of the 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".*

Despite some observations which have been made by the single Judge sitting in the Jersey Court of Appeal in Barker -v- Merchant Vintners Ltd (1981) 1 C.of.A. 218; In Re Barker (1987-88 JLR 1) we do not consider that it is for the applicant to show special circumstances justifying the stay; so to state the principle is to invert the general guideline laid down in Wilson -v- Church (No. 2). Our opinion is that once it is shown that if no stay be granted the right of appeal would be likely to be rendered nugatory, and that once a reasonable ground of appeal has been shown to exist, then special (that is to say, exceptional) circumstances have to be advanced to justify a refusal of the stay.

The English authorities to which we have referred, together with others, were considered by Pennycuick J. in Orion Property Trust Ltd -v- Du Cane Court Ltd [1962] 1 WLR 1085; having considered them, he applied the principle stated by Cotton L.J. in Polini -v- Gray, supra. As we understand it, this principle was also the foundation of the judgment (in relation to stay) of the Royal Court in In Re Barker, supra (see at p.22), where the decision not to grant a stay was based upon the absence of a "serious question to be tried" in the appeal.

We do not propose in this judgment to set out all those factors which may be taken into account in deciding whether to grant or to refuse a stay. The discretion of the court is ex facie unfettered and it may take into consideration any matter which it properly considers material to the exercise of its jurisdiction. Plainly, the factors referred to by Cotton L.J. in Polini -v- Gray, supra, are of first importance, that there may in a particular case be other factors, such as the consequences to the parties respectively of the grant or refusal of a stay, which require also to be weighed in the balance."

The principles that we can derive from the Judgment of the Court of Appeal are quite clearly that special circumstances have

to be advanced to justify the refusal of a stay if the fact that no stay is granted means that the right of appeal would be rendered nugatory. It must also be shown that a reasonable ground of appeal exists.

There are of course two possible interpretations of what is meant in these circumstances by a stay. It may simply be a stay of any further steps required to be taken by the Viscount. Now that, in our view, would not assist the applicant in any way; the *déclaration en désastre* would remain, the Viscount would retain the assets and the debtor would still be unable to trade. The affidavit of Mr. Eves who was representing Blue Horizon *en désastre* makes it perfectly clear that that is not what he anticipates. His affidavit reads (and asks St. Brelade's Bay Hotel Ltd which company is not before us for reasons which we have already explained) to show cause why the debtor should not be given a stay of execution, and then in his affidavit he goes on to say:

> *"That the appeal that the debtor has lodged under Rule 15 of the Court of Appeal (Civil) (Jersey) Rules 1964 would be rendered nugatory unless a stay is granted because the debtor would be deprived of his livelihood and right to trade. The creditors would be deprived of the right to receive full repayment of their monies, rightly deprived of them by the applicant. Credit funds were available to meet the debt of the applicant creditor on the day the désastre was declared confirming that the action was in any case maliciously prosecuted. The stay should be granted in the interests of normal trading laws and natural justice."*

So that is what the affidavit says and it is perfectly clear that that is the form of the application for the stay that has been put before us by the applicant today.

It seems to us, however, that whilst we appreciate the very perilous situation that Mr. Eves and his family are in as a result of the *désastre* being obtained, to grant a stay in the form required would be no more than raising the *désastre* on a basis quite different from that anticipated in the law.

In the application to recall the *déclaration en désastre* the Court on 14th February, said that it had to apply an arithmetical test and that is was: ***"Not satisfied that the property of the debtor vested in the Viscount is at this time 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".***

On 18th February, on a further application to raise the *désastre* , the Royal Court said this:

"There is one more thing the Court wants to say and it is this: all the property of Blue Horizon Holidays, Ltd is vested in the Viscount. Should the Viscount wish, at the request of - it would be impossible to say all - but the majority of creditors, both as to number and in substance, to make a Representation to this Court regarding the administration of the bankrupt Company, or regarding the possibility of its continued trading, the Court will, of course, listen to any such application, but it will have to be with the consent of the majority, I repeat, either in number or in substance, of the creditors."

We can see that the consequences of the Order, if we were to grant it in the form required by Mr. Eves, would be to raise the *désastre* on no better grounds than those already refused by this Court on four occasions. But looking at it in another way, the practical consequences would, in our view, be extraordinary. The Viscount would presumably have to return the assets to the debtor; there would be little or no incentive to progress the appeal, even if we were able to impose a deadline; and the opposing creditors - and there are certainly some of those - would have no say whatsoever.

Mr. Eves has told us that he has a very large number of creditors now prepared to allow the *désastre* to be raised. But the Viscount in a most carefully prepared report, presented to us by his accountant Mr. Paul Wojciechowski, BCS, FCA, says in a conclusion to that report:

"The projected cash flow which excludes payments to existing creditors and does not include customer deposits which should as a matter of best practice be held in a separately designated bank account shows that Blue Horizon would require funding of approximately £10,000 together with significant increases in turnover and gross profit in order to continue to trade. But an injection in this sum would not however be sufficient to discharge existing liabilities. In order to discharge them assuming enforced with enforceable claims in the region of £200,000 a further substantial sum of capital would be required. In the event of such further cash injection being substantially less than the total liabilities long term support would be required from the creditors."

The Viscount, having sat through the whole of the hearing before us, still feels - he told us so - that in the present circumstances he would not be able to support an application should one be made for a recall.

What of the grounds of appeal that Mr. Eves has set out on the company's behalf? The first of those is that the *désastre* was declared without any notification being given to the debtor to

appear in Court on 11th February, 1994, to defend the action. The problem there of course is that it is not necessary for the debtor to appear on a *désastre* application. Then it goes on to say that the debtor banked more money on 11th February than the amount claimed by the plaintiff. That again is a matter which was put before us and the Viscount has noted that position.

Again, it is said that the debtor approached the plaintiff's advocate on the afternoon of Friday 11th February to pay the debt and the offer was refused. That is a matter, of course, that would require more information. Again, it is said that by a letter dated 1st March, the advocates acting for the plaintiff have stated that they would be prepared to lift the *désastre*. This vital evidence (it is said) was withheld from the creditors' meeting on Thursday, 3rd March, and from the Royal Court on Friday, 4th March, as it was not received by the debtor until Saturday, 5th March. That letter was before us and it does clearly state that if monies were to be paid in full with costs then the *désastre* could possibly be raised. We cannot here deal with the question as to the time that letter was received.

A further ground is that, despite the agreement of the plaintiff to lift the *désastre*, the Royal Court of Jersey has refused to hear the application of the debtor. There have, in fact, as we understand it, now been four applications from the debtor to raise the *désastre* and none of these have been successful. Then we have, in the grounds of appeal, a series of matters dealing with the affidavit sworn by Mr. Robert Colley, who is an officer of the company that applied for the *désastre*, making most serious allegations against him.

Again we must say that those matters have already been dealt with by this Court at the application before the learned Bailiff where he said in effect - if those allegations were proved - that he would allow the applicant to make application under paragraph 3 of Article 6 of the Law. That is the Article which gives a right to purşue for damages for a wrongful declaration.

We have under the *désastre* Law previously had applications for a stay in certain circumstances and because of the importance of this matter, we think it is necessary for us to look at the four previous applications that have been made.

The first of those was made on 20th February, 1987, by In re Incat (Jersey) Ltd and in that case the debtor was declared *en désastre* at the instance of a creditor. Subsequently the debtor represented to the Court that it was negotiating a loan facility which would enable it to discharge its obligations and liabilities in full. The Court stayed the *désastre* proceedings for approximately one month, at which time it then raised the *désastre* having had an opportunity to hear the creditors and the Viscount.

Now that application for a stay and its granting we can clearly understand because more information was required.

The second is In re Walkers Advertising Associates Limited (20th November, 1992, and here the Royal Court stayed a *désastre* in consequence of insolvency proceedings being brought in England. In this case there were creditors in England and in Jersey. Subsequently the order for a stay was discharged and the *désastre* proceedings proceeded concurrently with the English winding up proceedings. That on its facts again is perfectly understandable as to the reasons for the granting of the stay.

Then in In re Barker (6th September, 1984) Mr. Barker brought an application to lift the *désastre* but the Court treated the application as if it were an application that the creditor prove the debtor's insolvency. The Court, at the time, did not consider it had sufficient information about the debtor's assets and liabilities to come to a conclusion. Accordingly the Court stayed the *désastre* proceedings for three months pending verification of the decision of the Viscount and allowed Mr. Barker to continue to trade. That again is distinguishable on its particular facts because in that case, Mr. Barker was *fondé en héritage* and apparently, because of that fact, had a surplus of assets over liabilities. He had a particular asset, St. Aubin's Wine Bar, which if it had closed down at that time, would no doubt have been sold for far less than the eventual price that it reached, so that it was in everybody's interest to allow that company, in the particular circumstances, to continue to trade. As we understand the situation on the information supplied, the company *en désastre*, Blue Horizon, has liabilities which in fact exceed its assets and is not *fondé en héritage*.

The last case is Vidamour and again on that application a creditor, Aleval (Holdings) Ltd, applied and the Court stayed the *désastre* proceedings but only for one week pending hearing interested parties and the *désastre* was subsequently lifted.

In all those cases, as Mr. Wheeler as *amicus curiae* has so helpfully pointed out to us, the applications were brought *ex parte* and the stay was short, pending the Court hearing interested parties or creditors, or it was done by consent.

On no occasion in any of those four applications was the stay resisted by any party. Here we have some quite serious opposition to the raising of the *désastre* and we have also heard, as we have said, the Viscount saying that at the moment he would not be able, on the information that he has before him, to give his confident vote in favour of a *désastre* being raised.

We would not say that the appeal is frivolous in any way at all - there are certain matters (if the Court of Appeal is prepared to hear the appeal) that Mr. Eves will properly raise

when he gets to the Court of Appeal. In the circumstances, we are not prepared to grant a stay of these proceedings, and we can only suggest that Mr. Eves proceed to the Court of Appeal as quickly as he possibly can.

AUTHORITIES.

Court of Appeal (Jersey) Law 1961: Article 13(d)(i).

Court of Appeal (Civil) (Jersey) Rules, 1964: 12(4); 15(1).

Places of Refreshment (Jersey) Law, 1967: Article 8.

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

Wilson -v- Church (No.2) (1879) 12 Ch. 454.

Polini -v- Gray (1879) 12 Ch. 438.

Re Barker (1987-88) JLR 4.