REMISE DE BIENS:

A Procedure of (un)Certain Value

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This article examines two recent cases highlighting the operation of the remise de biens procedure in Jersey, both of which focus on the issue of value for the purposes of entry to and exit from the process. The cases illustrate that remise de biens continues to have a modest, yet important, part to play in the canon of bankruptcy law on the island.

Introduction

1 Jersey has one of the oldest insolvency frameworks still in operation in Europe, where procedures transplanted from continental Normandy in the mediaeval period and lightly reformed by statute since continue to be used to the present day for the insolvency of companies and individuals. A *remise de biens* is a method for a debtor experiencing financial difficulties to ask for the protection of the court, which can only be granted on strict conditions being satisfied.[1] These conditions include the pre-requisite of holding immoveable property[2] and the prospect of the payment of the secured debt in full with a dividend (no matter how slender) for the unsecured creditors.

2 The granting of an order results in the affairs of the debtor being placed in the hands of the court for a fixed period, usually six months.[3] The period may be extended, although extensions beyond a year generally require the creditors to consent to the proposed order.[4] During this time, two Jurats appointed by the court attempt to

[1] The procedure, which developed in Jersey customary law, is said to be based on the *lettres de répit* issued by Royal fiat, a procedure which was later placed under judicial control and codified in a French ordinance promulgated in 1673 during the reign of Louis XIV.

[2] *Re Taylor* (10 December 1999, unreported) is authority that shares in a company which owns immovable property may serve the purposes of a *remise de biens.*

[3] The *Loi (1839) sur les remises de biens*, which codified and amended the customary law procedure, does not define a duration for the procedure.

[4] *Re Barker* 1985–86 JLR *N*–2b, *Re Barker* 1987–88 JLR 4.

discharge debts by realising the debtor's property. The utility of this procedure is to avoid a fire-sale of the debtor's assets with a view to obtaining a better price over the duration of the procedure than could be obtained were the sale conducted in haste. If the debts are paid in their entirety, any unsold property or surplus value is returned to the debtor.

3 A *remise de biens* is useful for a debtor at risk of losing any surplus value in their immovable property through the foreclosure that happens during the *dégrèvement* process as part of the transfer of the property into the hands of one of their creditors. As a result, a debtor who might otherwise be obliged to apply for a *cession de biens* or who might be the subject of an *adjudication de renonciation* at the creditor's behest has every interest to explore the possibility of a *remise de biens*, especially given that an application may be made at any stage of the *dégrèvement* process up to the moment the property is transferred into the hands of the *tenant après dégrèvement*. This also has the effect of enabling a discharge to occur despite the rule in *Birbeck* affecting the availability of a discharge for debtors who have been subject to an *adjudication de renunciation*.[5] Similarly, a *remise de biens* is useful when compared to a *désastre*, because the costs of the procedure are usually less than the fees charged by the Viscount in that procedure. Furthermore, in a *remise de biens* procedure, the debtor retains ownership of his property, although obliged to co-operate with the Jurats who exercise a power of management over the property.

4 *Remise de biens* is the only Jersey procedure of a suspensory type specifically to enable the rehabilitation of the debtor because it results in a discharge if successful. It is also fairer for the debtor, when compared to other possible procedures, because only so much of the debtor's property is realised as is necessary to satisfy the creditors. In fact, prior to the inclusion of immovables within the scope of *désastre* proceedings,[6] it was the only equitable method for dealing with a debtor with immovable property. As a result, it has remained in use until modern times, albeit case law, reported or unreported, on the operation of its provisions is sparse.[7] For this reason, the production of

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[5] *Birbeck v Midland Bank* 1981 JJ 121.

[6] Via the Bankruptcy (*Désastre*) (Jersey) Law 1990 (*Désastre* Law).

[7] One of the most extensive accounts, albeit of some vintage, of the operations of a *remise de biens* and its relationship to the procedures of *cession de biens/adjudication de renonciation* is the series of cases involving the debtor Barker, various hearings being reported as *Re Barker* 1985–86 JLR 120, 196, 284 and *N*–2b; 1987–88 JLR 4 and 23.

two judgments within the space of five months in 2017 dealing with aspects of the process is of some interest.[8]

The facts of the cases

In re GG and Tygres

5 This case involved two investment companies, each holding a property used as a guesthouse.[9] Both companies had applied for a *remise de biens*. The issue in both cases involved determining whether the value of the assets of the companies, including the properties in question, would be sufficient to pay off the secured creditors and offer a dividend to the unsecured creditors, an essential pre-requisite to the granting of an order. In both instances, the asset values were estimated on the basis of property valuations which fluctuated. In the case of the first company (Tygres), the lowest estimate was close to the amount due to the secured creditors.[10] Taking into account the likely costs of realisation, there would not be sufficient to offer the unsecured creditors a dividend, thus defeating the rationale of the process.[11]

6 In the case of the second company (GG), the estimates fell somewhat short of the amounts owed the secured creditors. There was also the issue of an inter-company loan, payment of which depended on the first company being able to realise its property at a higher value.[12] The valuations were objected to by the beneficial owner of the companies, who contended that the court should take into account the existence of an offer in respect of the first company and the likelihood of planning permission being available which would alter the value of the properties considerably.[13]

In re RBS Intl

7 The bank lent moneys to the O'Neills to purchase shares in a company, Millbrook, whose sole asset was a property in Jersey.[14] The bank's loan was secured by a security interest in the shares of the company. The O'Neills subsequently borrowed a further sum from the Le Cornus, which was guaranteed by the company and secured by

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[8] *In re GG Invs Ltd and Tygres Invs Ltd* [2017] JRC 102 (30 June 2017); *In re RBS Intl (Re Millbrook Park Ltd)* [2017] JRC 202A (30 November 2017), both available via the Jersey Law website at: <http://www.jerseylaw.je>.
[9] *In re GG and Tygres*, at para 1.
[10] *Ibid*, at para 2.
[11] *Ibid*, at para 3.
[12] *Ibid*, at para 11.
[13] *Ibid*, at paras 4–5, 13.
[14] *In re RBS Intl*, at para 1.

means of a *hypothèque* (real property security) over the property.[15] When the O'Neills' business failed in 2014, they fell into arrears on the loan from the Le Cornus, who in turn pursued a claim to judgment for the outstanding sum.

8 On the basis of the judgment being obtained, the Le Cornus then sought the opening of an *adjudication de renonciation* which would result in foreclosure of the property interest. The company then applied for a *remise de biens*, which was granted in August 2015.[16] During the procedure, the property was sold for a sum which paid off the Le Cornus and other creditors, leaving a surplus.[17] The issue in the case was the destination of the surplus, which normally would be returned to the debtor company. In the instant case, the bank sought an order that the moneys be paid directly to it in satisfaction of its outstanding loan, on which the O'Neills had also defaulted.[18]

The judgments

In re GG and Tygres

9 In both cases, the request for a *remise de biens* procedure to be opened was rejected.[19] In the case of the first company, the court accepted the higher of two valuations obtained by the Jurats based on the continued use of the premises as a guesthouse from which had to be deducted the estimated costs of the realisation process.[20] On this basis, there was a shortfall on the payment of the secured debts and no prospect of a dividend for the unsecured creditors.[21] In dealing with the objections to the valuation, the court accepted the evidence of a surveyor as to the likely value with planning permission obtained, for which an application had been made (but also the risk of it not being granted), which would result in a much lower sum than the continued use of the property in its current form.[22]

10 The offer, such as it was, from a third party, was not held to be realistic given that the only confirmation of its existence was a letter from an estate agent stating the offer had been made and no further steps had been taken, such as by means of a preliminary agreement for

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[15] *Ibid*, at para 2.
[16] *Ibid*, at para 3.
[17] *Ibid*, at para 4.
[18] *Ibid*, at paras 5–6.
[19] *In re GG and Tygres*, at paras 9, 18.
[20] *Ibid*, at para 2.
[21] *Ibid*, at para 3.
[22] *Ibid*, at para 4.

sale or an exchange of letters between lawyers.[23] For the court, using the test of whether there was likely to be a surplus following payment of the secured debts and whether that surplus was likely to be more than marginal, as the rule in *Re Mickhael*[24] required, did not leave the court confident that the pre-requisites for the opening of a procedure had been satisfied.[25]

11 Moreover, with the likely costs of dealing with the property, such as repairs and insurance, as well as the costs incidental to obtaining planning permission, still to be incurred without funds being available to the Jurats to undertake these steps, the court was motivated to deny the application on the ground that the tight margins, even on the basis of a more optimistic valuation, left no room for manoeuvre for the Jurats and it would not be expedient to require them to undertake these costs with the possibility of a shortfall being incurred.[26]

12 In the case of the second company, the court was not much exercised by the possibility of development, which were not yet at application stage, and which left matters to be determined on the property valuations.[27] As in the first case, the gulf between the valuations left the prospect of a considerable shortfall, given the much higher secured debt burdening the property. The existence of an inter-company loan, payable by the first company but dependent on its ability to realise its own property values, was not a factor the court felt could be taken into account when assessing the overall value of the assets available to the second company.[28]

13 As in the case of the first company, an independent surveyor's valuation was obtained. Though it was somewhat higher than the estimates obtained by the Jurats, it did not come anywhere near the value of the secured debt.[29] The beneficial owner's more ambitious plan of a development project by combining interests with a neighbouring property was, for the court, not based on any firm footing, there being, as with the first company, an absence of underpinning documentation that would indicate the project was sufficiently advanced so as to offer a realistic prospect of success.[30]

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[23] *Ibid*, at para 5.
[24] *Re Mickhael* 2011 JLR 1.
[25] *In re GG and Tygres*, at paras 6–7.
[26] *Ibid*, at paras 8–9.
[27] *Ibid*, at para 10.
[28] *Ibid*, at para 11.
[29] *Ibid*, at para 12.
[30] *Ibid*, at para 13.

The fact of the neighbour's recent demise, noted by the court, added a further complication that would not ease matters.[31]

14 As such, the court felt that the venture was much too speculative and declined to order a *remise de biens*, given the question over the availability of a dividend for the unsecured creditors and also the likely time within which a dividend could be paid, even if it were possible, which on the development plans put before the court would take the procedure beyond the normal period for a *remise de biens*.[32]

In re RBS Intl

15 The court's view was that there were really only two options open to the bank, given the structure of the loan and comforting security. The first was to return the surplus to the company and then ensure that the O'Neills, as directors, declare a dividend or conduct a winding up of the company and make a distribution to themselves as shareholders (and pay on the amount to the bank), the second being for the bank to enforce on the security interest, appoint new directors and procure a distribution via a winding up to the shareholders (ultimately payable to itself).[33]

16 The court was informed the second option was not really open to the bank, given issues with respect to the regulatory compliance regime to which it was subject, which made dealing with a company subject to an insolvency process problematic. The first option involved a risk that the bank would lose control of the money for such time as the directors were in charge of the distribution process until payment was made to the bank.[34] For that reason, the bank invited the court to "take a pragmatic approach" to pay the surplus directly to it so as to reduce the debt owed by the O'Neills, who in fact supported the bank's representation.[35]

17 The position of the Viscount (who held the moneys for the Jurats) was that she would only pay across the surplus on a court order being made, as in law the surplus was the property of the debtor company.[36] Subject to assurances by the O'Neills that there were no other creditors remaining to be paid out of the funds held by the Viscount, the court was amenable to taking the step of authorising the transfer to the bank

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[31] *Ibid*, at paras 14–15.
[32] *Ibid*, at para 2.
[33] *In re RBS Intl*, at para 6.
[34] *Ibid*, at para 7.
[35] *Ibid*, at para 8.
[36] *Ibid*, at para 6.

provided the bank gave an undertaking to pay out debts due to any creditors that might subsequently be identified.[37]

Analysis and impact

18 For those wishing to qualify as an advocate in Jersey, especially those from other jurisdictions, the fact that one of the compulsory courses for qualification is "Movable Security Law and Bankruptcy" provides a great deal of complexity. The procedures, two of which (*cession de biens* and *remise de biens*) are rooted deep in the Middle Ages, are baffling because the legal sources have been (until very recently) mostly in French and the procedures arcane. The third of the procedures, a comparative newcomer, is *désastre*, which was originally created in the 18th century as a procedural device for the concurrent marshalling of claims in the case of multiple creditors of the same estate.

19 *Désastre* has now been transmuted into a modern bankruptcy regime through the passing of the *Désastre* Law. The statute is not a codification by any means, recourse to the jurisprudence being necessary on occasion to flesh out its terms or fill in the lacunae. Similarly, the two older procedures, both the subject of laws passed in the 1830s, require much more by way of case-law infilling, the framework of the texts being very much bare bones. Only when we get to the modern age is there a statute with recognisable features in the shape of the Companies (Jersey) Law 1991 (Companies Law), which has both the scheme of arrangement and winding up.[38] Would-be advocates who have studied common law frameworks, particularly those derived from English law, are often comforted by the familiarity, until they realise that some of the procedural steps within winding up (art 166) refer back to the *Désastre* Law and that there is no right for a creditor to initiate the process.

20 This is not to mention the further complication of there being a hierarchy of choice, between the procedures based in the older laws, as well as between those in bankruptcy and company law, for those entities potentially subject to both.[39] This explains why art 4 of the *Désastre* Law prohibits the opening of a procedure where a cession or remise is afoot as well as the reasoning behind arts 154A and 185B of

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[37] *Ibid*, at paras 9–10.

[38] This is unsurprising, given it is based on the model of, *inter alia*, the Companies Act 1985 (United Kingdom).

[39] *Superseconds Ltd v. Sparta Invs Ltd* 1997 JLR 112.

the Companies Law requiring winding up to cede ground to a *désastre* order.[40]

21 The one issue, nevertheless, with these procedures is that they are overwhelmingly orientated towards liquidation, albeit *remise de biens* and *désastre* offer the possibility of a surplus that could be redirected to the debtor to use for recommencing business activity. In that light, the absence of a proper rescue procedure on the Island, with features consonant with those of developments taking place elsewhere and against the background of international benchmarks in the area, has been the subject of some note. To palliate this, courts and legal practice have explored the use of parts of the existing toolkit to try and mimic the effect of rescue.

22 For example, in common with other Commonwealth jurisdictions, Jersey has extended its scheme of arrangement practice to envelop entities near the insolvency threshold.[41] Although Jersey schemes are often carried out in parallel with schemes of arrangement in other jurisdictions, particularly the United Kingdom, the case-law has also seen authority for a scheme, in conjunction with the continuance procedure in Part 18C of the Companies Law, to avoid the territorial bar limiting the application of the statute to Jersey companies.[42] While Jersey practice in this area is very well developed, the scheme itself is a tool that is only really appropriate for financial restructurings at an early stage of a debtor's difficulties and benefits mostly larger entities.

23 Potentially, for other entities, however, the courts have evolved a jurisprudence focusing on, unusually, the just and equitable winding up provision in art 155 of the Companies Law which has seen the development of a workout style process, avoiding the cessation of activity inherent in a normal creditors' winding up and thereby enabling the sale of the business as a going concern.[43] The workout model has also been used, particularly successfully, in the case of entities carrying out regulated business, an area of some concern for the financial sector on the island. Recently also, the model has been taken further to facilitate a Jersey equivalent to the pre-pack procedure (a variant of the administration process in the United Kingdom) in the

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[40] See, for some limited exceptions to this rule, *Hotel Beau Rivage Co Ltd v Carèves Intl Ltd* 1985–86 JLR *N*–5b.

[41] *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10 (in part a Jersey case).

[42] *Re APIC Petroleum Corp and APIC (Petroleum) Jersey Ltd* [2012] JRC 228; [2013] JRC 034.

[43] *Re Poundworld (Jersey) Ltd* 2009 JLR *N* [12].

case of a trading concern, illustrating the potential range of business whose needs could be served by the use of this provision.[44]

24 For other businesses, particularly those in the investment and property development sectors, a passporting process has been developed, by which a letter of request sent to the High Court in London can lead to UK administration being made available for Jersey entities with the authority of s 426 of the Insolvency Act 1986 (UK) being used to permit the application of a Schedule B1 procedure.[45] This procedure has been so often used that it represents a well-trodden path for Jersey advocates and courts alike. While the option for rescue in the United Kingdom exists, there does not seem to be any urgency for any home-grown initiative to take its place, or indeed for any transplanting of the administration procedure as Guernsey has done in its Companies (Guernsey) Law 2008.[46]

25 For financial institutions, however, special provision has been made recently by means of the Bank (Recovery and Resolution) (Jersey) Law 2017 to introduce recovery and resolution procedures as options. As a result, rescue has arrived in Jersey for select entities but not for the majority of the companies and individuals that operate on the Island. That said, small consumer debts can be wiped out using the procedure under the Debt Remission (Individuals) (Jersey) Law 2016, though only in respect of qualifying debts under a threshold.[47]

26 Overall, this means that the procedures in the law on the Island remain relevant and, in a number of cases, the only option for some form of rescue or rehabilitation to take place. In the case of the *remise de biens*, the prospect of the payment of secured debt and some dividend for the unsecured creditors is the benchmark for admission to the process, over and above the other pre-requisites that may be required. As such, the debate in *In re GG and Tygres* over the margins available (depending on what valuations are accepted) is not simply

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[44] *Re Collections Group* [2013] JRC 039.

[45] *Siena SARL v Glengall Bridge Holdings Ltd* [2015] JRC 260.

[46] See, however, the court's pronouncement in *Re Orb arl (or Re Harbour Fund II LLP)* [2016] JRC 171, where an application for a letter of request was turned down where the court was concerned about proper supervision being available to monitor the office-holder's activities that were likely to take place in Jersey, preferring instead the opening of local proceedings placing the Viscount in charge.

[47] Currently fixed at £20,000. Prior to the introduction of this procedure, the development by the courts of the social *désastre* variant of the procedure palliated some of the deficiencies caused by the absence of a procedure directed to the problems of consumer and small business debt.

about the dividends payable to creditors in various categories but goes to the utility of the procedure itself and whether the courts, some of whose members (the Jurats) are in charge of the process, should authorise the expenditure of funds with view to a realisation that will offer returns to both secured and unsecured alike.

27 That the prospect of a dividend is not simply a theoretical possibility is illustrated by the most recent case, *In re RBS Intl*, where somewhat unusually the realisation of the property left a surplus destined to be returned to the debtor company. But for the fact that the company was a device by which the shareholders acquired an asset using a loan from the bank concerned, the funds would have been a true surplus, again showing the utility of the procedure as a managed process for the realisation of property.

Summary

28 The antiquity of a procedure is not necessarily grounds for retaining or indeed removing it. Though the *remise de biens* is an old procedure with roots in the Middle Ages, and though arguments could be made that it is not completely in keeping with the way modern insolvency frameworks are constructed, it nevertheless demonstrates a utility in certain cases that perhaps justifies its retention as part of the canon of insolvency law and procedures available in Jersey.[48] What is interesting about the trickle of jurisprudence that emerges from time to time is the attention paid by the courts to filling in the lacunae of the process, supplemented by the recent Practice Direction, so as to give the procedure more clarity and render it more effective. To this end, there is strong evidence in the reports of the cases of the willingness of the courts (assisted by the arguments of the advocates) to innovate. This is not a bad thing, in the absence of immediate moves towards reforms which may or may not come.

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[48] This (probably) explains the recent introduction of a Practice Direction (RC 17/12, effective 17 June 2017), governing applications for a *remise de biens*, listing the information that should be presented so as to justify the pre-requisites for the granting of an order.