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*An Introduction to Jersey Insolvency Law*

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# **An Introduction to Jersey Insolvency Law**

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## ***Introduction***<sup>1</sup>

Jersey is regarded as a mixed jurisdiction whose law contains features of the common-law and civil law.<sup>2</sup> Although the roots of the law in Jersey, called customary law in Jersey, are derived from the law in force at the time the Channel Islands were part of the Duchy of Normandy, subject to later borrowings and assimilations from the continent, many modern statutes, particularly in the commercial law arena, are modelled on their equivalents in the United Kingdom. This is certainly the case with respect to corporate law, where Jersey's local statute, the Companies (Jersey) Law 1991,<sup>3</sup> is based on the United Kingdom Companies Act 1985 (United Kingdom). The position in bankruptcy is different with the procedures having their origins firmly in the civil law, as will be detailed below.

## ***A - Winding Up Procedures in the Companies (Jersey) Law 1991***

### ***(i) Summary Winding Up***

In relation to procedures based in company law, companies' legislation contains a Part 21 dealing with the winding up of companies. Access, however, to the procedures of summary (when the company is solvent) or creditors' winding up (when the company is not) is predicated on action by the members resolving that a winding up take place. For certain companies, particularly those of limited duration or limited life companies (i.e. companies whose existence is measured by a fixed term or a contingent event or a combination of both), a resolution for winding up is deemed to have been passed on the expiry of the term or occurrence of the contingent event.<sup>4</sup> Summary winding up commences by the company then passing a special resolution within 28 days of the directors making a statement of solvency.<sup>5</sup> Following this, the company retains only such powers as are necessary to realise its assets, discharge its liabilities and distribute its assets.<sup>6</sup> Where the affairs of the company have been straightforward, the directors will often carry out a summary winding up, discharging the liabilities and distributing the assets, but a liquidator may

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<sup>1</sup> The author would like to thank Jonathan Walker, Solicitor of the Royal Court of Jersey and Adjunct Professor, Institute of Law, Jersey as well as Mark Harris and Elise Layzell, Advocates of the Royal Court of Jersey for kindly casting a critical eye over the contents of this contribution. Needless to say, all errors and omissions remain the author's own.

<sup>2</sup> For an outline of the various stages through which Jersey law has progressed, see S. Nicolle QC, *The Origin and Development of Jersey Law* (5th ed) (2009, Jersey and Guernsey Law Review Ltd, St Helier). An excellent website exists for legal materials in Jersey at: <[www.jerseylaw.je](http://www.jerseylaw.je)>, where the laws, cases from the Jersey Law Reports (JLR) and articles published in the Jersey Law Review (now the Jersey and Guernsey Law Review) may be located.

<sup>3</sup> See by this author, *Company Law Study Guide* (2011, Institute of Law Jersey, St Helier); M. Dunlop, *Jersey Company Law* (2010, Key Haven Publications, Oxford).

<sup>4</sup> Articles 144-144A, Companies (Jersey) Law 1991.

<sup>5</sup> *Ibid.*, Article 146(2)-(3).

<sup>6</sup> *Ibid.*, Article 148(2).

be appointed by special resolution if, for any reason, the company prefers to do so.<sup>7</sup> Following distribution of the assets of the company, the company is dissolved upon registration by the Registrar of Companies of a statement that the company no longer has assets or liabilities.<sup>8</sup> Summary winding up can be terminated during its course by the members of the company resolving to terminate the winding up.<sup>9</sup> It may also be terminated through the discovery of existing or supervening insolvency, in which case the procedure is converted to a creditors' winding up.<sup>10</sup>

### *(ii) Creditors' Winding Up*

Creditors' winding up is commenced by the passing of a special resolution by the company and, despite its name, cannot be commenced by creditors.<sup>11</sup> Notice is given by the company of the summoning of a creditors' meeting and nominating a person to be liquidator.<sup>12</sup> The creditors' meeting may also nominate a person to be liquidator and if that person is different from the person nominated by the company, it is the creditors' nomination who is appointed unless the court orders otherwise.<sup>13</sup> The liquidator must be appropriately qualified.<sup>14</sup> The liquidator enjoys wide powers to exercise any power of the company required for winding up, settle a list of contributories, summon general meetings of the company and pay the company's debts.<sup>15</sup> Other powers exercisable under the law include the ability to disclaim onerous property.<sup>16</sup> The liquidator is required, though, to obtain the sanction of the court or creditors' meeting (or a liquidation committee, if appointed) where the liquidator wishes to pay a class of creditor in full and compromise any claim against or by the company.<sup>17</sup> The liquidator is also required to make an application to court to reverse a transaction at an undervalue or which amounts to a preference.<sup>18</sup> Similar rules enable challenges in the case of extortionate credit transactions and the recovery of wrongful payments in respect of the purchase or redemption of shares.<sup>19</sup> The liquidator may also apply to court for an order where wrongful or fraudulent trading is alleged.<sup>20</sup> The liquidator is also under a duty to report any possible misconduct arising in the course of winding up, including conduct which could justify the making of a disqualification order under Article 78 against a director.<sup>21</sup> Subject to these powers, the conduct of the liquidation itself is governed by the same rules as would apply in a *désastre* in relation to the respective rights of secured and unsecured creditors, debts provable, time and manner of proving debts, the admission or rejection of proofs of debt and the order of payment and setting off of debts.<sup>22</sup> Only in respect of costs and the destination of any surplus does the law

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<sup>7</sup> Ibid., Article 149(1).

<sup>8</sup> Ibid., Article 150(5)-(6).

<sup>9</sup> Ibid., Article 154.

<sup>10</sup> Ibid., Article 151.

<sup>11</sup> Ibid., Article 157.

<sup>12</sup> Ibid., Articles 160 and 161(2).

<sup>13</sup> Ibid., Article 161(1).

<sup>14</sup> Article 7, Companies (General Provisions) (Jersey) Order 2002.

<sup>15</sup> Article 170(2)-(4), Companies (Jersey) Law 1991.

<sup>16</sup> Ibid., Article 171.

<sup>17</sup> Ibid., Article 170(1).

<sup>18</sup> Ibid., Articles 176-176A.

<sup>19</sup> Ibid., Articles 179 and 181.

<sup>20</sup> Ibid., Articles 177-178.

<sup>21</sup> Ibid., Article 184.

<sup>22</sup> Ibid., Article 166(1).

provide for particular rules to apply.<sup>23</sup> A creditors' winding up comes to an end once the affairs of the company are fully wound up, when the liquidator prepares an account of the winding up which is presented to meetings of the company and of the creditors. The liquidator is then required to make a return to the Registrar of Companies following which the company is dissolved, unless the court orders otherwise.<sup>24</sup> During its course, a creditors' winding up may be terminated by the liquidator applying to court for an order to that effect.<sup>25</sup> Creditors' winding up can also be terminated by the members of the company resolving to terminate the winding up and authorising the company to make an application, although a court is bound to refuse this unless it is satisfied that the company can then discharge its liabilities as they fall due and will also have regard to the interests of the company's creditors on the merits of the application.<sup>26</sup>

### *(iii) Just and Equitable Winding Up*

In Jersey law, winding up on just and equitable grounds also exists, with applications to be made by the company, a director or member of the company,<sup>27</sup> the Minister for Economic Development or the Jersey Financial Services Commission.<sup>28</sup> Under this procedure the court which orders the winding up may also appoint a liquidator and direct the manner in which the winding up is to be conducted.<sup>29</sup> This type of winding up is available where the company is being run as a quasi-partnership,<sup>30</sup> where there is deadlock in management<sup>31</sup> and where the company's substratum (fundamental purpose) has gone.<sup>32</sup> Increasingly, the courts in Jersey have extended the meaning of what is "just and equitable" to instances where there is a benefit to creditors and where it would be convenient and expeditious to make an order. In *In re Poundworld (Jersey) Limited* 2009 JLR Note 12, the court held it had a wide power to order a just and equitable winding up and that it was appropriate to do so, as it was clearly in the best interests of all the creditors for liquidators to be appointed to continue trading with view to a sale on a going concern basis. The court was of the view, however, that insolvent companies should normally be wound up by a creditors' winding up and the court should be cautious before ordering a just and equitable winding up in an ordinary case of an insolvent company.<sup>33</sup>

### *(iv) The Relationship of Winding Up to Bankruptcy Procedures*

The key difference between winding up in Jersey and elsewhere is that there is generally no right for the creditors to bring an application for an order, although, in a creditors' winding up, the creditors' may have a monitoring role if they are able to

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<sup>23</sup> *Ibid.*, Articles 165 and 166(2) respectively.

<sup>24</sup> *Ibid.*, Article 169.

<sup>25</sup> *Ibid.*, Article 185A(1).

<sup>26</sup> *Ibid.*, Article 185A(2)-(3).

<sup>27</sup> *Ibid.*, Article 155(2).

<sup>28</sup> *Ibid.*, Article 155(3).

<sup>29</sup> *Ibid.*, Article 155(4).

<sup>30</sup> *Bisson v Bish* 2008 JLR Note 46.

<sup>31</sup> *Jean v Murfitt* 1996 JLR Note 8c.

<sup>32</sup> *In re Leveraged Income Fund Limited* (2002) JRC 209.

<sup>33</sup> See also *In re Centurion Management Services* [2009] JRC 227, where the court preferred a just and equitable winding up to a creditors' winding up because of the limitations in Article 159 on continued trading to take into account the interests of the company's clients.

appoint the liquidator. Similarly, although a just and equitable winding up may take into account the interests of creditors, that is not the only ground for the initiation of that procedure, while a right of independent action is only accorded to external parties (the regulatory bodies). This is not the only distinction though: there is a hierarchy between the company law procedures and the bankruptcy law procedures which means that no winding up procedure (of whatever type) may be initiated while there is an order for *désastre* outstanding.<sup>34</sup> However, the winding up of a company normally bars the right to any person to take other proceedings in bankruptcy.<sup>35</sup> An exception exists, though, in relation to the right of a creditor or the company to apply for a declaration of *désastre*. What this means is that the existence of winding up proceedings is no bar to the initiation of *désastre* proceedings. On the making of such an order declaring a *désastre*, the winding up procedures must give way and proceedings are deemed to come to an end.<sup>36</sup> Furthermore, the declaration of *désastre* will result in the liquidator appointed for the purpose of the winding up ceasing to hold office and the company and all other persons being in the same position as if the winding up had not commenced,<sup>37</sup> although this does not affect the validity of acts carried out prior to termination occurring.<sup>38</sup> However, where a company is subject to winding up proceedings and being administered by a liquidator, who is independent and under the same duties as the Viscount, a court may be unlikely to exercise its discretion to declare a *désastre* instead of allowing the liquidation to proceed where the interests of the creditors would be adequately protected in a winding up.<sup>39</sup>

## ***B - Bankruptcy Procedures in the Customary Law and Statute***

As corporate law does not provide for a creditor-initiated procedure, attention focuses on the law of bankruptcy, which contains a number of different procedures.<sup>40</sup> The various procedures in Jersey, which may be collectively referred to as the bankruptcy procedures,<sup>41</sup> have their roots in the customary law, but have been extensively regulated by statute. Although, with the exception of *désastre*, where the statute has been more recently introduced, the bankruptcy procedures did not contemplate their application to corporate debtors, the rules on interpretation extend the definition of person to encompass both natural and legal persons and the argument may legitimately be made that all the bankruptcy procedures may be invoked by companies.<sup>42</sup>

### *(i) Cession de Biens*

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<sup>34</sup> Articles 146, 155 and 157, Companies (Jersey) Law 1991.

<sup>35</sup> *Ibid.*, Article 193.

<sup>36</sup> *Ibid.*, Articles 154A(1) and 185B(1).

<sup>37</sup> *Ibid.*, Articles 154A(2) and 185B(2).

<sup>38</sup> *Ibid.*, Articles 154A(3) and 185B(3).

<sup>39</sup> *Hotel Beau Rivage Co Ltd v Careves Investments Ltd* 1985-86 JLR 70.

<sup>40</sup> See by this author, Law relating to Security on Movable Property and Bankruptcy Study Guide (2010, Institute of Law Jersey, St Helier), Chapters 8-14; A. Dessain and M. Wilkins, Jersey Insolvency Law and Asset-Tracking (3rd ed) (2006, Key Haven Publications, Oxford), Chapter 5.

<sup>41</sup> See Article 8, Interpretation (Jersey) Law 1954, which extends the meaning of bankruptcy to all procedures listed here as well as creditors' winding up.

<sup>42</sup> *Ibid.*, Part 1 of the Schedule, where the position with respect to *remise de biens* and *cession de biens* rests on the assumption that the definition of a person as including "any body of persons corporate or unincorporated" extends these procedures, originally designed for use with individuals, to companies.

*Cession de biens* (transfer of goods) is a procedure of customary law origin that evolved in the late Middle Ages in Jersey.<sup>43</sup> It is patterned on a procedure known to Roman Law (*cessio bonorum*), which was resurrected in the early Middle Ages, first in Italy and then elsewhere in Europe. In Jersey, although rarely used, *cession de biens* is available as a procedure under which a debtor may voluntarily renounce all his property for the benefit of creditors. The voluntary surrender is also referred to as a *cession générale* (general transfer) or *cession volontaire* (voluntary transfer). A variant of the procedure is where an order of the court is obtained at the creditor's behest determining that, in default of debts being paid or *cession générale* being applied for by the debtor, the debtor was to be deemed to have renounced his property.<sup>44</sup> This is also referred to as a *cession involontaire* (involuntary transfer). The law required that, before a debtor could make *cession générale*, either the debtor had to have been imprisoned for debt and reduced to short rations or, where he had been imprisoned for failure to pay his debts, he must have obtained and published an act of the Royal Court announcing his intention.<sup>45</sup> The procedure is now available to debtors evidencing a particular hardship without the need for prior imprisonment,<sup>46</sup> although the court retains a discretion to refuse the application and will normally take into account the full facts disclosed in the debtor's affidavit, including the legitimate interests of the creditors and the debtor's ability to repay the debts, such as might arise through the *cession* or through future prospects of employment.<sup>47</sup> In the case of action by the creditor, the law states a creditor who has reduced a prisoner to short rations may apply to court within 15 days to request that the Viscount notify the debtor that the debtor has 2 months within which to satisfy debts owed to the creditor, in default of which the property, whether movable or immovable, is at risk of being adjudged renounced.<sup>48</sup> Notification by the Viscount may also be obtained if the creditor has a judgment that remains unpaid for a month and there is no requirement to have the debtor imprisoned before an application may be made.<sup>49</sup> A *cession générale* normally leads to a discharge from any further obligation.<sup>50</sup> In circumstances where an adjudication of renunciation follows a creditor's application, a discharge will not occur and the debtor remains obliged for the debt underpinning the security.<sup>51</sup>

Historically, *cession de biens* was a gateway procedure in that it terminated in a *décret* (decree) by which the court would transmit the debtor's immovable property to whichever of the creditors was prepared to accept it on condition that the creditor would pay off all prior secured claims. The *Loi (1832) sur les décrets* reformed the customary law practice of *cession de biens* and the use of the *décret* procedure. The

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<sup>43</sup> Reference is made to a case dating back to 1592 in C. Le Gros, *Traité du Droit Coutumier de l'Île de Jersey* (1943) (reprinted 2007, Jersey and Guernsey Law Review Ltd, St Helier), at 299.

<sup>44</sup> *Adjudication de renunciation* (adjudication of renunciation), although strictly speaking, it is a decision of the Royal Court by which the property of a debtor is adjudged renounced (*adjudgée renoncée*).

<sup>45</sup> Article 1, *Loi (1832) sur les décrets*.

<sup>46</sup> *Birbeck v Midland Bank* 1981 JJ 121.

<sup>47</sup> *Norris v Emprunt* 1990 JLR Notes-1.

<sup>48</sup> Article 2, *Loi (1832) sur les décrets*. Article 6, Civil Proceedings (Jersey) Law 1956 extends the period to 3 months in the case of a debt within the jurisdiction of the Petty Debts Court.

<sup>49</sup> Rule 11/1, Royal Court Rules.

<sup>50</sup> Article 10, *Loi (1832) sur les décrets*.

<sup>51</sup> *Birbeck v. Midland Bank Ltd* (1981) JJ 121.

*Loi (1880) sur la propriété foncière* changed the way in which debts and obligations were secured by hypothecation and guarantees. These changes also altered the way in which secured property was dealt with, through introducing a procedure titled *dégrévement* (discumberment of security), designed to supersede the *décret* as an improved form of this procedure. Whereas under *décret*, all the debtor's immovable property was disencumbered of the attached security together as one lot, *dégrévement* allowed for the discumberment of security separately in relation to separate lots of immovable property.<sup>52</sup> The procedure traditionally used in court, conducted before the Judicial Greffier,<sup>53</sup> is to summon the creditors in an order of "reverse" precedence (with unsecured preceding the secured and the secured in reverse date order of the creation of their security) and to ask whether they accept or decline the transfer of the debtor's property. A creditor who accepts the property does so on the condition of paying off debts secured in the normal priority to his, the sanction being that a creditor who does not accept has to renounce its claim against the debtor. The creditor who accepts the property is known as the *tenant après dégrévement*.<sup>54</sup> A creditor who accepts the property and who is able to pay off prior secured claims and its own is not bound to account to lesser ranked creditors (who are deemed to have renounced their claims) or to the debtor for any surplus arising from the sale of the property.

The 1880 law also introduced a liquidation procedure, applying to the debtor's movable property, which was replaced by a further procedure introduced in the *Loi (1904) (Amendement No. 2) sur la propriété foncière* titled *réalisation* (realisation). *Réalisation* serves as a procedure for realising any movables not dealt with by *dégrévement*. The court names an *Attourné* to conduct the *réalisation*. An *Attourné* must be an officer of the Crown, an Advocate or a Solicitor. Despite the wording of the law, which only refers to one *Attourné*, the practice is now to appoint two *Attournés*.<sup>55</sup> The *Attournés* take possession of the movables as well as any title documents, papers and other evidence, of which an inventory is made. The *Attournés* also gather in the assets and may pursue litigation to recover debts owed to the debtor, whatever the nature of the claim. The *Attournés* liquidate the debtor's movables and belongings by public sale.<sup>56</sup> Sums realised are lodged with the Treasurer of the States,<sup>57</sup> while persons with secured or unsecured claims relating to movables, except arrears on *rentes* and interest on conventional hypothecs, must send to the Judicial Greffier within a month of the first of two advertisements placed by the *Attournés* in the Jersey Gazette a note of their claims. On expiry of the period within which claims may be signified, the Greffier will make a list of those claims received. Following settlement of a list of creditors and claims, the Judicial Greffier distributes the proceeds in the following order: costs of the *réalisation*, including the

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<sup>52</sup> The *décret* procedure has largely fallen into desuetude as it relates to *propriété ancienne* (ancient property) only, which is defined as being immovable property acquired by the debtor prior to the *Loi (1880) sur la propriété foncière* coming into force. The last known *décret* is said to have taken place in 1917. *Dégrévement* applies to *propriété nouvelle* (new property), i.e. immovable property vesting in the debtor after the 1880 law came into force.

<sup>53</sup> Article 94, *Loi (1880) sur la propriété foncière*.

<sup>54</sup> The assumption henceforth is that *décret* is no longer available, although many of the comments below in relation to *dégrévement* would also be applicable.

<sup>55</sup> Article 2, *Loi (1904) (Amendement No.2) sur la propriété foncière*.

<sup>56</sup> *Ibid.*, Article 5.

<sup>57</sup> *Ibid.*, Article 10.

Greffier's and the *Attournés'* charges; preferential debts; the balance being distributed amongst the remaining creditors *pro rata* to their claims.

(ii) *Remise de Biens*

The *remise de biens* (handover of goods) is also a procedure of customary law origin, said to be based on the *lettres de répit* (letters of respite) issued by Royal fiat, a facility first introduced in France and whose practice was later regulated by a French ordinance promulgated in 1673 in the reign of Louis XIV. In Jersey, *remise de biens* provides a temporary respite granted by the Royal Court, during which two Jurats appointed by the court will realise as much of the debtor's property as is necessary to discharge the debts owed by the debtor and any unsold property being returned to the debtor. The procedure is based on a principle of justice and fairness that permits a debtor to invoke the assistance of the court against a creditor intending to seize his property by provisionally staying the Act of Court authorising seizure.<sup>58</sup> The *Loi (1839) sur les remises de biens* introduced changes to this procedure. Before the 1839 law was enacted, a debtor was required to satisfy the court that the debtor's immovable property was sufficient for the satisfaction of the debtor's total liabilities.<sup>59</sup> Now, the court only has jurisdiction to grant a *remise de biens* where it is satisfied that there will be a credit balance, however small, for distribution amongst the ordinary creditors.<sup>60</sup> Nonetheless, the pre-requisite for entry to this procedure is that the debtor must be *fondé en héritage* (i.e. must hold immovable property), although shares in a company which owns immovable property may be classified as the equivalent of immovable property for the purposes of a *remise de biens*.<sup>61</sup> In the event of failure of an application for *remise de biens*, the debtor has the alternative of an application for voluntary *cession* or *désastre*.<sup>62</sup> Alternatively, the court may choose to make an adjudication of renunciation, especially where the application is set against the context of a judgment on unpaid debts.<sup>63</sup> *Remise de biens* is considered to be a suspensory procedure in nature and the closest approximation to a rescue procedure under Jersey law.<sup>64</sup>

Interestingly, an application for a *remise de biens* may also be made during the currency of *cession* proceedings. A *remise de biens* may be ordered, notwithstanding that the debtor's property has been renounced either voluntarily or by adjudication of renunciation, provided that the property concerned has not yet vested in the *tenant après dégrèvement*.<sup>65</sup> This is because a *remise de biens* is

<sup>58</sup> Le Gros, above note 43, at 371.

<sup>59</sup> Article 6, *Loi (1839) sur les remises de biens*.

<sup>60</sup> *Re Shield Investments (Jersey) Limited and others* 1993 JLR Note 3. The debtor must also be acting in good faith.

<sup>61</sup> *In re Miss Coralie Jane Taylor* (1999) (unreported). For an outline of the operations of the procedure, see F. Benest and M. Wilkins, *Can we be at Ease with the Remise?* (2004) 8(1) Jersey Law Review.

<sup>62</sup> *Superseconds Limited and Santer & Santer v. Sparta Investments Limited* 1997 JLR 112.

<sup>63</sup> *Re De Gruchy* (1873) Ex 195.

<sup>64</sup> Interestingly, cases such as *Re OT Computers Limited* 2002 JLR Note 10, *Re The Governor and Company of the Bank of Ireland* [2009] JRC 126 and *Re Anglo Irish Asset Finance* [2010] JRC 087 appear to underline the absence of a true rescue procedure in Jersey by the resort in the cases to Letters of Request for an Order in Aid under section 426, Insolvency Act 1986 (United Kingdom) with view to the application of United Kingdom insolvency procedures (especially administration) to Jersey companies.

<sup>65</sup> *Re Barker* 1985-86 JLR 186.

always preferable to a *dégrèvement* if the circumstances warranted it as it did not necessarily deprive the debtor of all of his assets and could restore a surplus if there was one.<sup>66</sup> The draconian nature of the *dégrèvement* procedure means that the court is able to halt the procedure at any time and pursue a *remise de biens* instead. However, the court will have regard to any impact that a delay caused by halting *dégrèvement* has on the creditors' prospects of recovering debts owed them. Where there is a significant equity in the property, which would otherwise accrue to the fortunate creditor in *dégrèvement*, that fact could motivate the court to exercise its discretion to order a *remise de biens*. Conversely, the presence of only a marginal equity or the likelihood of a potentially complex process being necessary for the realisation of the assets in question might motivate a court to question whether a *remise de biens* would be appropriate.<sup>67</sup> Failure of an application in this instance merely revives the *cession* procedure (whether voluntary or involuntary) at whatever step it was suspended.

The law states that the applicant must present a detailed statement (*état détaillé*) of all his property, whether movable or immovable. Unless the application is rejected outright, the statement must be verified on oath before the court.<sup>68</sup> The court will then nominate two Jurats to examine the property. The Jurats have 15 days within which to present a report on the value of the property to the court and to state in their report whether it would be useful (*utile*) to grant the *remise de biens* (effectively that the value of the debtor's property does exceed the secured claims so that there will be a surplus available for distribution amongst the ordinary creditors). Following presentation of the report and the opinion it contains, the court will hear anyone who wishes to oppose the *remise* and will then grant or refuse the application.<sup>69</sup> In practice, however, unless it considers the objections of creditors overriding, the court is likely to follow the recommendations of the Jurats, especially where their report is supported by expert advice. Once the *remise de biens* is granted, the debtor's property is placed *entre les mains de la justice* and the Act of Court contains an authorisation on the part of the debtor to the Jurats to examine the property and to lease, sell, alienate or otherwise dispose of the debtor's property, whether movable or immovable. In practice, property that is easily realisable, such as movables, is sold first, followed by immovables.<sup>70</sup>

A successful *remise de biens* results in the debtor obtaining a discharge from all liability.<sup>71</sup> In the case of an unsuccessful *remise de biens*, either because the secured creditors are not paid or the assets are insufficient to allow the payment of a dividend, however small, to the unsecured creditors, the result is to automatically bring about a *cession de biens* of the voluntary type. This is because the placing of the debtor's property in the hands of the court is deemed to operate as a *cession conditionnelle* (conditional transfer), the condition being the ordering of a *remise of*

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<sup>66</sup> In cases where the procedure results from an adjudication of renunciation, obtaining the *remise de biens* would also attract a discharge that the rule in *Birbeck v. Midland Bank Ltd* (1981) JJ 121 prevents in the case of the involuntary *cession*.

<sup>67</sup> *Re Mickhael* [2010] JRC 166A.

<sup>68</sup> Article 1, *Loi (1839) sur les remises de biens*.

<sup>69</sup> *Ibid.*, Article 2.

<sup>70</sup> *Ibid.*, Article 4.

<sup>71</sup> *Re Remise Barker* 1987-88 JLR 23.

*biens* and it being successful. In this instance, the usual sequence of a *cession de biens* will follow with the consequence being that the debtor obtains a discharge.<sup>72</sup>

### (iii) *Désastre*

The main bankruptcy procedure in Jersey law is now the *désastre*.<sup>73</sup> In the late 18th and early 19th centuries, a procedure evolved in Jersey customary law in which all claims by creditors of a common debtor would be dealt with in a single set of proceedings. The first recorded *désastre* is said to have occurred in 1811 involving a person called Le Maistre, although Le Gros states that the failure of the trading firm Jean Fiott and Company in 1797 led to pressure for the introduction of a procedure that would place creditors *sur un pied d'égalité* (on an equal footing).<sup>74</sup> The function of a *désastre* procedure is to safeguard the interests and rights of creditors. Furthermore, in light of the debtor being deprived of the possession of his goods, a *désastre* procedure requires the appointment of a person by the court to have the custody of these goods.<sup>75</sup> In Jersey, the Viscount, an officer of the Royal Court, undertakes this role.<sup>76</sup> The procedure of *désastre* was initially confined to the debtor's movables, but was extended to cover immovable property by the law that reforms and sets out this procedure, the Bankruptcy (*Désastre*) (Jersey) Law 1990. With this extension, it was anticipated that the use of the *dégrévement* procedure covering immovables would diminish, but in fact it continues to be used by creditors. It offers creditors greater control over the realisation process than *désastre* and avoids incurring the costs of the Viscount.<sup>77</sup> In addition, because *dégrévement* focuses on individual *corps de bien-fonds* (real property lots/parcels), rather than applying to the whole of a debtor's property, it is a more focused procedure and can be quicker than *désastre*. Nonetheless, these observations aside, the *désastre* procedure has now become the pre-eminent procedure in Jersey law for creditors wishing to deal with insolvent individual and corporate debtors.<sup>78</sup> There are some circumstances, however, in which it is not possible for a *désastre* to take place. For example, where one of the other bankruptcy procedures is in place.<sup>79</sup> Similarly, a creditor who wishes to take proceedings against the estate of a deceased debtor

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<sup>72</sup> *Le Maistre v Du Feu* (1850) 171 Ex 508; *Re Santer & Santer* 1996 JLR 233.

<sup>73</sup> Although commonly referred to as a *désastre*, strictly speaking, the procedure results from an application to place the debtor's assets *en désastre* (in disaster).

<sup>74</sup> Le Gros, above note 43, at 75.

<sup>75</sup> *Ibid.*, citing *Godfray v Le Couteur* (1858).

<sup>76</sup> The office is an ancient one, being mentioned in Chapter 5 of the Grand Coutumier de Normandie (c. 1254-1258), for which see W. de Gruchy (trans J. Everard), *Le Grand Coutumier de Normandie* (1881) (reprinted 2009, Jersey and Guernsey Law Review Ltd, St Helier), at 18-19.

<sup>77</sup> The Jersey Law Commission has in fact recommended the abolition of *dégrévement* in its Consultation Paper No 2 (November 1998), at paragraph 4.3., copy available at: <<http://www.lawcomm.gov.je/consultation2.htm>> (last viewed 5 July 2011).

<sup>78</sup> The Bankruptcy (*Désastre*) (Jersey) Law 1990 makes express provision for its application to corporate debtors by the inclusion of a specific Part 10 dealing with the situation of a corporate debtor.

<sup>79</sup> *Ibid.*, Article 5.

may not use the *désastre* procedure.<sup>80</sup> Those debtors against whose property an application for *désastre* may be made are defined in the law.<sup>81</sup>

A *désastre* may be initiated by the debtor or a creditor. An application for a declaration may be made by a creditor with a liquidated claim which exceeds the prescribed sum, currently £3000.<sup>82</sup> An application may also be made by the debtor and by the Jersey Financial Services Commission in the case of particular regulated debtors. The application must be made by way of a *demande*,<sup>83</sup> supported by an affidavit, which must verify the contents of the statement and, where made by the creditor, must state the amount of the claim the creditor has, that to the best of the creditor's knowledge and belief the debtor is insolvent, but with realisable assets, and also specify the grounds on which the creditor believes the debtor to be insolvent. Where the debtor makes the application, the debtor must verify the statement and state that the debtor is insolvent but has realisable assets.<sup>84</sup> The court, after considering the evidence, may make a declaration of *désastre*.<sup>85</sup> A debtor may seek to have a declaration obtained by a creditor *ex parte* reviewed at an *inter partes* hearing in order to have it recalled.<sup>86</sup> Alternatively, the debtor may apply to the court for an order recalling the declaration with the burden of proof resting on the debtor to show that, on a balance sheet test, the debtor is solvent.<sup>87</sup> Even where the test is satisfied, the court remains free to exercise discretion under Article 7(4) and must balance the interests of the creditor against those of the debtor.<sup>88</sup>

Once a *désastre* is commenced, the property and powers of the debtor vest in the Viscount,<sup>89</sup> excepting trust property and certain rights under an approved pension arrangement.<sup>90</sup> Property acquired by or devolved upon the debtor since the date of the declaration may be claimed by the Viscount.<sup>91</sup> The law also provides a moratorium on remedies, action and execution against the debtor or his property except with the consent of the Viscount.<sup>92</sup> Where the debtor is a company, a transfer

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<sup>80</sup> *Ibid.*, Article 4(2). However, in *Crill v Alpha Asset Finance and others* 2009 JLR Note 8, the court supported a procedure modelled on the Bankruptcy (*Désastre*) Rules 2006 with the executor dealing with claims in a manner akin to the Viscount in a *désastre*.

<sup>81</sup> *Ibid.*, Article 4(1), which defines eligible debtors as including those ordinarily resident in Jersey at the time of the application or at any time in the 12 months preceding the application date; those carrying on business in Jersey, or who have carried on business at any time in the 3 years preceding the application date; those with any immoveable property in Jersey which is capable of realisation at the time of the application; a company incorporated in Jersey or which was dissolved under the Companies (Jersey) Law 1991; or a limited liability partnership in Jersey. The wide definition, especially where carrying on business is concerned, could enable the opening of proceedings in respect of debtors with a business connection with Jersey, however slight.

<sup>82</sup> *Ibid.*, Article 3(1) and Rule 2, Bankruptcy (*Désastre*) (Jersey) Order 2006.

<sup>83</sup> *Ibid.*, Article 3(3).

<sup>84</sup> *Ibid.*, Article 1(1) defining "insolvent" for these purposes to mean that the debtor is unable to pay his or her debts as they fall due. Exceptionally, what are termed *social désastres* may be ordered although the debtor may have no immediately realisable assets on the ground that debtors should not be denied the opportunity to be free of debts: *Re Roach and Lamy* 2005 JLR 412.

<sup>85</sup> *Ibid.*, Article 6(1).

<sup>86</sup> *Re Blue Horizon Holidays Limited* 1997 JLR 124.

<sup>87</sup> Article 7(1), Bankruptcy (*Désastre*) (Jersey) Law 1990.

<sup>88</sup> *Re La Sergenté Farm Limited* 2002 JLR Note-2.

<sup>89</sup> Article 8(1), Bankruptcy (*Désastre*) (Jersey) Law 1990.

<sup>90</sup> *Ibid.*, Articles 8(3) and 8A.

<sup>91</sup> *Ibid.*, Article 9(1).

<sup>92</sup> *Ibid.*, Article 10(1)-(2).

of shares unless made to or with the sanction of the Viscount or an alteration in the status of the company's members is void if made after the declaration of *désastre*.<sup>93</sup> Special rules apply to the position of movable and immovable property where the debtor is a joint owner with any security over immovables being deemed to apply *pro rata* the share of the property vesting in the Viscount.<sup>94</sup> Where the debtor has immoveable property, whether jointly held or not, in which a spouse and/or children are resident, the law provides a partial homestead exemption, by requiring the Viscount to refrain from using his powers to sell the property until a period of more than 3 months has elapsed from the date of the declaration.<sup>95</sup> This enables the spouse to apply to court for an order permitting, amongst other things, a buy-out of the debtor's interest or a transfer of that interest to the spouse subject to security being given to the creditor. The policy underlying the law is evident in its formulation of the court's duty in making any order is to give first consideration to the desirability of reserving the marital home for the occupation of the spouse and any of the debtor's dependants.<sup>96</sup>

The Viscount administers the assets of the debtor and the process by which creditors prove the debts owed them pending the realisation of the assets and distribution of a dividend.<sup>97</sup> The Viscount is given wide powers to deal with the assets, including those stated in an extensive list of general powers as well as the power of sale.<sup>98</sup> There are also specific powers, including the power to disclaim property and to settle the debtor's indebtedness under a hire purchase agreement.<sup>99</sup> The Viscount may also, under the law, apply to court to set aside transactions, including transactions at an undervalue, preferences, extortionate credit transactions and excessive pension contributions.<sup>100</sup> The debtor is bound by a duty to assist the Viscount and may be compelled to attend the Viscount to provide information and documents,<sup>101</sup> subject to a privilege against self-incrimination.<sup>102</sup> While the *désastre* is ongoing, the debtor is prohibited from acting in a number of capacities and may not obtain credit of more than £250 without disclosing that he is subject to a declaration.<sup>103</sup> During the course of the *désastre*, the Viscount may keep creditors informed,<sup>104</sup> but must report to the creditors in connection with the payment of the final dividend and destination of the surplus.<sup>105</sup> The conclusion of a successful *désastre* normally sees a debtor (who is an individual) discharged after a period of four years.<sup>106</sup> An order for discharge has the effect of releasing the debtor from all debts provable in the *désastre*, save for debts incurred by means of fraud or

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<sup>93</sup> Ibid., Article 10(3).

<sup>94</sup> Ibid., Articles 11 and 13. Article 14 also contains a rule dealing with intangible movables used as security under the Security Interests (Jersey) Law 1983 applying the enforcement procedure in Article 6 of the latter to such property.

<sup>95</sup> Ibid., Article 12(1).

<sup>96</sup> Ibid., Article 12(8).

<sup>97</sup> Ibid., Articles 29-32.

<sup>98</sup> Ibid., Articles 26-27.

<sup>99</sup> Ibid., Articles 15-16 and 35.

<sup>100</sup> Ibid., Articles 17-17D.

<sup>101</sup> Ibid., Articles 18 and 20.

<sup>102</sup> Ibid., Article 22.

<sup>103</sup> Ibid., Articles 24-25.

<sup>104</sup> Ibid., Article 28.

<sup>105</sup> Ibid., Articles 36-37.

<sup>106</sup> Ibid., Article 40(1). Article 41 provides a procedure by which the order may be granted or suspended and/or made subject to conditions.

fraudulent breach of trust, any debt where he obtained forbearance by any fraud to which he was party and any debt or liability under a maintenance order.<sup>107</sup> A corporate debtor is normally dissolved once the Registrar of Companies has received notice that the final dividend in proceedings has been paid.<sup>108</sup> In the case of a corporate debtor, the Viscount is also under a duty to report any possible misconduct arising in the course of a *désastre*, including conduct which could justify the making of a disqualification order under Article 78 of the Companies (Jersey) Law 1991 against a director.<sup>109</sup> The Viscount may also apply to court for an order where wrongful or fraudulent trading is alleged as well as the recovery of payments in respect of the wrongful purchase or redemption of shares.<sup>110</sup>

#### (iv) *The Priority of Bankruptcy Procedures*

The intention in the reforms of 1990 was that *désastre* would add considerably to the canon of procedures available for debtors in Jersey. However, the interplay and hierarchy between these procedures is set out partly in statute and partly in the case-law. The law clearly states that a court has a duty to refuse to make a declaration where, in respect of the debtor, there is an order in force in respect of a *remise de biens*, where the debtor has been permitted to make *cession générale* or where the debtor's property has been adjudged renounced.<sup>111</sup> That said, the commencement of the proceedings by a creditor for an adjudication of renunciation does not deprive the court of the power to declare a *désastre* until the property is adjudged renounced and a *décret* or *dégrévement* ordered. The duty under Article 5 would also arise in the situation where a failed *remise de biens* is deemed automatically to bring about a *cession générale* because the placing of the debtor's property in the hands of the court is deemed to operate as a voluntary *cession*. In terms of the sequence of procedures, the case law also establishes the principle that it is not possible for a *désastre* to begin once a *cession générale* is deemed to have occurred on the basis that, following the *cession*, the debtor had no valuable interest in the property capable of vesting in the Viscount and, following the debtor's discharge, there is no remaining liability for debt.<sup>112</sup>

Where the choice is open to the debtor or creditors in respect of which procedure to initiate, the courts have taken the view that, where *désastre* is available, it should be used in preference unless it can be shown that, in the interests of justice, the older procedures should be used, which is only likely where the administration of the debtor's property is likely to be a simple matter.<sup>113</sup> As a result of this stated preference for *désastre*, this means effectively that *cession de biens* or *remise de biens* are unlikely to be available except in limited instances.<sup>114</sup> As between the older procedures, a *remise de biens* is viewed by the courts as being preferable to the *dégrévement* (which normally follows a *cession* of either type) if the circumstances

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<sup>107</sup> Ibid., Article 42(1).

<sup>108</sup> Ibid., Article 38(2).

<sup>109</sup> Ibid., Article 43.

<sup>110</sup> Ibid., Articles 44-45A.

<sup>111</sup> Ibid., Article 5(1).

<sup>112</sup> *Superseconds Limited and Santer & Santer v. Sparta Investments Limited* (1997) JLR 112.

<sup>113</sup> Idem.

<sup>114</sup> *Representation of Jersey Home Loans Limited* [2011] JRC 102.

warrant it and the draconian nature of the *dégrévement* procedure means that a court may intervene at any time to halt it and pursue a *remise de biens* instead.

(v) *Cross-Border Bankruptcy*

The earlier laws on bankruptcy (including the customary law) did not make express provision governing the application of their provisions to the position of foreign debtors in Jersey or to the assets of Jersey debtors situated elsewhere. The application of private international law rules on the *lex situs* of property would have limited the application of procedures such as *décret*, *dégrévement* and *realisation* to assets situated in Jersey, leaving practice and the customary law to determine whether the authorities in charge of the process would have recourse to litigation before courts situated elsewhere to enable the seizure and repatriation of the debtor's assets in other jurisdictions. Customary law developments would also have governed the attitude of Jersey courts to the conduct of foreign insolvencies purporting to cover assets situated in Jersey. Where simultaneous proceedings involving the same debtor took place in Jersey and elsewhere, no specific rules provided for the co-ordination of these proceedings or the determination of any conflict between them. It is not until the reform of the law on *désastre* that a specific regime is provided enabling assistance to be effected.<sup>115</sup> Under this provision, a Jersey court may, to the extent it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard, to the extent it considers appropriate, to the provisions of the UNCITRAL Model Law on Cross-Border Insolvency 1997.<sup>116</sup> For the purposes of this provision, a request from a court of a relevant country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction.<sup>117</sup> In exercising its discretion for the purposes of this provision, a Jersey court is to have regard in particular to the rules of private international law.<sup>118</sup>

Because Article 49 is necessarily limited to only those jurisdictions that have been prescribed, it is necessary to use principles of comity developed by the courts to give effect to requests for assistance emanating from other jurisdictions. The Jersey court has held that they have an inherent jurisdiction enabling it to assist in foreign insolvencies. The Jersey court was likely to recognize the appointment of a foreign insolvency office-holder who was administering a bankruptcy which had arisen in a foreign jurisdiction when there was a valid connection between the debtor and the law under which the insolvency occurred.<sup>119</sup> Assistance would be especially forthcoming where there was evidence that assistance under a similar request made in the opposite direction would be reciprocated. The Jersey court has held that the principles under which assistance is given to foreign bankruptcy courts by the courts in England and Wales apply by analogy to requests for assistance to Jersey courts under the customary law. Under these principles, the request for assistance is a

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<sup>115</sup> Article 49, Bankruptcy (*Désastre*) (Jersey) Law 1990.

<sup>116</sup> *Ibid.*, Article 49(1).

<sup>117</sup> *Ibid.*, Article 49(2). The jurisdictions currently specified are Australia, Finland, Guernsey, the Isle of Man and the United Kingdom: Article 6, Bankruptcy (*Désastre*) (Jersey) Order 2006.

<sup>118</sup> *Ibid.*, Article 49(3).

<sup>119</sup> *Re F. & O. Finance AG* 2000 JLR Note 5a.

weighty factor to be taken into account by the Jersey court but is not conclusive as to the manner in which the discretion of the court should be exercised; the Jersey court may be expected to accept without further investigation the views of the requesting court as to what was required for the proper conduct of the bankruptcy or winding up and it would not normally be appropriate for the Jersey court to inquire into the basis for the views expressed by the requesting court.<sup>120</sup>

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<sup>120</sup> *Montrow International Limited v Tacon* 2007 JLR Note 49, applying *Hughes v Hanover* [1997] 1 BCLC 497.