



**INTERNATIONAL INSOLVENCY  
INSTITUTE**

*“Passporting” Rescue: Section 426 of the  
United Kingdom Insolvency Act and  
Assistance to Other Countries*

**Paul J. Omar**

From

*The Paul J. Omar Collection*

in

The International Insolvency Institute

*Academic Forum Collection*

<http://www.iiiglobal.org/component/jdownloads/viewcategory/647.html>

International Insolvency Institute

PMB 112

10332 Main Street

Fairfax, Virginia 22030-2410

USA

Email: [info@iiiglobal.org](mailto:info@iiiglobal.org)

# “Passporting” Rescue: Section 426 of the United Kingdom Insolvency Act and Assistance to Other Countries

Paul J. Omar

## **Introduction**

This chapter focuses on the use of the co-operation framework afforded by section 426 of the Insolvency Act 1986 (“section 426”) to extend the domestic rescue provisions contained in United Kingdom insolvency legislation, namely corporate voluntary arrangements and administration, to companies incorporated overseas. The section 426 framework has most recently provided the opportunity for companies incorporated in Jersey, where a domestic rescue law does not exist, to obtain an advantage in rescue by invoking these provisions. This chapter examines the case-law and suggests what might be the outcome of the development illustrated by the resort to the framework.

## **Section 426 Framework**

The text that is section 426 can be traced back to 19th century provisions on enforcement of orders given by courts within the United Kingdom and a requirement of assistance to and by other British courts, a definition which was extended to many of the courts in the then British Empire (later Commonwealth).<sup>1</sup> Prior to 1986,<sup>2</sup> the last consolidation of these provisions occurred as part of the Bankruptcy Act 1914, which applied uniquely to the insolvency of individuals and partnerships.<sup>3</sup> The provisions of this Act were designed to co-ordinate proceedings and enabled the courts within the Commonwealth to request other courts to assist in the management of bankruptcy proceedings within their own jurisdiction, the

---

<sup>1</sup> Section 220, Bankruptcy Act 1849; sections 73-74, Bankruptcy Act 1869; sections 117-118, Bankruptcy Act 1883.

<sup>2</sup> Although the references in this chapter are to the Insolvency Act 1986, there was a short-lived consolidation in the Insolvency Act 1985, which between it and the Companies Act 1985 grouped together in a different way the insolvency-related provisions later consolidated in the 1986 text.

<sup>3</sup> Section 122, Bankruptcy Act 1914.

making of an order being deemed sufficient authority to enable the other court to exercise the jurisdiction it would if the matter were before it for consideration. Apart from the use of the word 'British' as part of the definition, which prompted enquiries in a number of cases as to whether particular courts were included,<sup>4</sup> the remit and purpose of the section were considered in *Re A Debtor*,<sup>5</sup> in which it was held that the definition of "bankruptcy" referred to the judicial process dealing with insolvent persons and was to be construed in a wide sense as the section was designed to produce co-operation between courts acting under different systems of law. Once an English court was satisfied the request for aid fell within the ambit of the provision, there was no general duty to scrutinise anterior proceedings unless it could be shown that they were defective under the proper law of the court or that they offended against public policy.

Owing to the consolidation of provisions relating to the insolvency of individuals and the insolvency procedures applicable to companies and other legal persons in the same text in 1986, section 426 now applies to both types of insolvencies. Fletcher has suggested that, given its re-modelling and extension, section 426 is a "new element" in United Kingdom insolvency law, the hope being at the time of its enactment that it would allow for "reciprocal enlargement" of the international framework for court-to-court assistance within the Commonwealth.<sup>6</sup> Observations in the Cork Report in its chapter on extra-territorial aspects of insolvency law provide some of the reasoning for the re-modelling and change to the previous position.<sup>7</sup> The report notes the aim of extra-territorial jurisdiction as being the avoidance of conflict and confusion in cases of concurrent jurisdiction, the obtaining of recognition and enforcement by other courts of orders as well as reciprocity in recognition and enforcement where this would not be repugnant to domestic concepts of public policy.<sup>8</sup> The statutory provisions then in existence were criticised insofar as they were ill fitted by their use of outmoded definitions to modern commercial reality, although the co-operation provisions were highlighted as affording a flexible framework for assistance. It was desirable, according to the report, that this assistance should include the situation of corporate insolvency and be extended as far as possible to other countries on the basis of reciprocity.<sup>9</sup>

Under section 426, the courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant

---

<sup>4</sup> *Re Osborne* (1931-32) 15 B&CR 189 (Manx Court included); *Re Maundy Gregory* (1934) 103 LJ Ch 267 (Jerusalem District Court included); *Re James* [1977] 1 All ER 364 (post-UDI Rhodesian courts excluded).

<sup>5</sup> *Re A Debtor (ex parte the Viscount of the Royal Court of Jersey)* [1980] 3 All ER 665 (where the English court also held Jersey to be British for the purpose of section 122).

<sup>6</sup> I. Fletcher, *Insolvency in Private International Law* (2nd ed) (2007, Oxford University Press, Oxford), at paragraph 4.04.

<sup>7</sup> Report of the Review Committee into Insolvency Law and Practice 1982 (Cmnd. 8558) ("Cork Report") in Chapter 49, at paragraphs 1902-1913.

<sup>8</sup> *Ibid.*, at paragraph 1902.

<sup>9</sup> *Ibid.*, at paragraphs 1909-1911.

country or territory.<sup>10</sup> Assistance under any request is deemed authority for the court to which the request is made to apply the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. The number of countries to which the rules on assistance apply at present is limited, the section itself specifying automatic assistance internally between courts in different parts of the British Isles and also for Jersey, Guernsey and the Isle of Man.<sup>11</sup> Subsequent statutory instruments extend co-operation to other countries and territories, which, although not limited in scope by the text itself, in practice means a category constituted predominantly of Commonwealth countries and some former members, such as Hong Kong and Ireland.<sup>12</sup>

### How Section 426 Works

It should first be noted that the position under section 426 is different to that under Article 3 of the European Insolvency Regulation,<sup>13</sup> as the latter permits insolvency proceedings to be opened in respect of a company whose “centre of main interests” (“COMI”) is to be found within the jurisdiction, irrespective of where it is in fact incorporated, while section 426 has no such requirement for the finding of a COMI and the connection to the jurisdiction may be more tenuous, such as the presence of assets, the conduct of some business or the finding of some benefit to the creditors were proceedings to take place. The leading early case in English law with respect to the section 426 co-operation measure and how it was intended to work is *Re Dallhold*.<sup>14</sup> *Dallhold Investments*, itself in liquidation in Australia, had applied for an order for the winding up of its wholly-owned subsidiary *Dallhold Estates*. The parent company, with the support of the Australian provisional liquidator of the subsidiary, also sought the issue of a Letter of Request addressed to the High Court of Justice in London seeking assistance by the making of an administration order in respect of the latter.<sup>15</sup> Other creditors opposed that course and sought to be

---

<sup>10</sup> Section 426 applies to England and Wales and Scotland. It was also extended to Northern Ireland by virtue of section 441(1)(a), Insolvency Act 1986.

<sup>11</sup> *Ibid.*, section 426(11)(a), which deems the phrase “relevant country or territory” to include any of the Channel Islands and the Isle of Man.

<sup>12</sup> The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123), The Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996 (SI 1996/253) and The Co-operation of Insolvency Courts (Designation of Relevant Country) Order 1998 (SI 1998/2766). Thus section 426 applies to Anguilla, Australia, The Bahamas, Bermuda, Botswana, British Virgin Islands, Brunei, Canada, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, Hong Kong, Ireland, Isle of Man, Jersey, Malaysia, Montserrat, New Zealand, St. Helena, South Africa, Turks & Caicos Islands as well as Tuvalu.

<sup>13</sup> Council Regulation (EC) No. 1346/2000 of 29 May 2000 (“European Insolvency Regulation”).

<sup>14</sup> *Re Dallhold Investments Pty Ltd and Re Dallhold Estates (UK) Pty Ltd* (1991) 6 ACSR 378, (1991) 10 ACLC 1374 (Australia); *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394 (United Kingdom).

<sup>15</sup> It ought to be noted that at the time a rescue provision did not exist in Australian law, as the voluntary administration procedure was only introduced in 1993.

substituted as applicants in lieu of the parent company and for a winding up order pursuant to the original application to be made in respect of the subsidiary.<sup>16</sup>

The Australian court first hearing the matter noted the effect of the provision was to permit the court to request a foreign court to act in aid of the Australian court in an “external administration matter”, a phrase defined to include matters relating to the winding up of the parent company. The court accepted the submission by the parent company, also the principal creditor of its subsidiary, that an administration offered the possibility that the value of an agricultural lease owned by the subsidiary might be preserved for the benefit of the creditors as a whole through administration proceedings. This would not be achieved by the making of a winding up order either in Australia or in England. The court also accepted advice given by English solicitors that there were significant doubts as to whether an administration order may be made except at the request of this Court under the co-operation measures and concluded that was desirable that the best possible realisation of the assets of the subsidiary be achieved for the benefit of all its creditors. The court made a declaration that it is desirable to request the assistance of the English Courts and ordered the issue of a Letter of Request.

When the case was brought to London, it was held that the effect of section 426 was to confer on the English courts a jurisdiction to apply any domestic remedy. As the pre-conditions for the granting of an administration order were satisfied, the court was able to grant the remedy sought. The discretion in subsection (5) extended solely to the granting of the request and not the application of the rules of insolvency law to a request that, once granted, was mandatory. The judge at the hearing, Mr. Justice Chadwick, held:

“It appears ... that the purpose of [section] 426(5) ... is to give to the requested court a jurisdiction that it might not otherwise have in order that it can give the assistance to the requesting court ... the scheme of subsection (5) appears to be this. The first step is to identify the matters specified in the request. Secondly, the domestic court should ask itself what would be the relevant insolvency law applicable by [it] to comparable matters falling within its jurisdiction. Thirdly, it should then apply that insolvency law to the matters specified in the request .... The result is that an English court can act on a request by the Federal Court by applying to the matters specified in the request provisions of English insolvency law, including the provisions of [section] 8...”<sup>17</sup>

Following this case, it was reasonably clear that once a request for assistance was granted, it naturally followed that a court would apply all of the rules of insolvency law that would apply to a domestic insolvency subject to any exercise of discretion in the application of these rules that would feature in a domestic case.<sup>18</sup> This wide definition of domestic rules as interpreted by the judge allowed the extension of administration, not hitherto considered as available in the case of

<sup>16</sup> Under the ancillary assistance framework in what are now sections 221 and 225, Insolvency Act 1986.

<sup>17</sup> Above note 14, at 398-399.

<sup>18</sup> See *Re BCCI International (Overseas) Ltd* [1988] 1 WLR 708 (application made by liquidator of a bank in Cayman Islands claiming relief under sections 212-4 and 238, Insolvency Act 1986).

foreign companies subject to proceedings in England and Wales. This was favourably commented on as being an innovative order that allowed for the flexible treatment of foreign companies using all the means available under domestic legislation.<sup>19</sup> The case is also notable for expressing the nature of the assistance given under provisions as being mandatory, leading to the assumption that, as in *Re A Debtor*,<sup>20</sup> courts were not bound to examine too closely the proceedings leading up to the request unless they would be manifestly contrary to public policy, because of the imperative terms in which the section is drafted. Later cases have, however, raised serious questions about whether mandatory means mandatory in all situations.

Consideration of whether courts had a particular choice as to what rules to apply came in *Re BCCI*,<sup>21</sup> where the liquidators in England and the Cayman Islands sought to commence proceedings against a former director of the bank and associated companies to recover the deficiency in the assets. The judge noted that:

“... the effect of [section] 426 is to give [the] court a discretion... as to whether it should apply English insolvency law whether ‘procedural’ or ‘substantive’ or the law of the requesting court...”<sup>22</sup>

In this case, it was clear that once a request for assistance was granted, it naturally followed that a court, where it chooses to apply domestic law, will apply all of the rules of insolvency law that would apply to a domestic insolvency subject to any exercise of discretion in the application of these rules that would feature in a domestic case. The question remained, however, as to what foreign law rules the domestic court might choose to apply or disapply.<sup>23</sup> In *Re Focus*,<sup>24</sup> it was held that assistance would not be forthcoming where this would be contrary to the conduct of proceedings already on foot within the jurisdiction. The courts took the view that England and Wales was the proper forum for disclosure of the subject of the request relating to assets held outside Bermuda. A possible alternative formulation for the views of the courts may be seen in *Re Business City Express*,<sup>25</sup> where it was authoritatively stated that, unless good grounds existed for not making an order, that the domestic courts should accede to the request emanating from the foreign

---

<sup>19</sup> See J. Bannister, *The Co-Operative Court - The Decision of Chadwick J in Re: Dallhold Estates (UK) Pty Ltd* (1992) 8 IL&P 31 (Casenote); M. Stallworthy, *The Application of the Administration Provisions of the Insolvency Act to Overseas Companies* [1992] 9 ICCLR 319; H. Rajak, *Cross-Border Insolvency: UK Style* (1996) 24 IBL 246; P. Smart, *Administration Orders and Foreign Companies* (1997) 13 IL&P 186.

<sup>20</sup> Above note 5.

<sup>21</sup> *Re BCCI* [1993] BCC 787.

<sup>22</sup> *Ibid.*, at 801-802 (per Rattee J).

<sup>23</sup> *Re Bell Lines Ltd* (unreported) 6 February 1997, cited in D. Turing, *Set-Off and Netting: Developments in 1996 affecting Banks* (1997) 4 JIBFL 155, at 158 (stay on set-off effective in Ireland given effect in England).

<sup>24</sup> *Re Focus Insurance Co Ltd* [1997] 1 BCLC 219.

<sup>25</sup> *Re Business City Express* [1997] BCC 826; [1997] 2 BCLC 510.

court, in this case the Irish High Court seeking to bind creditors in England through a scheme of composition.

It has also been held that the definition of insolvency contained in section 426 should be given as wide an interpretation as possible so as not to fetter the exercise of the court's equitable discretion.<sup>26</sup> The limits of the assistance possible have been canvassed in two cases where orders were sought by a foreign court for the public examination of persons in connection with insolvency. The first instance courts refused the orders, drawing the analogy between the likelihood of refusal in the context of an exclusively domestic case.<sup>27</sup> In any event, the Court of Appeal qualified the question of whether oppression was a valid ground for refusal of the request by looking to the overall policy of the co-operation section. This was held to include the acceptance and, where appropriate, application of the foreign law, even where the results might have a different effect than the corresponding domestic provisions.<sup>28</sup> In the later case of *Re HIH*,<sup>29</sup> in proceedings involving an Australian insurance company whose business within the jurisdiction was being wound up in England and Wales, Mr Justice Richards held that, in his view, the co-operation mechanism cannot be used to oblige a liquidator carrying out proceedings in the United Kingdom to transfer funds to Australia where the priority rules on distribution would be so different as to trigger a possible offence to a court's view of the *pari passu* principle.<sup>30</sup> This was not a view with which the House of Lords agreed, which held that the co-operation implicit in the section 426 framework required in some instances co-operation even though the foreign law was very different to the equivalent domestic provisions.<sup>31</sup> As a final point, although the issue of the extension of the co-operation element was decided early on as far as administration was concerned, it was not until 2002 that the ambit of assistance under section 426 was held to include ordering corporate voluntary arrangements in the case of a foreign company.<sup>32</sup>

### Domestic Insolvency Law in Jersey

Jersey is regarded as a mixed jurisdiction whose law contains features of the common-law and civil law.<sup>33</sup> Although the roots of the law in Jersey, called

<sup>26</sup> *Hughes & others v Hannover Ruckversicherungs-AG* [1997] 1 BCLC 497. See K. Dawson, The Extent of the Jurisdiction under Section 426 Re: *Emlico* (1998) 22 Ins Law 14; P. Smart, English Courts and International Insolvency (1998) 114 LQR 46.

<sup>27</sup> *Re JN Taylor Finance Pty Ltd* [1999] 2 BCLC 256; *Re Southern Equities Corporation Ltd* [2000] 2 BCLC 21. See R. Nolan, International Insolvency Assistance (1999) 20 Co Law 336.

<sup>28</sup> *England v Smith* [2000] 2 BCLC 21. See J. Scott, Public Policy and International Co-Operation between Courts exercising Insolvency Jurisdiction: Section 426 Insolvency Act 1986 (2000) 1 RALQ 1.

<sup>29</sup> *Re HIH Casualty and General Insurance Limited and Others* [2005] EWHC 2125.

<sup>30</sup> This was endorsed by the Court of Appeal: [2006] EWCA Civ 732.

<sup>31</sup> [2008] UKHL 21.

<sup>32</sup> *Re Television Trade Rentals Ltd* [2002] EWHC 211.

<sup>33</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

customary law on the island, are derived from the law in force at the time the Channel Islands were part of the Duchy of Normandy,<sup>34</sup> subject to later borrowings from the continent, many modern statutes, particularly in the commercial law arena, are modelled on their equivalents in the United Kingdom. In relation to corporate insolvency, Jersey’s local statute, the Companies (Jersey) Law 1991,<sup>35</sup> based on the United Kingdom Companies Act 1985, 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 directors or members resolving that a winding up take place. Only exceptionally, in relation to winding up on a just and equitable ground, does Article 155 provide for a right to petition the court to be given to the Minister for Economic Development or the Jersey Financial Services Commission. The result is that corporate law does not provide for a creditor-initiated procedure and incidentally also requires those procedures that exist to give way to those in the law of bankruptcy.<sup>36</sup> Bankruptcy law is thus the natural focus of those wishing to ascertain how debtors may be dealt with under Jersey law.<sup>37</sup>

*Cession de biens* (transfer of goods) is a bankruptcy procedure of customary law origin that was introduced sometime in the Middle Ages in Jersey.<sup>38</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. 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, providing a partial statutory framework for this procedure.

---

Helier). An excellent website exists for legal materials in Jersey at: <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) cited in this chapter may be located.

<sup>34</sup> Continental Normandy (excluding the Channel Islands) was lost by King John in 1204, the result of which was to grace him with the sobriquet “*Sans-Terre*” (Lackland) by his contemporaries.

<sup>35</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>36</sup> In fact, Articles 146, 155 and 157, Companies (Jersey) Law 1991, prevent any company already subject to an order placing their assets *en désastre* from being the subject of liquidation proceedings, while Articles 154A and 185B, Companies (Jersey) Law 1991, require a summary or creditors’ winding up to give way to a subsequent *en désastre* order.

<sup>37</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>38</sup> Reference is made to a case dating back to 1592 in C. Le Gros, *Traité du Droit Coutumier de l’Ile de Jersey* (1943) (reprinted 2007, Jersey and Guernsey Law Review Ltd, St Helier), at 299. Note also that the definition of “bankruptcy” in Article 8, Interpretation (Jersey) Law 1954, includes all those procedures referred to below as well as a creditors’ winding up.

A later procedure, titled *dégrèvement* (disencumberment of security), was introduced in 1880 and specifically designed to supersede the *décret* procedure.<sup>39</sup> Whereas under *décret*, all the debtor's immovable property was disencumbered of the attached security together as one lot, *dégrèvement* allowed for the disencumberment of security separately in relation to separate lots of immovable property.<sup>40</sup> The 1880 changes also introduced a liquidation procedure, applying to the debtor's movable property. This was replaced by a procedure introduced in 1904 titled *réalisation* (realisation),<sup>41</sup> which serves as a method for realising any movables not dealt with by either the *décret* or *dégrèvement*. The successful conclusion of the procedures to which a *cession de biens* leads normally also confers upon the debtor a discharge from any further obligation.<sup>42</sup> However, in certain circumstances, where a *décret* or *dégrèvement* followed an order of the court at the creditor's behest determining that, in default of debts being paid or a *cession de biens* being applied for by the debtor, the debtor was deemed to have renounced his property,<sup>43</sup> a discharge will not occur and the debtor remains obliged for the debt underpinning the security.<sup>44</sup> In substantive terms, *cession de biens* is a liquidation-oriented procedure in that it results in a foreclosure of the debtor's property by adjudication in a creditor's favour of the entirety of that property.<sup>45</sup>

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 granted by French monarchs and later available by application to the courts in France, with the procedure subsequently being governed by a French ordinance promulgated in 1673 in the reign of Louis XIV.<sup>46</sup> In Jersey, to where the procedure was introduced, also in the late Middle Ages, *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 with any unsold property being returned to the debtor. In principle, therefore, there is a possibility that the debtor would recoup any funds not required to satisfy the creditors, although the debtor has no choice in what

<sup>39</sup> Introduced by the *Loi (1880) sur la propriété foncière*, which changed the way in which debts and obligations were secured by hypothecation and guarantees and the way in which secured property was dealt with.

<sup>40</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. *Dégrèvement* applies to *propriété nouvelle* (new property), i.e. immovable property vesting in the debtor after the 1880 law came into force.

<sup>41</sup> *Loi (1904) (Amendement No. 2) sur la propriété foncière*.

<sup>42</sup> Article 10, *Loi (1832) sur les décrets*.

<sup>43</sup> *Adjudication de renonciation* (adjudication of renunciation), also referred to as a *cession involontaire* (involuntary transfer).

<sup>44</sup> *Birbeck v Midland Bank Ltd* (1981) JJ 121.

<sup>45</sup> This is one of the reasons why the Jersey Law Commission have recommended the abolition of *dégrèvement*, in its Consultation Paper No 2 (November 1998), at paragraph 4.3., copy available at: <<http://www.lawcomm.gov.je/consultation2.htm>> (last viewed 21 September 2011).

<sup>46</sup> C. Saint-Alary-Houin, *Droit des Entreprises en Difficulté* (5th ed) (2006, Montchrestien, Paris), at paragraph 11.

property is realised and in what order, making this a procedure that is more akin to liquidation in substance.<sup>47</sup> In its origins, 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, although the stay is usually limited.<sup>48</sup> The *Loi (1839) sur les remises de biens* introduced changes to this procedure in that, prior to its enactment, 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>49</sup> The current position, as introduced by this law and later refined by judicial commentary, is that the court has no jurisdiction to grant a *remise de biens* unless it is satisfied that there will be a credit balance, however small, for distribution amongst the ordinary creditors.<sup>50</sup> A successful *remise de biens* results in the debtor obtaining a discharge from all liability.<sup>51</sup> 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, result automatically in a *cession de biens*. 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* and it being successful.<sup>52</sup> In this instance, a *décret* (if available), *dégrévement* and/or *réalisation* will follow with the consequence being that the debtor obtains a discharge.

The main bankruptcy procedure in Jersey law is now the *désastre*.<sup>53</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>54</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

---

<sup>47</sup> This also explains why parties subject to an *adjudication de renonciation* and subsequent *dégrévement* often seek to apply for a *remise de biens*, as they are permitted to do up till the moment the property vests in the creditor taking it (referred to as the *tenant après dégrévement*). They are not usually successful as illustrated by cases such as *Re Mickhael* [2010] JRC 166A and *Re Gibbins* [2011] JRC 033. *Re Venton* [2011] JRC 103 also shows the preference, equally unsuccessful, by debtors for the *remise de biens* as opposed to a *désastre*, as the costs of the latter procedure are greater.

<sup>48</sup> Le Gros, above note 38, at 371.

<sup>49</sup> Having immovable property is still a precondition for the use of this procedure. See F. Benest and M. Wilkins, Can we be at Ease with the Remise? (2004) 8(1) Jersey Law Review.

<sup>50</sup> *Re Shield Investments (Jersey) Limited and others* 1993 JLR Note 3.

<sup>51</sup> *Re Remise Barker* 1987-88 JLR 23.

<sup>52</sup> *Le Maistre v Du Feu* (1850) 171 Ex 508; *Re Santer & Santer* 1996 JLR 233.

<sup>53</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>54</sup> Le Gros, above note 38, at 75. The procedure may last for up to 12 months and may only be extended beyond this period if the Jurats recommend it and the creditors consent: *Re Barker* 1987-88 JLR 4.

have the custody of these goods.<sup>55</sup> In Jersey, the Viscount, an officer of the Royal Court, undertakes this role.<sup>56</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. 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>57</sup> In fact, courts have stated that:

“...in the ordinary course of events, where a court has a discretion to make a declaration treating a debtor's property as being *en désastre*, that course will be preferable to authorizing one of the older procedures, unless it is shown to be in the interests of justice that the latter should be used. The court is unlikely to be satisfied of this save in the simplest cases.”<sup>58</sup>

A *désastre* may be initiated by the debtor or a creditor. Once a *désastre* is commenced, 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. The Viscount is given wide powers to deal with the assets, including the power to apply to court to set aside transactions. There are certain circumstances, however, in which it is not possible for a *désastre* to take place. For example, where an order relating to a *remise de biens* has been made, a *cession de biens* has taken place or the debtor's property has been adjudged as renounced.<sup>59</sup> Similarly, a creditor who wishes to take proceedings against the estate of a deceased debtor may not use the *désastre* procedure.<sup>60</sup> Those debtors eligible for proceedings are defined in the law.<sup>61</sup> The conclusion of a successful *désastre* normally sees the debtor discharged after a period of four years.<sup>62</sup> In substantive terms, a *désastre* procedure is also liquidation-oriented although the law foresees

<sup>55</sup> *Ibid.*, citing *Godfray v Le Couteur* (1858).

<sup>56</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>57</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. The position with respect to *remise de biens* and *cession de biens* rests on the assumption that Part 1 of the Schedule to the Interpretation (Jersey) Law 1954 in defining a person to include “any body of persons corporate or unincorporated” extends these procedures, originally designed for use with individuals, to companies.

<sup>58</sup> *Superseconds Limited and Santer & Santer v. Sparta Investments Limited* 1997 JLR 112.

<sup>59</sup> Article 5, Bankruptcy (*Désastre*) (Jersey) Law 1990.

<sup>60</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>61</sup> *Ibid.*, Article 4(1).

<sup>62</sup> *Ibid.*, Article 40, which applies in the case of individuals, while Article 38(2) provides that a corporate debtor is dissolved once the Registrar of Companies has received notice that the final dividend in proceedings has been paid.

the possibility that the debtor may have the benefit of any surplus that may arise, just as in *remise de biens*.<sup>63</sup>

The summary, therefore, is that there are no Jersey procedures that are, strictly speaking, rescue in the way that term is understood elsewhere. *Cession de biens*, *remise de biens* and *désastre* all focus on the repayment of creditors with only the latter two allowing for the possibility of a surplus to accrue to the debtor. This does not approach the way in which rescue may be understood as giving the debtor time to allow the debtor (and/or an insolvency practitioner) time to negotiate with the creditors for a solution that favours the continuity of the business. Similarly, although *remise de biens* has been described as having a suspensory (or moratorium) effect,<sup>64</sup> it does not achieve the same objectives as administration or corporate voluntary arrangements. Furthermore, proposals issued by the Jersey Financial Services Commission in 1999 for a modern suspensory procedure have failed to progress and the matter remains pending.<sup>65</sup> The question arises therefore if a Jersey debtor were to require the application of rescue proceedings to its business, in the absence of appropriate local legislation, how would it achieve this?<sup>66</sup> This is where the section 426 framework has offered potentially a solution to the problem.

### The Jersey Cross-Border Dimension

Jersey is a jurisdiction that subscribes to the ideal of cross-border co-operation in insolvency. For outgoing requests, Jersey is a prescribed country for the purposes of assistance by courts in Australia,<sup>67</sup> Guernsey<sup>68</sup> and Ireland,<sup>69</sup> but is curiously not so prescribed in the case of the Isle of Man,<sup>70</sup> to which Jersey extends assistance under

<sup>63</sup> *Ibid.*, Article 37(6).

<sup>64</sup> Jersey Law Commission Consultation Paper No 2, above note 45, at paragraph 2.5.1.

<sup>65</sup> Benest and Wilkins, above note 49, at paragraph 20.

<sup>66</sup> Note also that some companies, while still solvent, may be able to take advantage of the schemes of arrangement procedure (in Articles 125-127, Companies (Jersey) Law 1991) and the procedure has undergone a renaissance in Jersey as it has in the United Kingdom. Others may be able to take advantage of recent changes to the merger framework in Articles 127A et. seq., Companies (Jersey) Law 1991, introduced by the Companies (Amendment No. 5) (Jersey) Regulations 2011, which permit insolvent companies to merge subject to court permission being obtained.

<sup>67</sup> Regulation 5.6.74, Corporations Regulations 2001, made by virtue of section 580, Corporations Act 2001 (Australia); Regulation 3.0.1, Bankruptcy Regulations 1996, made by virtue of section 29, Bankruptcy Act 1966 (Australia).

<sup>68</sup> Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989/2409), extending the application of section 426, Insolvency Act 1986 (United Kingdom) to Guernsey, made by virtue of section 442, Insolvency Act 1986. Interestingly, section 442 permits the extension of any of the provisions of the Act to “the Channel Islands or any colony”, thus affording the possibility of introducing rescue to Jersey if Jersey were to agree to this step.

<sup>69</sup> Section 142, Bankruptcy Act 1988, although no orders have been made under section 250, Companies Act 1963 or section 36, Companies (Amendment) Act 1990 mentioning Jersey.

<sup>70</sup> Section 1, Bankruptcy Act 1988 (Isle of Man) refers to assistance being forthcoming to “the courts having bankruptcy jurisdiction in any relevant country or territory”. However, there is no statutory counterpart in the case of corporate insolvency: R. Long, *Isle of Man*, Chapter 22 in *Judicial Cooperation in Civil and Commercial Litigation: The British Offshore World* (2009, Wildy Simmons

its equivalent to section 426.<sup>71</sup> Jersey is also one of the jurisdictions specified under section 426(11)(a), which enables the courts in the United Kingdom to extend assistance to the Jersey courts on receipt of a Letter of Request. As stated above, although insolvency law in the United Kingdom has long permitted the liquidation of an overseas company conducting business within the jurisdiction,<sup>72</sup> the application of administrations to foreign companies was stated as only permissible if a Letter of Request made under section 426 was forthcoming, the position being settled early on in the case of *Re Dallhold*.<sup>73</sup> As also mentioned above, the position of corporate voluntary arrangements was not settled until *Re Television Trade Rentals*,<sup>74</sup> where proceedings were extended in favour of an Isle of Man company pursuant to a Letter of Request. The judgments in these cases indicate the potential availability of rescue procedures in the United Kingdom through the Letter of Request route. For that reason, this has seemingly become attractive to overseas companies where the jurisdiction of incorporation lacks rescue-type procedures analogous to corporate voluntary arrangements or administration. As noted above, this is certainly the case in Jersey, where no rescue procedure currently exists. In this light, the trend, first noted in 2002 and temptingly coincident with the judgment in *Re Television Trade Rentals*,<sup>75</sup> to use Letters of Request to underpin support for Jersey companies wanting to use rescue procedures in the United Kingdom, mostly to take advantage of administration, can be understood. A number of cases have shown the way in this regard.

In *Re OT Computers*,<sup>76</sup> the company, which was Jersey-registered but was insolvent, owned a substantial information technology business in the United Kingdom. The Jersey court agreed to issue a Letter of Request to permit the High Court in London to extend assistance under the terms of section 426. This would occur by the issuing of an administration order to permit the company's assets to be sold at the most advantageous price and to safeguard the position of the 950 employees. The court stated that it was within the inherent jurisdiction of the court

---

and Hill, London), at 269-270. Information supplied to the author by Mr Long indicates that Jersey is not mentioned in either of the Bankruptcy (Designation of Relevant Countries) Orders of 1990 or 1999, but applications may nonetheless be made at common law on the principle in *Re Cambridge Gas* [2006] [2006] UKPC 26.

<sup>71</sup> Article 49, Bankruptcy (*Désastre*) (Jersey) Law 1990. Article 6, Bankruptcy (*Désastre*) (Jersey) Order 2006 lists the jurisdictions that are prescribed, which include Australia, Finland, Guernsey, the Isle of Man and the United Kingdom. Jurisdictions that are not prescribed may still obtain assistance under the rules of customary law, particularly where reciprocity can be evidenced: *Re The Bankruptcy of First International Bank of Grenada* 2002 JLR Note 7.

<sup>72</sup> Sections 221 and 225, Insolvency Act 1986.

<sup>73</sup> Above note 14.

<sup>74</sup> Above note 32.

<sup>75</sup> *Idem*. In reality, however, the Jersey judgment preceded that involving the Isle of Man company.

<sup>76</sup> *Re OT Computers Limited* 2002 JLR Note 10. The note is only a summary of a judgment that is not too lengthy, but had the merits of being delivered by Sir Philip Bailhache, the then Bailiff, sitting with Jurats Tibbo and Georgelin with Advocate Dessain making the application. Sir Philip was Solicitor-General at the time of *Re A Debtor* (above note 5), in which case he was subjected to a gruelling cross-examination by the eminent insolvency lawyer Muir Hunter QC on the Jersey law of *désastre*. Advocate Dessain is of course one of the authors of the text cited (above note 37).

to issue the Letter of Request and that it would be appropriate to do so if it were also in the best interests of the company’s creditors, particularly as the court saw that the likelihood of a sale as a going concern would be able to maximise value for creditors in a way that could not have happened were the company put into liquidation or its property were declared *en désastre* in Jersey. The court stated that it had this inherent jurisdiction, notwithstanding the fact that no insolvency proceedings were afoot in Jersey as had been the case in *Re A Debtor*.<sup>77</sup>

The matter was critical at the time of the application as the company was due to lose its banking facilities within 2 days, being both cash-flow and balance-sheet insolvent. Fortunately for the company, interest had been shown by a prospective purchaser of the business, which was conducted through 160 high street stores located across the British Isles.<sup>78</sup> This could only be achieved though were the company to be placed into administration as the buyer would only deal with an independent insolvency practitioner. The court did note that administration was not a concept familiar in Jersey, but accepted, on the basis of the description by Mr Justice Nicholls in *Re Atlantic*,<sup>79</sup> that administration was intended to be:

“a breathing space while the company, under new management in the person of the administrator, seeks to achieve one or more of the purposes set out in section 8(3) [of the Insolvency Act 1986]”.<sup>80</sup>

The court was also persuaded on the basis of an opinion supplied by English counsel that receipt of the Letter of Request would enable the English court to consider whether the making of an administration order was the right outcome for the debtor company and that the court would probably consider it appropriate on the evidence that it would have available to it. Jersey commentators are of the view that this was a ground-breaking decision inasmuch as the court used its inherent and insolvency jurisdictions to seek assistance via section 426 because the insolvency procedures available in Jersey were not likely to achieve as good a result for the creditors and, furthermore, that concurrent procedures would in addition simply duplicate costs unnecessarily.<sup>81</sup> Regrettably, administration proceedings failed and, in a later hearing, the court was invited to issue a second Letter of Request to enable the company to become subject to a creditors’ voluntary

---

<sup>77</sup> Above note 5.

<sup>78</sup> It is also likely on the basis of the COMI test in the European Insolvency Regulation that these facts would support the view that the closest connection of the company concerned was with the United Kingdom by virtue of its extensive operations there. At the time, of course, this text was not yet in force. The COMI test is in fact referred to by the court in the 2004 hearing in this case, noting the Redhill location of the company headquarters and the fact that “almost all the economic activity of the Company was effectively undertaken in the United Kingdom”.

<sup>79</sup> *Re Atlantic Computer Systems plc* [1992] Ch 505.

<sup>80</sup> *Ibid.*, at 528. These purposes, prior to the changes introduced by the Enterprise Act 2002, were the survival of the company as a going concern, the approval of a corporate voluntary arrangement or scheme of arrangement and the more advantageous realisation of assets than would occur in a winding up. The Jersey court held the relevant purpose here to be the last one.

<sup>81</sup> Dessain and Wilkins, above note 37, at paragraph 5.5.4.2.1(g).

liquidation in the United Kingdom and did so on the grounds that this would be in the creditors' interests.<sup>82</sup> The court did state that it was open to the company to undergo liquidation or *désastre* proceedings in Jersey, but declined to entertain this because of the unnecessary duplication of costs likely to occur. Instead, the court issued the Letter of Request with view to having the administration proceedings discharged and the liquidation opened.

The precedent set by this case has been followed in a number of instances. In a 2009 case, *Re First Orion*,<sup>83</sup> the bank concerned was the major creditor of two insolvent Jersey companies which owned property in the United Kingdom. Although fixed charge receivers had been appointed, it was felt desirable to open administration proceedings to enable the sale of the property to take place at a later date when market conditions were improved with the properties being refurbished in the interim and converted into either hotel or office space. As counsel's opinion had been received to the effect that the English courts would be likely to accede to such a request, the court agreed to issue a Letter of Request to facilitate this on grounds that it was in the interests of the creditors to do so. However, the Letter of Request was made subject to the condition that the Jersey Comptroller of Income Tax be granted the same priority creditor status as enjoyed in Jersey.<sup>84</sup>

Similarly, in 2010, in *Re St John Street Limited*,<sup>85</sup> the bank asked the Jersey court to issue a Letter of Request inviting the courts in England and Wales to place a Jersey company, over which the bank had already appointed receivers, in administration. The receivers had nearly completed the development that the company had begun and it was seen as desirable to appoint the administrators, by reason of the more extensive powers of administrators compared to receivers. Receivers, the court was informed, could only act within the scope of the powers given them by the instrument creating the security and had no particular duty to the unsecured creditors, while the administrators would benefit from the more extensive powers contained in the Insolvency Act 1986. The case was also particularly acute as the company was, on both cash-flow and balance-sheet tests, insolvent. On the basis of an opinion indicating that the English court would probably consider this an appropriate case in which to make an administration order, the court held that it had an inherent jurisdiction to issue a Letter of Request and accepted that the law in relation to administration offered better prospects for a return for creditors. Although the company had no prospects of rescue as a going concern, the administration would certainly achieve the third objective set out in the United Kingdom statute, that of realising property in order to make a distribution to a

<sup>82</sup> *Re OT Computers Limited* 2004 JLR Note 4.

<sup>83</sup> *Re First Orion Amber Limited and Another* [2009] JRC 126 (unreported). The court here consisted of Commissioner Clyde-Smith and Jurats Le Brocq and Clapham. Advocate Hoy acted for the applicant.

<sup>84</sup> Article 32(1)(b) and (c), Bankruptcy (Désastre) (Jersey) Law 1990. Glen Davis QC, who was English Counsel in both the 2009 and 2010 cases mentioned here, has indicated, in an e-mail to the author, that "the English court was content to accommodate [the priority] by a direction [to that effect]."

<sup>85</sup> *Re St John Street Limited (or Representation of Anglo Irish Asset Finance)* [2010] JRC 087 (unreported). The court on this occasion consisted of Sir Philip Bailhache sitting with Jurats Tibbo and Marett-Crosby with Advocate Pallot making the application.

secured creditor.<sup>86</sup> The making of an order would also allow the bank to have more confidence in the outcome and to inject some financing with the prospect of a better recovery.

### The Way Forward

It might be suggested that the Jersey courts are merely treading a path first illuminated by the *Re Dallhold* case and subsequently extended in *Re Television Trade Rentals*.<sup>87</sup> In the first case, it is noteworthy that Australia did not at the time have a rescue procedure, a fact that made the application for administration quite cogent, given the many benefits of that procedure, particularly its rescue potential. However, the cases noted here also serve to display the creativity of the Jersey courts in their use of the Letter of Request procedure to enable the rescue of Jersey companies through the facility offered by the courts in the United Kingdom, with which Jersey companies often have close financial and trading connections. The corporate voluntary arrangements and administration procedures in the United Kingdom are well-regarded and resort to them is increasing, not just for companies in that jurisdiction, but for those who can show their COMI in the United Kingdom, irrespective of where they are in fact registered or incorporated.<sup>88</sup> Nonetheless, the result of these cases is to underline the lack of a rescue-type procedure in Jersey, which undoubtedly needs to be remedied before long. The Jersey Law Commission has made its views on the older procedures felt,<sup>89</sup> while the law on *désastre* is reaching the age when it might usefully be revised to keep it in tune with the needs of the ever evolving business environment and changes to the conception of insolvency law.<sup>90</sup> The development of an autochthonous insolvency regime is the logical next step, to which the creative “passporting” of rescue via the Letter of Request framework naturally leads.

---

<sup>86</sup> Rule 3, Schedule B1, Insolvency Act 1986 (where the purposes are the rescue of the company as a going concern, achieving a better result for the creditors than would be the case in liquidation and the making of a distribution to one or more preferential or secured creditors).

<sup>87</sup> Above notes 14 and 32 respectively.

<sup>88</sup> Some creativity in the location of the COMI, particularly in the case of corporate groups, has also been seen: *Re Collins & Aikman Europe SA and others* [2006] EWHC 1343.

<sup>89</sup> Above note 45.

<sup>90</sup> A conference, jointly organised by the INSOL Europe Academic Forum and the Jersey Institute of Law on 14 October 2011 may well offer an insight into whether and when a reform process is likely to occur.