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Section 426 of the Insolvency Act 1986: Extending Rescue to Foreign Debtors on a “Passporting” Basis

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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 been more usually invoked to offer assistance in the procedural context by permitting assistance to be offered facilitating the conduct of pre-existing procedures opened in the jurisdictions issuing a Letter of Request. It has also been interpreted so as to enable the extension of domestic rescue proceedings and has been used in a number of cases since the provision was first enacted. More recently, section 426 has 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 on the basis of Letters of Request being issued by the Jersey courts to their equivalents in the United Kingdom. This chapter examines the history and functioning of section 426, the position in domestic law in Jersey as well as the recent case-law emanating from that jurisdiction which seeks to provide Jersey debtors with rescue via section 426. This chapter then concludes by suggesting what might be the outcome of the developments illustrated by resort to the section 426 framework.

The Section 426 Framework

In 1986, the United Kingdom acquired a provision to deal with cross-border assistance in insolvency matters involving both individuals and corporate entities in the shape of section 426. The text that is section 426 has a rich pedigree and 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).¹ Prior to 1986,² the last consolidation of these provisions occurred as part of the Bankruptcy Act 1914, which applied uniquely to the insolvency of individuals and partnerships.³ 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 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,⁴ the remit and purpose of the section were considered in *Re A Debtor*,⁵ 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. Professor Fletcher has suggested that, given its re-modelling and extension, section 426 is a “new element” in United Kingdom insolvency law, the hope being expressed 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.⁶ 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

* This chapter is based on a paper delivered to the INSOL Europe Academic Forum Annual Conference in Venice on 20-21 September 2011. The author would like to note the helpful comments and observations of the audience on that occasion, although all errors and omissions are, nevertheless, the author’s own. A shorter summary of this paper also appears in the conference proceedings booklet.

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

² 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.

³ Section 122, Bankruptcy Act 1914. This provision is the legislative ancestor of a family of similar provisions in the Commonwealth today, including section 426 itself, section 29, Bankruptcy Act 1966 and section 582, Corporations Act 2001 (Australia), section 104, Bankruptcy Act 1967 (Malaysia) etc.

⁴ *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).

⁵ *Re A Debtor (ex parte the Viscount of the Royal Court of Jersey)* [1981] Ch 384 (where the English court also held Jersey to be British for the purposes of section 122).

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

change from the previous position.⁷ 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.⁸ 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.⁹

How Section 426 Works

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 country or territory.¹⁰ 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 to those in Jersey, Guernsey and the Isle of Man.¹¹ 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.¹²

It should be noted that the position under section 426 is different to that under Article 3 of the European Insolvency Regulation,¹³ as the latter permits insolvency proceedings to be opened in respect of a company whose “centre of

⁷ Report of the Review Committee into Insolvency Law and Practice 1982 (Cmnd. 8558) (“Cork Report”) in Chapter 49, at paragraphs 1902-1913.

⁸ *Ibid.*, at paragraph 1902.

⁹ *Ibid.*, at paragraphs 1909-1911.

¹⁰ 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.

¹¹ *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.

¹² 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.

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

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. Since the repeal of section 122 of the Bankruptcy Act 1914 and the introduction of section 426, a number of cases have fleshed out how assistance under section 426 is to be offered. 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*.¹⁴ 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.¹⁵ Other creditors opposed that course and sought to be 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.¹⁶

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 measure 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 was 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:

¹⁴ *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394.

¹⁵ 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. The Australian cases are cited as *Re Dallhold Investments Pty Ltd and Re Dallhold Estates (UK) Pty Ltd* (1991) 6 ACSR 378, (1991) 10 ACLC 1374.

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

“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...”¹⁷

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.¹⁸ 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 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.¹⁹ 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*,²⁰ 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*,²¹ 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:

¹⁷ Above note 14, at 398-399.

¹⁸ *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).

¹⁹ 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.

²⁰ Above note 5.

²¹ *Re BCCI* [1993] BCC 787.

“... 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...”²²

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 also feature in a domestic case. The question remained, however, as to what foreign law rules the domestic court might choose to apply or disapply.²³ In *Re Focus*,²⁴ 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*,²⁵ 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 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.²⁶ 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.²⁷ 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.²⁸ In the later case of *Re HIH*,²⁹ in proceedings involving an Australian insurance company whose business within the jurisdiction was being wound up in

²² *Ibid.*, at 801-802 (per Rattee J).

²³ *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).

²⁴ *Re Focus Insurance Co Ltd* [1997] 1 BCLC 219.

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

²⁶ *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.

²⁷ *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.

²⁸ *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.

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

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.³⁰ 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.³¹ More recently, the courts have held that a foreign practitioner seeking the assistance of the English courts may do so under section 426 even though another parallel framework may exist for the recognition and enforcement of judgments.³² In this case, the court was of the view that both section 426 and other regimes could operate side by side even if the scope of application for both regimes was not identical, given that different countries were designated under the two texts. However, where they did overlap, they could still operate in parallel, although the courts would be free to determine which avenue was the more appropriate for the office-holder to use.

The interest of section 426 is quite clearly that it is flexible enough to accommodate many of the requests that may be typically made pursuant to a Letter of Request for co-operation, including for the recognition of office-holders, for disclosure of assets or information (especially documents), for the examination of witnesses, to prevent disclosure ("gagging" orders), for freezing assets (including bank accounts), restricting how information that is obtained may be used, delaying publication of the court order until further enquiries have been made as well as ancillary cost issues.³³ The extension of domestic rescue proceedings, however, to foreign debtors was not at first certain, unlike the position in liquidation, where statutory co-operation measures were available at an early stage.³⁴ Ultimately, the extension of the co-operation element to included administration was decidedly early on in the case of *Re Dallhold*,³⁵ albeit it was not until 2002 that the ambit of assistance under section 426 was held to include the possibility of ordering corporate voluntary arrangements in the case of a foreign company.³⁶ In this case, a request was made under section 426 in respect of the debtor companies, Isle of Man incorporations, because of doubts that the corporate voluntary arrangements provisions in the legislation would apply absent such a request to what were effectively overseas companies trading in the United Kingdom. The court was able to do so reliant in part on the precedent set by *Re Dallhold* in the case of administration, but also on the wording of the provision itself. Both cases clearly

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

³¹ [2008] UKHL 21.

³² *New Cap Reinsurance Corp Ltd v Grant and others* [2011] EWCA Civ 971.

³³ See M. Cavey, Article 48 Applications in Bankruptcy – A Practitioner's Guide (2002) 6(2) Jersey Law Review, illustrating common requests made under Article 48 (now 49), Bankruptcy (*Désastre*) (Jersey) Law 1990, a provision that shares a common ancestry with section 426.

³⁴ Above note 16.

³⁵ Above note 14.

³⁶ *Re Television Trade Rentals Ltd* [2002] EWHC 211.

enable the United Kingdom courts to provide foreign debtors with rescue measures, subject to the proviso in these cases that, *prima facie*, the purposes of the procedures could be met by the opening of proceedings, a position that would be analogous to that of a domestic company applying for the same procedures to be opened. As in *Re Dallhold*, where at the time the Australian legislation did not include such a rescue provision, the extension in that case and in *Re Television Trade Rentals* have pointed the way for jurisdictions where rescue is absent to invoke section 426 if this presents an advantage for them to do so.³⁷

Domestic Insolvency Law in Jersey

Jersey is regarded as a mixed jurisdiction whose law contains features of the common-law and civil law.³⁸ Although the roots of the law in Jersey, called 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,³⁹ 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 1991,⁴⁰ 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 (where the company is solvent) or creditors' winding up (where it 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.⁴¹ Bankruptcy law is thus the natural focus of those wishing to

³⁷ The analogy may be drawn here with instances in which COMI manipulation evidently takes place in order to allow procedural consolidation of group company cases to take place before the courts in the United Kingdom, in part to avoid the inconvenience of the jurisdictional paradigm in Article 3, European Insolvency Regulation, but also to enable the extension of domestic rescue proceedings to all group companies regardless of where they are in fact incorporated: *Re Collins & Aikman Europe SA and others* [2006] EWHC 1343.

³⁸ 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>, 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.

³⁹ 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.

⁴⁰ 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).

⁴¹ 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,

ascertain how debtors may be dealt with under Jersey law.⁴² The various procedures in Jersey, which may be collectively referred to as the bankruptcy procedures, have their roots in the customary law, but have been extensively regulated by statute.

Cession de biens (transfer of goods) is a bankruptcy procedure of customary law origin that was introduced sometime in the Middle Ages in Jersey.⁴³ 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.⁴⁴ This is also referred to as a *cession involontaire* (involuntary transfer). 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. Under the law, 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.⁴⁵ The procedure is now available to debtors evidencing a particular hardship without the need for prior imprisonment,⁴⁶ 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 de biens* or through future prospects of employment.⁴⁷ 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

while Articles 154A and 185B, Companies (Jersey) Law 1991, require a summary of creditors' winding up to give way to a subsequent *en désastre* order.

⁴² See by this author, Law relating to Security on Movable Property and Bankruptcy Study Guide (2011, Institute of Law Jersey, St Helier), Chapters 8-15; A. Dessain and M. Wilkins, Jersey Insolvency Law and Asset-Tracking (3rd ed) (2006, Key Haven Publications, Oxford), Chapter 5.

⁴³ 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. 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.

⁴⁴ *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 (*adjudée renoncée*).

⁴⁵ Article 1, *Loi (1832) sur les décrets*.

⁴⁶ *Birbeck v Midland Bank* 1981 JJ 121.

⁴⁷ *Norris v Emprunt* 1990 JLR Notes-1.

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.⁴⁸ 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.⁴⁹

A later procedure, titled *dégrévement* (disencumberment of security), was introduced in 1880 and specifically designed to supersede the *décret* procedure.⁵⁰ Whereas under *décret*, all the debtor's immovable property was disencumbered of the attached security together as one lot, *dégrévement* allowed for the disencumberment of security separately in relation to separate lots of immovable property.⁵¹ The procedure traditionally used in court, conducted before the Judicial Greffier,⁵² 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*.⁵³

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),⁵⁴ which serves as a method for realising any movables not dealt with by either the *décret* or *dégrévement*. 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.⁵⁵ However, where a *décret* or *dégrévement* followed an adjudication of renunciation, a discharge will not occur and the debtor remains obliged for the debt underpinning the security.⁵⁶ 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. In fact, a creditor who accepts the property

⁴⁸ 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.

⁴⁹ Rule 11/1, Royal Court Rules.

⁵⁰ 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 with which secured property was dealt.

⁵¹ 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.

⁵² Article 94, *Loi (1880) sur la propriété foncière*.

⁵³ The assumption henceforth is that *décret* is no longer available, although many of the comments in relation to *dégrévement* would also be applicable.

⁵⁴ *Loi (1904) (Amendement No. 2) sur la propriété foncière*.

⁵⁵ Article 10, *Loi (1832) sur les décrets*.

⁵⁶ *Birbeck v Midland Bank* 1981 JJ 121.

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.⁵⁷

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.⁵⁸ 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 property is realised and in what order, making this a procedure that is more akin to liquidation in substance.⁵⁹ 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.⁶⁰

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.⁶¹ 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, not only will the secured creditors be paid, but that there will be a credit balance, however small, for distribution amongst the ordinary creditors.⁶² Nonetheless, the pre-requisite for entry to this procedure is that the debtor must be *fondé en héritage* (seized of 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*.⁶³ A successful *remise de biens* results in the debtor obtaining a discharge from all

⁵⁷ This is one of the reasons why the Jersey Law Commission have 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 March 2012).

⁵⁸ See C. Saint-Alary-Houin, *Droit des Entreprises en Difficulté* (5th ed) (2006, Montchrestien, Paris), at paragraph 11.

⁵⁹ 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.

⁶⁰ Le Gros, above note 43, at 371.

⁶¹ 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.

⁶² *Re Shield Investments (Jersey) Limited and others* 1993 JLR Note 3.

⁶³ *Re Taylor* (1999) (unreported)..

liability.⁶⁴ 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, results automatically in a *cession volontaire*. 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.⁶⁵ In this instance, a *décret* (if available), *dégrèvement* and/or *réalisation* will follow with the consequence being that the debtor obtains a discharge. Illustrating some resistance to the foreclosure effect in *cession de biens*, an application for a *remise de biens* may also be made during the currency of *cession de biens* 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*.⁶⁶ Where there is a significant equity in the property, which would otherwise accrue to the fortunate creditor in a *dégrèvement*, that fact could motivate the court to exercise its discretion to order a *remise de biens*, provided the pre-requisites for this procedure are met. The advantage for the debtor faced with an adjudication of renunciation in particular is that, where the *remise de biens* succeeds, a discharge is obtained.⁶⁷

The main bankruptcy procedure in Jersey law is, however, now the *désastre*.⁶⁸ 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).⁶⁹ 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.⁷⁰ In Jersey, the Viscount, an officer of the Royal Court, undertakes this role.⁷¹ 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

⁶⁴ *Re Remise Barker* 1987-88 JLR 23.

⁶⁵ *Le Maistre v Du Feu* (1850) 171 Ex 508; *Re Santer & Santer* 1996 JLR 233.

⁶⁶ *Re Barker* 1985-86 JLR 186.

⁶⁷ The same is true even where the *remise de biens* fails as the *cession conditionnelle* it is deemed to include is treated as a *cession volontaire*.

⁶⁸ 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).

⁶⁹ Le Gros, above note 43, 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.

⁷⁰ *Ibid.*, citing *Godfray v Le Couteur* (1858).

⁷¹ 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.

of the *dégrévement* procedure covering immovables would diminish, but in fact it continues to be used by creditors because it offers greater control over the realisation process than *désastre* and avoids incurring the costs of the Viscount. 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.⁷² In fact, the Jersey 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.”⁷³

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 £3000.⁷⁴ An application may also be made by the debtor and by the Jersey Financial Services Commission in the case of particular regulated debtors. 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.⁷⁵ Similarly, a creditor who wishes to take proceedings against the estate of a deceased debtor may not use the *désastre* procedure.⁷⁶ Those debtors eligible for proceedings are defined in the law.⁷⁷

Once a *désastre* is commenced, the property and powers of the debtor vest in the Viscount,⁷⁸ excepting trust property and certain rights under an approved pension arrangement.⁷⁹ Property acquired by or devolved upon the debtor since the date of the declaration may be claimed by the Viscount.⁸⁰ The law also provides a

⁷² 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.

⁷³ *Superseconds Limited and Santer & Santer v. Sparta Investments Limited* 1997 JLR 112.

⁷⁴ Article 3(1), Bankruptcy (*Désastre*) (Jersey) Law 1990 and Rule 2, Bankruptcy (*Désastre*) (Jersey) Order 2006.

⁷⁵ Article 5, Bankruptcy (*Désastre*) (Jersey) Law 1990.

⁷⁶ *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*.

⁷⁷ *Ibid.*, Article 4(1).

⁷⁸ *Ibid.*, Article 8(1).

⁷⁹ *Ibid.*, Articles 8(3) and 8A.

⁸⁰ *Ibid.*, Article 9(1).

moratorium on remedies, action and execution against the debtor or his property except with the consent of the Viscount.⁸¹ Where the debtor is a company, a transfer 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*.⁸² 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.⁸³ Where the debtor has immovable property, whether jointly held or not, in which a spouse or civil partner 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.⁸⁴ This enables the spouse or civil partner 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 or civil partner 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/partnership home for the occupation of the spouse or civil partner and any of the debtor's dependants.⁸⁵

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.⁸⁶ 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.⁸⁷ There are also specific powers, including the power to disclaim property and to settle the debtor's indebtedness under a hire purchase agreement.⁸⁸ 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.⁸⁹ The debtor is bound by a duty to assist the Viscount and may be compelled to attend the Viscount to provide information and documents,⁹⁰ subject to a privilege against self-incrimination.⁹¹ 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.⁹² During the course of the *désastre*, the Viscount may keep creditors

⁸¹ *Ibid.*, Article 10(1)-(2).

⁸² *Ibid.*, Article 10(3).

⁸³ *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.

⁸⁴ *Ibid.*, Article 12(1).

⁸⁵ *Ibid.*, Article 12(8).

⁸⁶ *Ibid.*, Articles 29-32.

⁸⁷ *Ibid.*, Articles 26-27.

⁸⁸ *Ibid.*, Articles 15-16 and 35.

⁸⁹ *Ibid.*, Articles 17-17D.

⁹⁰ *Ibid.*, Articles 18 and 20.

⁹¹ *Ibid.*, Article 22.

⁹² *Ibid.*, Articles 24-25.

informed,⁹³ but must report to the creditors in connection with the payment of the final dividend and destination of the surplus.⁹⁴ The conclusion of a successful *désastre* normally sees the debtor discharged after a period of four years.⁹⁵ In substantive terms, a *désastre* procedure is also liquidation-oriented although the law foresees the possibility that the debtor may have the benefit of any surplus that may arise, just as in *remise de biens*.⁹⁶

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. The former, however, simply has a foreclosure element that extinguishes the debtor's interest in the property, while only the latter two allow for the possibility of a surplus to accrue to the debtor, however unlikely, which could conceivably be used to recommence entrepreneurial activity. Similarly, although *remise de biens* has been described as having a suspensory (or moratorium) effect,⁹⁷ it does not appear to function in the same way as might be understood in the case of rescue procedures such as administration or corporate voluntary arrangements, where moratoria are available. The procedures overall do 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 or the rehabilitation of the indebted entity through some form of turnaround management. A precise definition of what constitutes rescue may be problematic, as Professor Belcher has argued:

“...if rescue is defined simply as the avoidance of distress and failure, all management activity can be thought of as constant and repeated rescue attempts.”⁹⁸

Nevertheless, modern views of rescue associate it with the revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity, employment and the continued rewarding of capital and investment. Rescue is regarded as a process in which preservation of the debtor or its business has acquired a status as a desirable end for the insolvency process, either as a re-consolidation of the debtor's economic health and well-being or as a restructuring, with the excision of unviable elements. If this perspective is taken, then none of the Jersey procedures really respond to the definition of what rescue is seen as being. by enabling the rescue of the debtor and/or its business. Furthermore, proposals issued by the Jersey Financial Services

⁹³ *Ibid.*, Article 28.

⁹⁴ *Ibid.*, Articles 36-37.

⁹⁵ *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.

⁹⁶ *Ibid.*, Article 37(6).

⁹⁷ Jersey Law Commission Consultation Paper No 2, above note 57, at paragraph 2.5.1.

⁹⁸ See A. Belcher, *Corporate Rescue* (1997, Sweet & Maxwell, London), at 12.

Commission in 1999 for a modern suspensory procedure have failed to progress and the matter remains pending.⁹⁹ 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?¹⁰⁰ This is where the section 426 framework has offered potentially a solution to the problem, given that it enables the extension of United Kingdom domestic rescue proceedings to foreign debtor companies, including those established in Jersey, a jurisdiction to which assistance under the section 426 framework is automatically forthcoming.

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,¹⁰¹ Guernsey¹⁰² and Ireland,¹⁰³ but is curiously not so prescribed in the case of the Isle of Man,¹⁰⁴ to which Jersey extends assistance under its equivalent to section 426.¹⁰⁵ Jersey is also one of the jurisdictions specified under sub-section (11)(a), which enables the courts in the United Kingdom to extend assistance to the Jersey courts on receipt of a Letter of Request.

⁹⁹ Benest and Wilkins, above note 61, at paragraph 20.

¹⁰⁰ 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.

¹⁰¹ 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).

¹⁰² 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.

¹⁰³ 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.

¹⁰⁴ 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 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] UKPC 26.

¹⁰⁵ Above note 33. 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.

As stated above, although insolvency law in the United Kingdom has long permitted the liquidation of an overseas company conducting business within the jurisdiction,¹⁰⁶ 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*.¹⁰⁷ As also mentioned above, the position of corporate voluntary arrangements was not settled until *Re Television Trade Rentals*,¹⁰⁸ 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*,¹⁰⁹ 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*,¹¹⁰ 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 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*.¹¹¹

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

¹⁰⁶ Above note 16.

¹⁰⁷ Above note 14.

¹⁰⁸ Above note 36.

¹⁰⁹ *Idem*. In reality, however, the Jersey judgment preceded that involving the Isle of Man company.

¹¹⁰ *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 42.

¹¹¹ Above note 5.

prospective purchaser of the business, which was conducted through 160 high street stores located across the British Isles.¹¹² 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*,¹¹³ 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]”.¹¹⁴

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.¹¹⁵ 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 liquidation in the United Kingdom and did so on the grounds that this would be in the creditors’ interests.¹¹⁶ 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*,¹¹⁷ the bank concerned was the major creditor of two

¹¹² 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”.

¹¹³ *Re Atlantic Computer Systems plc* [1992] Ch 505.

¹¹⁴ *Ibid.*, at 528. The purposes mentioned in section 8, 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.

¹¹⁵ Dessain and Wilkins, above note 42, at paragraph 5.5.4.2.1(g).

¹¹⁶ *Re OT Computers Limited* 2004 JLR Note 4.

¹¹⁷ *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.

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.¹¹⁸

Similarly, in 2010, in *Re St John Street Limited*,¹¹⁹ 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 secured creditor.¹²⁰ 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 trend noted here is continued in the 2011 case of *Re REO*.¹²¹ The facts arise from debts owed by a number of companies in the REO Group to the Bank of Scotland plc and the Governor and Company of the Bank of Ireland. These debts

¹¹⁸ 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]."

¹¹⁹ *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.

¹²⁰ 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.

¹²¹ *Re REO (Powerstation) Limited* [2011] JRC 232A (unreported). The court on this occasion consisted of William Bailhache DB sitting with Jurats Fisher and Olsen with Advocate Pallot making the application.

were payable on 21 November 2011 and were defaulted upon. On the basis of the cash-flow test, the companies were clearly insolvent. On the basis of an affidavit filed on behalf of the Bank of Scotland, the group companies indebted to it were also shown to be balance sheet insolvent, arguably all the companies in the group being in this position. The main assets of the companies concerned were real estate properties in London. The creditors applied to the Royal Court of Jersey for a Letter of Request to be issued to the High Court in England and Wales requesting on the basis of section 426 that administration proceedings under Schedule B1 of the Insolvency Act 1986 be opened in respect of the group companies. The application was made on notice to the companies, who indicated they did not wish to resist the application concerned, albeit reserving their rights before the English courts, and to the Viscount,¹²² who did not make any observations in the matter.

At the hearing before the court, the court was minded first to note that, although *désastre* proceedings under Jersey law were in theory available, such proceedings were not contemplated here and it was in fact argued that *désastre* proceedings would not be in the best interests of the companies or of their creditors. As such, it was feasible for administration proceedings in the United Kingdom to be opened on the basis of a Letter of Request being issued to that effect. The court here assumed that as the United Kingdom was a prescribed country for the purposes of Jersey's own co-operation measure¹²³ and that Jersey was a relevant country or territory for the purposes of section 426, the request by the Jersey court would receive "sympathetic consideration". The court was of the view that its jurisdiction to make such a request was established "both on authority and on principle", given the fact of previous applications having been made on the basis of section 122 of the Bankruptcy Act 1914 and section 426. The Jersey court points to dicta by Mr Justice Goulding J¹²⁴ and Mr Justice Chadwick¹²⁵ to the effect that, in the interests of comity, the English courts would give assistance to the Jersey court, absent good reason to the contrary. Indeed, the view is taken that the English courts would not normally feel themselves bound by any duty to scrutinise the content of the request once they were satisfied that the case fell within the ambit of the co-operation section and would not otherwise offend against any mandatory rules of public policy.¹²⁶ Similarly, in relation to the specific request made to open administration proceedings, an English court would satisfy itself that one of the purposes of administration proceedings could be fulfilled pursuant to such a request and would make such an order to give effect to the mandatory requirements of the co-operation provision.

The court also noted previous instances in which Letters of Request had been issued to allow for the opening of proceedings in the United Kingdom in

¹²² Above note 71.

¹²³ Above note 33.

¹²⁴ Above note 5, at 402D.

¹²⁵ Above note 14, at 398-399.

¹²⁶ This is also consonant with the position of the Jersey courts in respect of incoming requests for assistance as illustrated in *Montrow International Limited v Tacon* 2007 JLR Note 49, applying *Hughes v Hanover* [1997] 1 BCLC 497.

respect of Jersey companies, mentioning the prior history of requests under section 426. The court also pointed to its inherent jurisdiction to make such an order, referring to two earlier cases of the Jersey Court of Appeal,¹²⁷ partly in a bid to forestall any objection that might be taken in proceedings in London by the debtor companies. It also noted that the Jersey procedure of *désastre* began as an exercise of curial discretion to achieve equity between creditors of a common debtor and whose roots lie in the inherent jurisdiction of the court to achieve this. Referring to another Jersey insolvency procedure, the *remise de biens*, the court observes that whether to grant the order sought is very much a question for the court's discretion, subject to the constraints set in previous judgments of the court creating authority.¹²⁸ The court remarks, *obiter*, that it would unlikely on the facts in the instant case to grant such an order even if an application were made, given issues as to whether jurisdiction were available and whether the asset-value would exceed the secured debt to be able to effect a dividend to the unsecured creditors.¹²⁹ It also states that administration is likely to provide a "more satisfactory remedy" on the basis that the first two of the hierarchy of objectives in the United Kingdom text were analogous to the objectives of a *remise de biens* and therefore indicated a consistency of approach between the Jersey and United Kingdom insolvency processes. The court stated that it was prepared to contemplate issuing a Letter of Request in the interests of the creditors or the debtor or also in the public interest. In relation to this last point, the court was of the view that what it termed "a satisfactory methodology" for dealing with the interests of the debtor and the creditors fell within the scope of public interest, to which was allied the general reputation of the island as a financial centre. Key to the court's decision to issue a Letter of Request was the view that a major insolvency affecting a group of Jersey companies with the potential effect of damage to creditors required to be dealt with by the most satisfactory remedy available, which it saw in this case to be the opening of administration proceedings in the United Kingdom.

The Way Forward

It might be suggested that the Jersey courts are merely treading a path first illuminated by the *Re Dallhold* case.¹³⁰ In the former 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. The only surprise is that the path illuminated by this case has not been followed in many other instances, especially

¹²⁷ *Finance and Economics Committee v Bastion Offshore Trust Company* 1994 JLR 370; *Re X* 2003 JLR 111. The same inherent jurisdiction is available in respect of incoming requests for assistance: *Re F. & O. Finance AG* 2000 JLR Note 5a.

¹²⁸ See, by this author, *Demise of the Remise: Greatly Exaggerated?* (2011) 15 *Jersey and Guernsey Law Review* 83, in which the case of *Re Mickhael* [2010] JRC 166A is explored.

¹²⁹ Above note 62.

¹³⁰ Above note 14.

given that many of the jurisdictions that are prescribed for the purposes of section 426 do not have rescue procedures in the true sense with only the Isle of Man later following in the wake of the *Re Dallhold* experiment with an application leading to the extension of corporate voluntary arrangements in *Re Television Trade Rentals*.¹³¹ The precedents set have clearly influenced the Jersey courts and also serve to display their creativity 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. It is perhaps this close connection that explains why “passporting” rescue has become useful for companies incorporated in Jersey. Furthermore, the availability of highly-regarded corporate voluntary arrangements and administration procedures in the United Kingdom and benefits for companies incorporated elsewhere is also a factor that promotes the resort to this facility by Jersey courts. This is also a phenomenon noted in the case of companies that, for the purposes of the European Insolvency Regulation, can show their COMI to be located in the United Kingdom, irrespective of where they are in fact registered or incorporated.¹³²

At the root of the problem illustrated by these cases, however, is the fact that there are no Jersey procedures that are, strictly speaking, rescue in the way that term is understood elsewhere. As stated earlier, although all Jersey insolvency procedures focus on the repayment of creditors with some allowing for the possibility of a surplus to accrue to the debtor, they do not respond to the way in which the modern conception of rescue is articulated. All procedures function essentially as liquidation-type processes, in which the interests of the creditors are paramount and which lead to the dispossession of the debtor. Even *remise de biens*, which is also described by the court in the *Re REO* case as potentially having the same objectives as administration, in reality does not function in the same way as administration or corporate voluntary arrangements in facilitating rescue. The lack of a rescue-type procedure in Jersey undoubtedly needs to be remedied before long.¹³³ The Jersey Law Commission has made its views on the older procedures felt,¹³⁴ 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.¹³⁵ The development of a domestic insolvency regime in Jersey is the logical next step, whether the procedure is ultimately inspired by those available elsewhere or proceeds from an autochthonous basis. The creative “passporting” of rescue via the Letter of Request framework and the extension of section 426 to foreign debtors naturally leads to this, revealing as it

¹³¹ Above note 36.

¹³² Above note 37.

¹³³ Of interest here is the fact that Guernsey has introduced United Kingdom-style administration in the Companies (Guernsey) Law 2008.

¹³⁴ Above note 57.

¹³⁵ A conference, jointly organised by the INSOL Europe Academic Forum and the Jersey Institute of Law on 14 October 2011, offered an insight into the challenges facing the use of the current insolvency procedures and the factors that might inform a reform process when it eventually takes place.

does the lacuna that prompts the courts in Jersey, impelled by the needs of creditors pushing for this technique to be used, to have resort to the Letter of Request facility.