

21st March 1986

ROYAL COURT (SUPERIOR NUMBER)

Before: Sir Charles Frossard, Commissioner,
Jurat J.H. Vint,
Jurat M.G. Lucas,
Jurat L.A. Picot,
Jurat P.G. Blampied,
Jurat Mrs. B. Myles,
Jurat P.F. Misson,
Jurat M.W. Bonn.

In the matter of the DOLEANCE of James Barker.

Advocate P.A. Bertram for James Barker

Advocate R.A. Falle for Ann Street Brewery Company Limited.

Mr. James Barker (the Petitioner) has presented to the Court a doléance wherein he complains at the refusal of the Inferior Number of the Royal Court on 29th October, 1985, to grant him a remise de biens.

The reasons for this doléance are set out in the doléance itself, but may be summarised as follows:-

On 31st May, 1985, the Royal Court pronounced l'adjudication de la renonciation of the Petitioner's real and personal property to be followed by a

dégrèvement and a réalisation.

The Petitioner, on 5th July, 1985, applied to the Royal Court for a remise de biens. Ann Street Brewery Company Limited (ASB), a creditor of the Petitioner, disputed the Petitioner's right to request a remise de biens when a dégrèvement and a réalisation had already been ordered. The Inferior Number rejected ASB's contention and this was affirmed by the Court of Appeal on 25th September, 1985.

In accordance with Article 2 of the Loi (1839) sur les Remises de Biens (the Law), two Jurats, having been duly appointed, on 10th October, 1985, presented, a report which recommended that the Petitioner's application for a remise de biens should be granted. The Inferior Number, having noted certain undertakings given by ASB, refused the application and ordered the dégrèvement and réalisation to proceed. Those undertakings are set out in a judgment delivered by the then Deputy Bailiff, the relevant parts of which are as follows:-

- "1) The Ann Street Brewery will pay all the unassigned, unsecured creditors, whether or not they have filed in the dégrèvement proceedings.
- 2) To obtain the best market price for all the properties but, in any case, not less than that shown in the Jurats' report, and in the event of any dispute about the price the Judicial Greffier will have the matters referred to him and, if necessary, they can be referred back to this Court.
- 3) The Ann Street Brewery will have the option of retaining the Wine Bar upon their paying £350,000 for it. Or if, I suppose, Mr. Barker can come to some arrangement to finance it at that price - we do not express any opinion on that matter - but £350,000 will have to be made available for the creditors in respect of those premises.
- 4) The Company will hold any balance at the conclusion of the dégrèvement for the benefit and to the order of Mr. Barker and we order also that accounts in respect of the dégrèvement - we cannot order this, but we would ask the Ann Street Brewery also to lodge with the Greffier accounts in respect of the dealings in the dégrèvement."

The essential difference between a dégrévement and a remise de biens is that in a dégrévement the realty of the debtor eventually vests in either the pursuing or other creditor, who takes the realty in satisfaction of his and, in certain cases, other claims, the debtor not being entitled to any equity in the value of the realty which may remain after settlement of claim. In a remise de biens, the realty of the debtor is sold under the authority of the Court, the debtor being entitled to retain any equity in the value of the realty after settlement of all claims.

Article 2 of the Law states -

"La Cour, après la présentation dudit rapport et avoir entendu ceux qui opposeront ladite remise, accordera ou refusera ladite permission. Cette décision sera finale et sans appel".

Hence, there being no appeal, this doléance is presented to this Court on the grounds which are set out in extenso in the doléance itself and which need not be repeated here, but may be summarised -

The Jurats' report being favourable, it was wrong and against the principles of natural justice to refuse a remise de biens, more particularly as the order for dégrévement of 10th October, 1985, contained conditions which were inappropriate to a dégrévement and could be unenforceable.

Mr. Bertram, appearing for the Petitioner, invited the Court to consider the nature of a remise de biens as set out in the Report of 1861 of the Commissioners appointed by Her Majesty to inquire into the civil, municipal and ecclesiastical laws of the Island of Jersey -

(a) **MINUTES OF EVIDENCE, § 10630 -**

"Perhaps you will be good enough to tell us the course of proceeding under that, and, afterwards, to give us your own views as to how far it is attended with benefit, and how far there may be resulting evil,

which may or may not counterbalance that benefit? -The mode in which that law is carried out is this: the debtor must in the first instance be arrested, if he wish to place his property in the hands of justice, and profit by the benefit attendant on that process; when he is brought up for the confirmation of the arrest of his person he comes prepared with a complete statement of his property, real and personal, its value and its nature, with a statement of his different liabilities; and the balance is drawn in that document. This is submitted to the court by his counsel, and if the court think that there is sufficient ground for proceeding further, two of the jurats are named to examine his property, and the usual course is for two or three experts to be named by the jurats to value his houses, lands, or other real property. This done, if the two jurats so named think there is some reasonable expectation of the party being enabled to overcome his difficulties, or, at any rate, by the sale of the property to realize sufficient assets to discharge the mortgage debts, they report the facts to the court, and recommend that his prayer as to placing his property in the hands of justice shall be granted. At this stage of the proceeding any creditor may come forward, and, if he see fit, oppose the remise , and thereupon the court decides for or against the prayer. If the prayer be granted one of the attorneys (écrivains) or one of the advocates is appointed by the two jurats to conduct the remise de biens. The jurats appointed as already described are empowered to dispose of the property by public sale or by private agreement, as may be deemed most advantageous for the creditors as well as the debtors".

(b) **MINUTES OF EVIDENCE, § 10683 -**

"Is there any punishment if they detect him in an endeavour to defraud his creditors of a considerable sum of money? Suppose upon examining his books there is a large sum of money, and that they cannot get any account of it? Possibly he has a large sum in cash in his own house, which he is concealing, and they discover it, or they are on the track of a very gross fraud; can they do more than report those circumstances to the court? - They would immediately report to the court that the remise ought not to be granted; the court would then refuse the remise, and in consequence the acte de prison, which had been obtained by a creditor, would be immediately put in force; the man would be put in prison, and cession would be refused, so that he would remain in gaol".

(c) **REPORT - PART X, PARAGRAPH 4 -**

"Remise de Biens entre les Mains de Justice is the indulgence of a temporary protection granted usually for a year to a debtor on a detailed statement on oath of all his property. It is applied for in the hope of preventing a décret by present forbearance. Two Jurats are appointed by the Court to inquire into the condition of the estate, and on their report that it may be sufficient to discharge the liabilities, the remise is granted. The Jurats, under whose counsel and advice alone the debtor can act, are authorized to sell the estate, if sufficient to pay the privileged debts, which are first satisfied out of the proceeds of the sale. The balance, if any, is paid to the other creditors, any surplus being returned to the debtor. It is well to give an encouragement to debtors to give up their estates before they are

entirely dissipated. For this purpose we believe that this law is beneficial".

(d) **MINUTES OF EVIDENCE, § 4578 -**

"(Mr. Jebb) Suppose it is not sufficient to pay all?

(Mr. Marett) When they cannot sell at all, it becomes en décret".

submitting that these authorities showed that there was a presumption in favour of a debtor if it appears that the value of his realty was greater than the value of his debts. That being so, a remise de biens should only be refused if there was fraud or the Jurats' report was unfavourable, see -

1) Commissioners' Report, Minutes of evidence, § 10683

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They would immediately report to the Court that the remise ought not to be granted; the Court would then refuse the remise".

2) Application for remise by Edouard Le Couteur Bisson, 1892.

Mr. Bertram further argued that the judgment of 29th October, 1985, was defective in that the Inferior Number failed to exercise properly the judicial discretion vested in it, the exercise of such discretion being laid down in Sharp -v- Wakefield 1891 H.L. at p. 179, " 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion". This principle has been accepted by the Royal Court of Jersey in Cottignies -v- the Housing Committee (1969). "What the Court in previous cases has said is that it cannot interfere unless it can be shown that the discretion was exercised in consequence of an erroneous view of law, or an obvious mistake of fact, or by taking into account irrelevant matters, or by failing to take into account relevant matters, or because it did not accord to commonsense and to justice".

Applying these principles, Mr. Bertram contended that the judgment of the Inferior Number showed that the Court -

- a) had failed to take sufficiently into account the Jurats' report on the remise de biens which was favourable to the Petitioner;
- b) had placed too great an emphasis on delays occasioned by the Petitioner;
- c) in ordering that the dégrèvement and réalisation should proceed, had accepted undertakings given by ASB which could not be enforced against them.

Mr. Falle, appearing for ASB, commenced his submission by reminding the Court of the nature of a doléance, which only provided a remedy if the Court had exceeded its jurisdiction, resulting in an injustice - it was an ancient remedy available when Courts were not as professional as in modern times. Whilst it has been described as "plainte contre juge", it does not imply any criticism of the Inferior Number - see Ex parte Nicolle (1879) A.C. 348.

Before allowing a doléance, the Court must be satisfied that there was an excess of jurisdiction or a breach of natural justice which must be remedied, as a doléance was a remedy "in last resort", all other doors being closed, and a grave injustice would remain unless remedied. This being so, the onus to show this was on the Petitioner and could only be described as a heavy burden.

A remise de biens was discretionary. The preamble to the Law shows that it was enacted to remedy two abuses, viz -

"Considérant que la Loi sur les remises de biens entre les mains de la Justice est défectueuse, d'autant que lesdites remises sont accordées sans aucun examen préalable pour vérifier l'état présenté à la Justice, et que souvent les personnes qui ont obtenu cette indulgence refusent, au grand préjudice de leurs créanciers, de se guider par l'avis et conseil des autorisés de

Justice".

i.e., no proper procedure and refusal of sale by a debtor.

The Law sets out the procedure to be followed and Article 2 uses the word "utile" when referring to the report of the Jurats. They must in their report state whether in their opinion it was "utile" (no translation is necessary) for a remise de biens to be granted, not whether it was desirable.

A remise de biens bears a discretionary remedy and the Court should follow the principles set out in Le Geyt, "Privilèges, Loix et Coustumes de l'Isle de Jersey" (1953 Edition), at page 76 (Titre VII, Article 1) -

"Les Débiteurs sur leur Remonstrance à la Cour Royale à l'occasion de pertes dures & fortunes arrivées depuis dix ans, sans qu'il y ait de leur faute, peuvent obtenir un an de Surseance de toutes executions,"

That being so, any debtor seeking a remise must come with clean hands, without fault.

The Court has a discretion; it can hear opposition as it did in this case. The Court has an unfettered discretion to take everything into consideration and depart from the recommendation in the Jurats' report.

The Inferior Number had before it the judgment of the Court of Appeal of 25th September, 1985. This sets out very clearly the various steps taken by both the Creditors and the Petitioner, which show inaction by the Petitioner resulting in delay being prejudicial to the Creditors.

The orders and undertaking in the dégrèvement are of benefit to both the Petitioner and the Creditors and should not be disturbed by allowing the doléance.

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The Court carefully considered all the submissions by Counsel, being well aware that to succeed a doléance must show that there has been a failure of

natural justice leading to injustice and that should a doléance be allowed, in the words of Mr. Justice Hoffmann -

"The Court should not be left with the uneasy feeling that in following the old authorities it might have perpetuated an injustice upon one of the litigants".

The Court came to the conclusion that a remise de biens is always preferable to a dégrèvement when conditions warrant it.

The Court also came to the conclusion that in directing that the dégrèvement should proceed subject to the undertakings given by ASB, the Inferior Number was creating a new, and hybrid, procedure, which was neither a remise de biens nor a dégrèvement, and that the discretion vested in the Inferior Number did not extend to taking such a course.

In addition, the Court was satisfied that such procedure was unfairly weighted in favour of ASB as against the Petitioner and that the interests of both the creditors and the Petitioner could have been prejudiced for the following reasons -

- (a) the procedure proposed by ASB and accepted the Inferior Number that the St. Aubin's Wine Bar, inclusive of goodwill, would have been available at a fixed price of £350,000 and, unlike the other properties, would not be sold on the open market, is inflexible;
- (b) the undertakings given by ASB would not be enforceable in law; and, as the directors of ASB might change or the company be taken over, such undertakings could have no greater meaning than good intentions.

The Court therefore concluded that the doléance should be allowed.

The Jurats' report showed that there is sufficient equity to justify a remise de biens. Accordingly, the Court -

- (1) annulled the Act of Court of 31st May, 1985, ordering the dégrèvement and

the réalisation;

- (2) granted the Petitioner's application for a remise de biens, to be conducted by Jurats Coutanche and Le Boutillier, such remise de biens to be for a period of six months; and
- (3) ordered that the costs of the doléance be paid out of the proceeds of the remise de biens.