

ROYAL COURT
(Samedi Division)

57.

21st March, 1996

Before: The Deputy Bailiff and
Jurats Le Ruez and Vibert.

In the matter of the *désastre* of the property of
Mr. Christopher Anthony Delaney

Representation of the Viscount

Crown Advocate Pallot for the Viscount.
Advocate J. Clyde-Smith for Mr Delaney.

JUDGMENT

THE DEPUTY BAILIFF: This representation by the Viscount concerns the property of Mr Christopher Anthony Delaney ("the debtor") who was declared *en désastre* by an Act of Court dated 11th October, 1991, in accordance with the provisions of the Bankruptcy (Désastre) (Jersey) Law 1990 ("the Law"). The Viscount was charged to administer the proceedings.

It is perhaps necessary to say that on the 24th September, 1991, one month before the successful *désastre* application, Mr Delaney disappeared and was subsequently reported missing. Letters discovered in his safe at his home address admit large debts of an estimated £1.2M. Mr Delaney was charged following a full investigation by Touche Ross, the Chartered Accountants, and the States of Jersey Police into his companies. With a number of offences relating to his business activities he was of course charged in his absence. Although attempts to trace Mr Delaney were unsuccessful, on the 26th January, 1992, of his own volition he telephoned the States of Jersey Police and returned to Jersey on the 28th January, 1992, submitting to his arrest.

We will not go into the detailed background, but there were serious defalcations of clients' money and Mr Delaney stole from

5 one creditor in order to stave off the demands of another. He had
invested in far-fetched business ventures which he himself
described as "bizarre and disastrous". These included the "sale
of chocolate to America" and the "staging of a world harmonica
10 championship". There were, of course, infinitely more serious and
sophisticated crimes. Criminal investigations continued until the
7th January, 1993, when Mr Delaney was formally charged with one
count of false pretences, five counts of fraudulent conversion and
one count of forgery. He pleaded guilty to all the charges and on
15 the 13th May, 1993, he was sentenced to a term of imprisonment of
six years.

20 He appears in Court before us today on licence from H.M.
Prison, Leyhill for this hearing. The unsecured creditors, both
15 ordinary and priority, have claims filed with the Viscount
totalling £60,415.76, of these £11,474.11 ranked for a priority.
The other payments after a balance available for distribution of
£442,915.46 were charged on property which has been realised. Mrs
Delaney received half the share of the net sale proceeds,
20 £22,608.03.

25 Article 40 of the Law provides that at the expiration of four
years from the date of a declaration of a *désastre* the Viscount
"shall apply to the court for an order discharging the debtor".
But paragraph (2) of Article 40 provides that the Viscount, the
debtor or a creditor of the debtor may apply to the court for an
order that the period referred to in paragraph (1) be reduced or
extended. What Crown Advocate Pallot described as the "apple of
discord" is the recommendation under the terms of Article 40(2)
30 that instead of granting an immediate discharge, the discharge be
deferred and the matter be referred back to the court for
reconsideration for two years after Mr Delaney's release from
prison. The Court has since the enactment of the Law made three
(perhaps four) Orders under Article 40 as follows:

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- (a) on 31st March, 1995 in the case of Paul Michael Gilbraith
granting the debtor's early application for discharge
following payment in full;
 - 40 (b) on 22nd September, 1995 in the case of Deborah Elizabeth
Lloyd Williams ordering the suspension of the debtor's
discharge because she failed to notify the Department of any
change of address or employment;
 - 45 (c) on 3rd November, 1995 in the case of Steven Burke ordering
the suspension of the discharge in the case of an offence in
which assets were concealed and where Mr Burke led an
extravagant life-style.

50 However, each of the representations in these cases was
either not opposed or proceeded specifically by consent. This is
therefore the first time where the Court has had an opportunity to

consider the nature of the Court's discretion under Article 41 of the 1990 Law.

5 It is not necessary to detail the criminal activities of Mr Delaney which led to his receiving his prison sentence. It is only necessary to say that there is no dispute that the criminal activities of Mr Delaney were the obvious pre-cursor to the *désastre* proceedings. Mr Delaney has suffered further sanctions beyond his prison sentence. Under Article 43 of the 1990 Law, he was disqualified as a director of a company until 13 May, 1998. It seems to us, from investigations carried out at our request by Advocate Clyde-Smith with the legal department of the Chartered Association of Certified Accountants that Mr Delaney will never again be issued with a practising certificate as a Certified Accountant.

20 Crown Advocate Pallot has made it very clear to us that his argument for an extension lay in the fact that the criminal activities of Mr Delaney not merely produced the bankruptcy but was the "*causa causans*" of it. In other words, Mr Delaney has only himself to blame for his predicament and the fact that he has served, or is serving, his punishment does not give him an automatic right to be discharged, particularly because the rights of creditors would be lost under Article 42 of the Law if the Court were to grant a discharge. As Mr Pallot put it, the claim to a release is not a right, it is a privilege.

30 That theory accords, in the submission of Mr Pallot, with established Jersey practice because prior to the law, a *désastre* did not operate to release the debtor from his debts provable in the *désastre*. Only by making "*cession*" could a debtor secure his release. Le Gros in his "Droit Coutumier de l'Ile de Jersey" says at page 297:

35 "*La cession de biens, ou cession judiciaire, est l'acte par lequel un débiteur malheureux et de bonne foi, incarcéré pour dettes, se fait libérer de prison, et s'affranchit de ses dettes, en abandonnant tous ses biens-meubles et héritages à ses créanciers.*
40 *Il faut donc:*

1 *Que le débiteur soit malheureux. En effet, il y a eu combinaison de causes, indépendantes de sa volonté, qui lui ont porté malheur dans son commerce, dans ses entreprises. Ce revers de fortune l'empêche de faire honneur à ses affaires.*

2 *Qu'il agisse de bonne foi. La fraude le rend indigne de la cession.*

50 3 *Qu'il soit detenu en prison à l'instance d'un créancier. C'est la contrainte par corps.*

5 *La personne qui a été admise au bénéfice de la
cession n'est plus à la merci de ses ci-devant
créanciers. Elle est en mesure de conduire de
nouveau un commerce, d'exercer un métier, avec
l'espoir de faire des bénéfices qui lui permettront
de payer ses dettes dues le jour de la cession si son
honneur lui conseille à suivre cette voie."*

10 This Court must firstly determine the criteria to be applied
in exercising its discretion under Article 41 and then determine
how that discretion is to be exercised judicially on the facts of
the case.

15 The wording of the statute "as it thinks fit" apparently
gives to the Court an absolute discretion. All that really
implies to us is that we must interpret our duty within a
perspective whereby the statute is intended to operate. There
must be found within the statute the objects for which the
20 particular article was intended.

 There is some similarity in the Insolvency Act 1986 of the
United Kingdom where section 280 provides:

25 "*(1) An application for an order of the court discharging
an individual from bankruptcy in a case falling
within section 279(1)(a) may be made by the bankrupt
at any time after the end of the period of 5 years
beginning with the commencement of the bankruptcy.*

30 *(2) On an application under this section the court may -*

35 *(a) refuse to discharge the bankrupt from
bankruptcy,*

(b) make an order discharging him absolutely, or

40 *(c) make an order discharging him subject to such
conditions with respect to any income which may
subsequently become due to him, after his
discharge, as may be specified in the order.*

45 *(3) The court may provide for an order falling within
subsection (2)(b) or (c) to have immediate effect or
to have its effect suspended for such period, or
until the fulfilment of such conditions (including a
condition requiring the court to be satisfied as to
any matter), as may be specified in the order."*

50 The authors of Halsbury's Statutes, (Vol 4 para 280),
commenting on S.280, speak of the court considering the interests

of the public and of commercial morality as well as the interests of the bankrupt and of the creditors.

5 Although it predated the 1986 Act by nearly one hundred years, we feel that the words of Lord Esher in Baker exp. Constable (1890) 25 QBD 285 gives some useful pointers to the matters that must be weighed in the balance. Lord Esher said at page 293:

10 *"Does it follow that the judge may take into consideration upon the application for a discharge everything which has been done by the bankrupt during his past life? It seems to me that there must be some limit; and I think the judge ought not to take into his consideration conduct which*
15 *could not have had anything to do with the bankruptcy, either in producing it or in affecting it in any way after its commencement...Only such conduct or affairs as may or can have had some effect upon the bankruptcy itself ought to be taken into consideration."*

20 In the context of the 1990 Law and particularly Article 2(4) the reinstatement brings the debtor back into the fold as a citizen. He can, for instance, act as a trustee, become a tuteur, he can hold public office, he can sit on a jury.

25 Crown Advocate Pallot asks whether Mr Delaney in the circumstances of this *désastre*, has the same entitlement as a debtor who was "*malheureux*" and "*de bonne foi*".

30 He argues that if Mr Delaney were to be discharged after four years there would be an injustice done to the still unpaid creditors. Crown Advocate Pallot raises the spectre of Mr Delaney inheriting a hypothetical sum by way of inheritance. That would be of no help to the unpaid creditors. And while an order of
35 discharge releases the debtor from all debts provable in the *désastre* except debts or liabilities incurred by means of fraud or fraudulent breach of trust (Article 42(1)) that would exclude those unsecured creditors with whom Mr Delaney had transacted
40 honestly.

40 The Viscount has set his limit and asks that the matter of discharge be reconsidered two years after Mr Delaney's release from prison. That would enable a monitor to be kept on the
45 situation and would allow his creditors (perhaps particularly because the majority are overseas) to maintain a working knowledge of any income that might, or might not, accrue to his benefit. (It is important for us to note that Mr Pallot told us that neither the Viscount nor Mr Keeble of Touche Ross has any
50 knowledge of other assets and no existing grounds for suspecting that there are other assets. That conclusion is reached on the basis of the 1992 and 1994 reports).

5 Against that argument, of course, is the very real public
policy concern that the debtor should be given the chance to put
the *désastre* behind him and start again. That is why in social
and economic terms the Statute lays down a period of four years as
a general principle. There must be a time when any reasonable
10 person could see that it would be unacceptable to extend it.
Advocate Clyde-Smith spoke of a form of financial "enslavement",
regarded by the debtor as a form of additional punishment in a
case where apparently Mr Delaney gave himself up to the
authorities and co-operated with them and where he has been
punished by society in his six year prison sentence.

15 If he were to live in England then the fact that he would be
an undischarged bankrupt might very well hinder his possibility of
employment.

20 Mr Delaney plans to engage in manual work. A problem arises
because the Parole Board, which apparently obtains its
instructions from the Home Office, has held that it cannot allow
prisoners to be released on licence to serve their period of
supervision outside of England and Wales. This is a complex
matter of dispute which may not be decided for some time. As Mr
Delaney does not have that time he has apparently made a decision
25 to live, and hopefully work, in Poole in Dorset despite the fact
that his wife, family and home are in Jersey. Both Mr Delaney's
parents are dead, his wife is unemployed and lives in a flat
provided by her father, their children are of age.

30 Mr Clyde-Smith gave us a helpful line of cases where the
court used its discretionary power in England (and some of the old
cases were very much in point) to grant a refusal of the
discharge.

35 As was said in In Re Gaskell (1904) 2 KB 478 by Vaughan
Williams LJ at 482:

40 *"After all, the overriding intention of the Legislature in
all Bankruptcy Acts is that the debtor on giving up the
whole of his property shall be a free man again, able to
earn his livelihood, and having the ordinary inducements
to industry. Sometimes it is not right that the bankrupt
should be free immediately; he must pass through a period
of probation; and theoretically there may be cases in
45 which he ought not to be free at all, but primâ facie he
is to give up everything he has, and on doing that he is
to be made a free man. Now what is the position of the
bankrupt in this case? If I thought that there was any
tangible expectation of his receiving a larger income than
50 than which is necessary for his support in his position of
life as an officer in the army, then I should see the
propriety of suspending his discharge for a longer period,
or even of setting aside some portion of his income.*

The fact that the court had acted leniently or severely would not be a ground for interference. The Court of Appeal in Re Smith (1947) 1 All ER 769 has this at its headnote:

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"The protection of the public is a matter to be taken into account when the length of suspension of a bankrupt's discharge is being considered, but no rule can be laid down regarding the length of suspension which would be applicable to every class of case. The whole circumstances of the bankruptcy must be regarded to see whether the date to which the discharge of the bankrupt is ultimately remitted is excessively remote. The court will interfere only where it comes to the conclusion that the discretion has been unconscionably exercised in the matter of the length of suspension of discharge, but no court has jurisdiction to bind the discretion of its successors in bankruptcy jurisdiction in any way."

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Mr Clyde-Smith pointed out to us that the costs of the Viscount in the *désastre* were £57,000 and, as he put it, the Viscount would have a prior claim before the creditors even "got a whisper". There might well be contested claims in any event where two companies formerly owned by Mr Delaney, "Deltrust (CI) Ltd." and "Sentinel Management Limited", might have to be in dispute with the Viscount over realised funds. Certainly it seems difficult to see that in the scenario outlined to us, there is much potential for the unsecured creditors being paid a dividend of any material size.

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Crown Advocate Pallot was not swayed by the powerful argument of his opponent. He agreed that a *désastre* should only be extended for proper reasons. These could, for example, be where a debtor was in default of his obligations and duties under the law (we have seen examples of that in the post-statute decisions cited above), where there was need for the debtor to give continuing assistance in cases where, for example, there was litigation in train or indeed where the Viscount's investigations into the affairs of the debtor may not be complete. Crown Advocate Pallot put the matter somewhat more cogently. He told us that the Defendant is asking the Court for leave to tell the creditors to go away and lick their wounds.

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While Article 9 of the Law deals with after-acquired property of the debtor, there does not seem to be a dichotomy between that Article and Article 18(1)(f) because the Viscount gave us an assurance that he would never seize the pay cheque of Mr Delaney - that indeed would have been an example of the financial enslavement feared by Mr Clyde-Smith.

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The Viscount has a duty to his creditors. He does not wish to stymie Mr Delaney in the difficult task that he faces. Without

5 the existence of the *désastre* the Viscount would be washing his
hands of his obligations to recover whatever he legitimately can,
commensurate with considerations of common humanity towards Mr
Delaney. In the light of the Viscount's continuing opposition to
10 the granting of a discharge we are minded to view that the
continuing protection of the rights of the creditors defrauded by
Mr Delaney should have precedence over the privilege that Mr
Delaney claims. We remain satisfied that the purpose of the
Viscount's intransigence is not directly to punish Mr Delaney but
rather to perform a difficult pragmatic exercise and to wait and
see rather than not to wait at all. It will not be that Mr
Delaney will as Mr Clyde-Smith put it "labour year in and year out
under this disability".

15 We order that Mr Delaney's discharge be deferred and the
matter be referred back to the Court for reconsideration two years
after his release from prison. We make no conditions under
Article 41 as we have an assurance from the Viscount that the
object of his application is not to impose such financial
20 impediments on Mr Delaney that would prevent him from surviving in
his new place of work and abode.

Authorities

Bankruptcy (Désastre) (Jersey) Law 1990.

Insolvency Act 1986: ss 279-81.

The Insolvency Rules 1986: R.6.215-6.221.

4 Halsbury 4: para. 280.

Le Gros: "Traité du Droit Coûtumier de Jersey" (Jersey, 1943):
p.297.

Grier & Floyd: "Personal Insolvency - a Practical Guide" (London,
1987): pp.116-8.

re Barker exp. Constable (1890) 25 QBD 285.

R. -v- Green (1993) Cr.L.R. 46 C.A.

re Gaskell (1904) 2 KB 478 C.A.

Re Smith (1947) 1 All ER 769 C.A.

re Reed (1979) 2 All ER 22.

Re Tobias (1891) 1 QB 163.