INSOLVENCY IN JERSEY - ASPECTS OF DÉSASTRE

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Mr Chairman, Ladies and Gentlemen: May I immediately apologise for duplication of information supplied by Sir Philip; and doubly-so for any contradiction of it. To set my presentation in context, and to ensure that it is free-standing, it has not proved possible to avoid reference to the historical perspective

So, the classical form of insolvency proceeding in Jersey is *'désastre'*, a term first applied by the Royal Court as long ago as the late 1700s. At that time, deployment of the word *'désastre'* was simply a convenient, if appropriately expressive and colourful, way of referring to factual circumstances pertaining to financial disaster or crash.

However, as the law - that is to say the Island's common, or more correctly, customary, law - developed, the term became associated with insolvency as a legal concept. Indeed, by 1966, in the case of Re Overseas Insurance Brokers Ltd (1966) JJ547 the Royal Court was able to conclude that:

Whereas it may well have been the case that in its original form the désastre was invented to consolidate the claims of numerous creditors and to preserve equality between them, its scope has been enlarged over the years.

The Court in that case then went on to define *désastre,* as we have heard, as:

A declaration of bankruptcy, the effect of which is to deprive an insolvent debtor of the possession of the debtor's estate and to vest that possession in the Viscount, whose duty it is to get in and liquidate the estate for the benefit of the creditors who prove their claims.

Note that in *désastre* there was - and, I would add, is - a vesting of the debtor's property in the Viscount (or *Vicomte*), the Royal Court's Executive Officer. To skew the proposition a little: the Viscount was always, and remains, the only possible appointee as office-holder in any case of *désastre* – though, of course, he may, and does, appoint advisers, delegates and agents.

Also by 1966, Court Rules had come into operation to provide a more formal, consistent and transparent basis upon which the administration of *désastre* should proceed. Thus, the Royal Court (Désastres) (Jersey) Rules, 1964, prescribed arrangements such as for the filing, proving and adjudication of claims. These Rules were amended by the Royal Court (Désastres) (Amendment) (Jersey) Rules, 1966, before being subsumed into the Royal Court Rules, 1968.

These developments can be seen to be of particular significance in light of the fact that the origin of Jersey as an international finance centre can be traced back to 1961 - fifty years this year: in other words, they were co-extensive with the Island's gestation as a financial services centre.

Of course, provisions for the incorporation of limited liability companies did not exist in the late 1700s. In Jersey, the first Companies Law came into force in 1861 by virtue of the Loi sur les Sociétés à Responsabilité Limitée. However, the Loi of 1861 contained no specific provision for the winding-up of Jersey companies. Little wonder, then, that the Royal Court found a limited company duly to be amenable to a declaration *'en désastre'*. Hence, *'désastre'* has historically applied equally to individuals and to companies since the first corporate *désastres* were declared, records of which can be traced back certainly to 1900.

I have mentioned Jersey's development as an international finance centre: It is interesting to note, then, that in the case of Jobas Limited v Anglo Coins Limited, 1987-88 JLR 359, the Royal Court made observations in the context of a *désastre* of a company which had set out to invest in precious metals on behalf of external investors prior to defaulting on obligations to various of them:

The Court said this:

As Jersey's standing as an international finance centre grows and the volume of offshore business expands, it is necessary for the insolvency service to respond in a manner that will ensure the continued protection of the public interest.

The actual process of désastre administration in Jersey has itself become necessarily investigative, for its overriding objective is to safeguard the Island's reputation for commercial integrity and morality.

Whenever insolvency does occur, the insular authorities will act to examine the reasons underlying the failure, and to recover the assets for the benefit of those who are properly entitled to them.

The Anglo-Coins case pre-dated the passing of the Bankruptcy (*Désastre*) (Jersey) Law, 1990 by three and a half years and provides a good example of how the judges of the Royal Court have always been prepared to develop the common law up to the point where a threshold appears, beyond which lies the domain of the legislature. It should be noted here that the 1990 Law (henceforth to be referred to by me as the 'Désastre Law') does not codify the law of *désastre*, being specifically stated *to amend and extend* it. Accordingly, except to the extent that express provision is made in the Désastre Law, the existing common law of Jersey concerning declarations *en désastre* remains in force, as the Court of Appeal pointed out in Re Baltic Partners Limited (18 April, 1996, JU 75 CA). It might also be noted here that the *Désastre* Law repealed the mentioned Royal Court Rules of 1968 and facilitated the concurrent promulgation of the Bankruptcy (Désastre) (Jersey) Rules, 1991, since further amended and supplemented by Ministerial Orders, given the advent of Ministerial government in Jersey from 2005.

It is interesting that the Royal Court in the Anglo Coins case was cognisant of what it described as 'the expanding volume of offshore business' conducted in Jersey. Fortunately, it is beyond the scope of this presentation to attempt to define with precision what 'offshore' means, at least in the widest sense. But for present and practical purposes offshore business is taken to refer - as the IMF suggests - to situations where the bulk of financial transactions are initiated externally and where the majority of entities involved are controlled by non-residents. This has an obvious and major consequence in

the field of insolvency administration other than where one is dealing with an entirely domestic situation - namely, there will inevitably be cross-border and inter-jurisdictional, complications, challenges and issues to overcome. Hence, Jersey has long practical acquaintance with such; indeed, an experience that substantially pre-dates both the 1997 UNCITRAL Model Law on Cross Border Insolvency (further reference to which will be made later) and the EU Insolvency Regulation of 2000 (not itself applicable in the Island, of course).

However, for the moment I wish to turn, not entirely incongruously, to personal *désastre*. Why? Because, in the first case, as I have said, *désastre* refers to individuals, too, the Désastre Law being virtually an omnibus statute with debtor, creditor and public interest declarations all being available. Because, in the second case, the place of the individual in the international financial architecture is too easily overlooked in a world of mobile and globalised financial flows. Because, in the third case, the categorisation of personal insolvency is itself far from straight-forward. And because, in the fourth case, Jersey is topically re-evaluating the options for giving relief to individual over-indebtedness.

To take the third case first: What is meant by personal insolvency? Does the term refer to natural person insolvency? Or to sole trader insolvency? Or, where applicable, to student loan insolvency? Or to credit-card insolvency? Or to consumer insolvency? If so, as to the latter, is one justified in regarding consumer insolvency as applying specifically to the individual who is not engaged in business or commercial activity? To take the second case next, the identification of personal insolvency as a systemic risk in terms of internationalism's elusive quest for financial stability has perhaps only been brought into sharp relief by the ongoing global crisis. If Professor Rajak will permit a minor intrusion, take only the experience of the USA where 11 million borrowers, or 23% of households with a mortgage, were under-water as at 30 June, 2011 - this against a backcloth of $10 trillion of first-mortgage debt. $10 trillion: that's 10 thousand billions or 10 million millions. Nothing in one's personal experience can measure numbers so large so it is almost impossible to appreciate what such figures really mean. But here is an illustration to assist one: If one was to earn $50,000 per year, it would take one 20,000 years to earn a trillion dollars. And here's another: a stack of a trillion one-dollar bills would be 68,000 miles high.

Here, more questions are asked than answers provided but hopefully the place of individual over-indebtedness has been marked schematically - for the issues go directly to social stability: returning to the experience in the USA, mortgage foreclosures on residential properties are still running at up to 100,000 per month. (In related vein it is perhaps also interesting to note that UNCITRAL's mentioned Model Law on Cross Border Insolvency does not itself include a definition of 'debtor' and while consumers are not expressly excluded from its ambit nor does their situation seem to have been specifically addressed within it.)

Well, one can at least move on to acknowledge that while there is a divergence in the treatment of natural-person insolvency across the world, generally arising out of the goals of the regime in question and its definition of success, components providing for the effective administration of natural person insolvency include exclusion from execution in bankruptcy of exempted property and the availability of discharge. In Jersey, categories of exempted property always existed at common law and the administrative approach has conceivably been honed, or at least appropriately informed, having regard to the Convention safeguards imported by the Human Rights (Jersey) Law, 2000. (Interesting observations made by the Royal Court, on related practices of the Viscount, are to be found, incidentally, In the matter of the Representation of Mr Michael O'Brien, 2003 JLR 1.) As to discharge from bankruptcy, Article 40 of the Désastre Law provides that an individual debtor will normally obtain what amounts to a virtually automatic release from indebtedness at the expiration of four years from the date of the *désastre.* However, the Désastre Law permits variations on this theme, on grounds, and some indebtedness, such as that incurred by fraud, is not susceptible to discharge in any event.

A third aspect of an enlightened personal insolvency scheme appears to relate to the availability of a formal debt restructuring mechanism. Here it has to be acknowledged that Jersey possibly does not score so highly: there indeed may be scope for the Island to introduce a modern statutory facility, the ancient ancillary procedures such as *Remise (de biens)* and *Cession* having surely run their course in spite of demonstrable flexibility and self-evident longevity. I confirm that, despite the intervention of what amounts to a general election, the insular authorities are currently reviewing the position.

Certainly this apparent lacuna, if it is such – for it falls to be recalled, notwithstanding my earlier comments, that post-2008 the international banking community has itself been forced to renegotiate the repayment of tranches of non-performing and patently toxic debt – can be seen to present an opportunity for an enlarged cultural framework possibly to be developed: One in which the importance of credit and responsible credit management is seen by all stakeholders to be a necessary constituent of a healthy and vibrant economy; And one in which the governmental, judicial, public, private and voluntary sectors work together in a spirit of philosophical partnership supportive of shared values and objectives which pay due regard to considerations of cost-effectiveness and proportionality. Many of the contributory elements of such an approach are already actively in place in Jersey: Income Support; an Insolvency Payments Scheme; Mediation and Tribunal Services; on-line access to the law and to legal and Registry services; Legal Aid; CAB (that is, the Citizens Advice Bureau).

I should add, however, that the World Bank is in the course of undertaking a study of personal insolvency regimes (also their operation and related dynamics, causes and effects) throughout the global village, in light of the ongoing recessionary pressures. Jersey has been invited to participate in this study and one therefore anticipates emerging from this process substantially better informed.

I must not overlook to make at least passing reference to what has become known as 'Social Désastre'. This occurs where the Royal Court affords a self-declarant the relief of désastre when the prospect of asset realisation is minimal. The concept has its origin in the matter of the désastre of Mr C S Russell (5th August 1994, unreported). Both CAB, consistently, and the Jersey Law Commission, more recently (in a Report of March 2011), have taken issue with this development on the ground that the Court is here exercising a discretion on the basis of a legal fiction, namely that the debtor has realisable property (a pre-requisite for a désastre). However, In the applications of Roach and Lamy (2005) JLR 412 – two applications heard together - the Court simply steered a course, it seems to me, between applications based on good and not-so-good antecedents, respectively. This appears to me to have been a perfectly proper exercise of discretion on the Court's part: the fact that it chose, in Mr Roach's case to grant a désastre on the basis of a possible, if remote, expectation of future income seems to me

to be an incidental rather than a fiction. In short, the Royal Court undertook a necessary and difficult balancing exercise in the knowledge that, on the one hand, relief should not be denied to debtors who are too poor to be declared bankrupt while, on the other, persons should not be admitted to bankruptcy rather than pay their debts. But Advocate Marcus Pallot must be left to tell us more and possibly to propound a different approach, as does the Jersey Law Commission. In any event, as I said, the Insular authorities are reviewing the position, though I apprehend that a review of the statistics, at least when viewed in isolation, possibly belies the need: since 2005 there have only been four applications for the grant of a Social Désastre, each of which was duly received.

I am almost out of time and have barely been able to scratch the surface of my topic - of today's theme. Hopefully, however, I have time to make reference to two additional issues.

First, reverting to the investigatory nature of corporate désastre as identified in the Anglo Coins case I should clarify that the States of Jersey established and funded a specialist section to administer and manage désastres in support of the Viscount in 1974. Further, the States make available to the Viscount additional funding to initiate investigatory activity in appropriate cases, such as where investors' interests fall to be protected.

Second, referring again to the topic of cross-border insolvency, a proposition seems to be in circulation following the opinion of the Privy Council in Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 21 ('the Cambridge Gas case') and that of the English Court of Appeal in Rubin and Lan v Eurofinace Sa and others [2010] ECWA Civ 895 (a decision itself now under appeal). The premiss arising, broadly put, seems to be, largely following Lord Hoffman's – incidentally, once a most distinguished judge of the Jersey Court of Appeal - analysis, in the Cambridge Gas case, to the effect that insolvency judgments are of a species distinct from both *judgments in rem* and *judgments in personam*, such that the former, issuing in Country A, will become directly enforceable in an assisting jurisdiction, Country B, on the basis of universalism and comity. This does seem to be an over-simpfication of the position if I have understood the argument correctly. A correct and exemplary analysis of the actual position, and practical outcome, seems to me to be formulated in the judgment of Heath J in the New Zealand

case of Williams v Simpson, 17 September, 2010 (CIV 2010-5419-1174). In short, an assisting court can be expected to reserve to itself a jurisdiction protective of justice and public policy within the assisting jurisdiction. This outcome is entirely four-square with the framing of the reciprocal assistance provisions contained in Article 49 of the Désastre Law which confer upon the Royal Court a wide and discretionary ancillary jurisdiction which may be informed in its exercise by the terms of the UNCITRAL Model Law on Cross Border Insolvency but constrained by the rules of private international Law.

Finally, I would leave you with a snippet. This room is full of intelligent and learned people: Some here will even know that the term 'global village' with which we are all today so familiar and to which I earlier referred, was coined by the Canadian educationist Marshall McLuhan in the early 1960s as a way to describe the effect of radio and television in bringing us in faster and more proximate contact with each other than ever before. But fewer are likely to know that Marshall McLuhan's use of the term was arguably inspired by Pierre Teilhard de Chardin a Jesuit priest, scholar and philosopher who foresaw a stage of evolution characterised by a complex membrane of information enveloping the globe. Teilhard de Chardin lived and wrote in Jersey at various times between 1900 and 1910. There is the microcosm; there is the macrocosm: but Jersey functioning – now essentially, though not exclusively - as the clarion of a mature financial services centre must continue to stand between them, as did Teilhard de Chardin, necessarily and unremittingly aware of the inter-dependency of the one with the other.

Mr Chairman, Ladies and Gentlemen, thank you for your valuable time and attention.

MW – 14:10:2011