ABSTRACT OF CONFERENCE PAPER

LAW COMMISSION PROJECTS: 1998 DEGREVEMENT CONSULTATION PAPER AND 2010 SOCIAL DESASTRE WORKING GROUP

1998 DEGREVEMENT CONSULTATION PAPER

The somewhat startling thing about the consultation and reporting exercise undertaken by the learned members of the Law Commission in 1998 is not that, having navigated their way through the turbulent waters of this particular customary process, they adroitly managed to reach a clear and unequivocal recommendation, but that since that time and that clear proposal for a way forwards, nothing has happened and the process remains unaltered. From my perspective, I am a little relieved. I do not, entirely, agree with the Law Commission's proposals, but I do agree that the process is inequitable, ripe for abuse and needs to be changed. To substantiate and elaborate on these comments, I will:

a. Look at the history;
b. Consider other jurisdictions;
c. Put forward a couple of case studies;
d. Consider the law on security and enforcement on moveables; and
e. Suggest an alternative way forwards.

History

I will speak to the history of dégrèvement:

i) The Law Commission Consultation Paper sets out a most informative history of the matter;
ii) the process of dégrèvement was designed so as to move away from décret to a process where one corps de biens fonds could be separately disencumbered.
iii) No other existing process permits a creditor to enforce on a specific property
iv) The abolition of cession, would be a step too far. It would leave désastre as the only remedy for a creditor.
    a. Désastre would involve the taking of the entirety of the debtor's property,
    b. it cannot be used as a means to enforce against only a part.
    c. it involves the Viscount in a prescribed process where he can take 12 ½% as a levy, require an indemnity from the petitioning creditor and takes the process away, entirely, from the creditor.

Other Jurisdictions

Guernsey:

i) saisie procedure different with similarities;
ii) Creditors take the property in reverse date order; and
iii) no requirement to account to the debtor in the event of surplus.

England & Wales:

i) There are a number of enforcement routes
ii) foreclosure is included: chargeholder can take possession and retain any surplus
iii) English courts will be generally slow to make a foreclosure order if alternative routes appear available.
iv) LPA provides for the appointment of a receiver with rights to take the property and get it sold.
v) Receiver's obligations are to pay the costs of sale, and to discharge the secured creditors in order of preference.
vi) Surplus returned to the debtor.

Case Studies

I will speak to case studies based on actual situations concerning the manner and operation of the process of dégrèvement and its potential for abuse.

I will compare and contrast dégrèvement and désastre and highlight the pitfalls for both lender and borrower alike

Moveables

I will look for guidance at the recently reviewed intangible moveables regime and speak ot the exercise of a power of sale under prescribed circumstances.

Way Forwards

I do not advocate the abolition of cession so that only désastre remains. It would negate the ability of a creditor to enforce against specific property. My view is that such a process is essential. Nor do I advocate retention of dégrèvement in its current form. I prefer a version of a receiver. I do not see why the Court, Greffier or Viscount has to be involved. The debtor should have the right to go to court and I consider would be able to invoke inherent jurisdiction of the court even if not specifically provided for in any amending law. I prefer the example of a receiver, adapted to suit the needs of jersey and ot fit with our immoveable property laws.

2010 SOCIAL DESASTRE WORKING GROUP

I will focus on:

i) the suggestion by the Commission that the purpose of a désastre is to protect creditors and will speak to the contrary view that it exists for creditors and debtors alike;
ii) that there is a specified requirement that a debtor has realisable assets and where that has come from;
iii) that the process of désastre is itself an evolutionary process; and
iv) the need for reform to match a personal bankruptcy process to current social needs, trends and expectations.

I will draw from customary writings, to include from Le Gros[1] in his Chapters both on désastre, but also on cession and highlight my concern that the proposed abolition of cession as advocated in the dégrèvement consultation may take away the remaining legal, if in practice only theoretical avenue for the truly penniless.

I mention cession particularly because it establishes that Jersey, as a jurisdiction, has recognised the need for a debtor to be able to take his own action. Indeed, the process of désastre before the 1991 law also recognised the ability of a debtor to declare himself en désastre. Le Gros records[2] that "un débiteur a le droit de déclarer, lui-meme, ou par son fondé de pouvoir, ses biens en désastre". The Bankruptcy (Désastre)(Jersey) Law 1991 at Article 3(1)(b) preserves this position. I am in slight disagreement with the learned Commissioners that a désastre is a process "for the protection of the creditors"[3]. I submit that it is a process by which a debtor is equally entitled, as matter of law, to the protection afforded him by the process and can equally be said to be a process which has as one of its aims to relieve a debtor from otherwise enduring debt.

I propose that if a debtor has exhausted all of his assets, that should not be a bar:

i) fraud should be investigated and reports made appropriately by the Viscount to the Attorney General;
ii) unlawful distribution of assets by way of preference and/or transaction at an undervalue should be investigated: such transactions are susceptible to being overturned.
iii) if a person has no means by which to pay their debts then there should be a process by which they are relieved of that debt by surrendering themselves to a legal process which requires them, I suggest on pain of committing criminal offences, to co-operate fully in an investigation which satisfies itself that there are no assets, or such as there are, subject to statutory restrictions on the bare minimum such as workman's tools etc, get realised.
iv) The Viscount (or equivalent monitoring officer) should have strict powers: including the ability to place the individual under a lengthy period of control;
v) the process must not be one which appeals nor one which encourages profligate spending.

[1] Traite du Droit Countumier de L'ile de Jersey
[2] Traite du Droit Countumier de L'ile de Jersey at P 77
[3] The Jersey Law Commission Report "Social Desastre" at Para 5.5

I will look particularly at the requirement first set out in legislative form in the Bankruptcy (Désastre)(Jersey) Rules 1991 for there to be realisable assets

It appears the argument for having this as a requirement is set out in the oft quoted section from Re Désastre Overseas Insurance Brokers Limited (1966) JJ 547 at P552 where it is stated that the Viscount's duty is to:

> "get in and liquidate that estate for the benefit of the creditors who prove their claims"

and subsequently in Jobas Limited v Anglo Coins Limited 1987-88 JLR 359 at P 366,

> "…and to recover the assets for the benefit of those who are properly entitled to them"

However, in addition to the above, it is also stated in Overseas Insurance Brokers Limited at P547 that:

> "The only purpose for which a désastre may legitimately be declared is to establish a status of equality among creditors"

This is also clear from Le Gros at P 75:

> "Le désastre est une procédure qui a pour but d'établir l'égalite entre les créanciers d'un débiteur insolvable"

which sentence does go on to say:

> "dans la distribution de ses biens mobiliers après paiement des préférences accordées"

What does realisable assets mean? How much takes you from "social" desaste into mainstream désastre territory? Is this really a distinction without a difference since all désastre applications are discretionary in any event.

Why should an asset holding person with very significant debts appear to qualify more easily for désastre when a poor person with no assets but much small debts cannot, or cannot without dificulty? Why should particular attention be paid to the very poor? Why should they not have a means by which to get protection?

Given current restrictions on lending the concern which could have been expressed, say 3 years ago, that money was cheap and easy to borrow, must be severely mitigated.

I will note that in England & Wales, New Zealand, Australia, Canada and France, no similar requirement to have realisable assets exists although investigation and the establishment of some form of inquisitive commission is common.

In conclusion, I advocate a significant change, but will accept that, instead, a small change to the Rules can have a potentially significant effect and one which is entirely in line with the spirit of the law and what a modern and sophisticated society ought to expect.