

JERSEY / JUDGMENT

# Roach and Lamy v Viscount

## [2005] JRC 149 (25 October 2005)

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### judgment

deputy bailiff: 1. On 4 th July 2005 the Court sat to hear applications by Mr Roach and Mrs Lamy respectively to declare themselves en désastre. The Court granted the application of Mr Roach but refused that of Mrs Lamy and said that it would give its reasons later because the applications raised a point of principle as to whether the Court could or should grant a declaration of désastre where the applicant had no immediately realisable assets. We now give those reasons.

Jurisdiction 2. We will refer to the individual positions of the applicants in more detail shortly but they are both insolvent in the sense that they cannot pay their debts as they fall due. Each has an income but neither has any realisable assets in the sense of assets which could be realised immediately for the benefit of the creditors. Does the Court have jurisdiction to grant a declaration of désastre in such circumstances? 3. A declaration of désastre was originally a creature of the customary law and we were referred to *Re Désastre Overseas Insurance Brokers Limited* (1996) (JJ 457) where the Court said at 552:- "A désastre is a declaration of bankruptcy, the effect of which is to deprive an insolvent debtor of the possession of his movable estate and to vest that possession in Her Majesty's Viscount whose duty it is to get in and liquidate that estate for the benefit of the creditors who prove their claims." 4. The matter was put on a statutory footing in the Bankruptcy (Désastre) (Jersey) Law 1990 ("the 1990 Law"). This built on the customary law to a substantial extent but extended it in certain respects. Thus a désastre could now cover immovable property; after acquired property could be brought into the désastre; and a debtor was to be freed from all his debts at the end of the désastre, which would normally be a period of four years. 5. There is no doubt that the general expectation both under customary law and under the 1990 Law was that there would be property held by the debtor at the time of the declaration which could be realised by the Viscount and distributed pro-rata amongst his creditors. Thus:- (i) In Article 1 of the 1990 Law 'declaration' is defined as an Act 'declaring the property of a person to be en désastre'. (ii) The effect of a declaration is that the property of the debtor vests in the Viscount (Article 8) . (iii) Under Rule 2 of the Bankruptcy (Désastre) Rules 1991 , an application for a declaration of désastre (whether made by a creditor or the debtor himself) must be accompanied by an affidavit which, inter alia , states that the debtor is insolvent but has realisable assets. 6. However, in the case of *Russell* (5 th August 1994) the Court granted a declaration even though the applicant had negligible assets. The position is conveniently

summarised in Dessain & Wilkins - Jersey Insolvency Law in Practice (Second Edition) at page 46:- "Note, though, that in the case of the *désastre* of Mr C S Russell (5 th August 1994), unreported, the Royal Court effectively introduced a category of declaration which may conveniently be referred to as social *désastre*. Here, following consideration of a report requested from the Viscount, the Court permitted a debtor with negligible assets to declare himself *en désastre* so as to avail himself of the protection afforded by the *Désastre* Law. In this case the Court seems to have taken the view that access to the bankruptcy system should not be denied to debtors in *forma pauperis*: it should not be possible for one to be too poor to be declared bankrupt. (Legal Aid is available to facilitate the making of an application by an impoverished debtor; such a debtor may also obtain exemption from payment of the attendant judicial fees.) In Mr Russell's case, the Court felt able to grant the debtor access to the bankruptcy system by adopting a wide interpretation of the term "realisable assets"." 7. We were informed that, since 1994, the Court has on other occasions granted a *désastre* in similar circumstances. However, so far as can be ascertained, in none of the cases (including Russell ) was any reasoned judgment given and it is not thought that there was any argument as to whether the Court had jurisdiction to grant a declaration. Accordingly, having been notified of the present two applications, the Viscount has invited the Court to consider whether those cases were correctly decided. We have therefore had the advantage of hearing submissions from Advocate Benest on behalf of the Viscount as well as from counsel for both applicants. 8. In essence the applicants submit that, if a person with some assets, however modest as compared with his debts, can be declared *en désastre* (and therefore benefit from the provision freeing him of his debts upon completion of the *désastre*), it seems highly illogical and unfair that a person who is worse off (because he has the same debts but no assets) should be unable to be declared *en désastre* and should therefore be unable ever to take advantage of the provision freeing him from his debts. In elaboration of the point made by Dessain & Wilkins , they submitted that it should not be possible for one to be too poor to be declared bankrupt with the consequence that one could never be free of one's debts. 9. Mr Benest, on behalf of the Viscount, did not seek to argue that the Court did not have jurisdiction to grant a *désastre* in such circumstances but urged that the Court should only do so in exceptional circumstances. 10. Notwithstanding that the Viscount did not take the point, we have considered first whether there is jurisdiction in the Court to grant a *désastre* notwithstanding the absence of immediately realisable assets. We find that there is jurisdiction to do so for the following reasons:- (i) There is no specific requirement in the 1990 Law itself that the applicant should have property which is capable of realisation at the time of the application. (ii) The declaration is, of course, made of the property of the debtor but 'property' is extremely widely defined in Article 1 of the 1990 Law and includes any future interest arising out of or incident to property. (iii) There is a specific provision (Article 9) allowing property acquired after the declaration but during the *désastre* to vest in the Viscount. Thus future income can be vested in the Viscount and become available for the debtor's creditors. There would seem to be no logical principle which enables a *désastre* to be declared where a debtor has a small amount of capital together with a substantial earning capacity but prohibits one being granted if the debtor merely has the substantial earning capacity. (iv) We have of course considered the fact that Rule 2 of the *Désastre* Rules requires an affidavit to the effect that

the debtor has realisable assets. In this respect we would comments as follows:- (a) The wording of Rule 12/3 of the Royal Court Rules 1982 (which governed applications for a *désastre* under customary law) was, in this respect, in identical terms in that it required the debtor to have realisable assets. Despite this *Tomes*, DB, a judge of great familiarity with the customary law of Jersey, said in *Re Royco Investment Company Limited* (1 st June 1989):- "Therefore, we should attempt to satisfy ourselves on three matters: (1) the 'locus standi' of the declarant; (2) that the debtor is insolvent; and (3) that the debtor has realisable assets; although we accept as Mr Dessain has said that we have a wide discretion, and could in an appropriate case accept a declaration, even if not fully satisfied as to insolvency and realisable assets." (b) In any event, given the framework of the 1990 Law, which allows for after acquired property to be made available for creditors, we are willing to treat a future income (whether from earning capacity or otherwise) as a realisable asset. (v) As already mentioned, there seems no reason in principle for denying a person with no capital assets but a likely future income the possibility of freeing himself of his debts but allowing such a possibility to a similar debtor who merely happens to have some existing assets, even if of a modest amount. 11. However, it is well established that the Court has a discretion as to whether or not to grant a declaration of *désastre* even if the necessary criteria of insolvency and assets are met (see Article 6(1) of the 1990 Law). Although we have found that the Court technically has jurisdiction to make a declaration where there are no current assets but merely a future expectation of income, we think that only exceptionally should the Court exercise its discretion to grant a declaration in such circumstances. Our reasons for so concluding are as follows:- (i) The whole tenor of the 1990 Law and the customary law has been that the applicant should have current assets which can be realised with a view to being shared out equally between his creditors. The purpose of a *désastre* is to create equality amongst creditors from the realisation of the debtor's property; the purpose of a *désastre* is not to enable the debtor to avoid paying creditors although this may be a consequence. (ii) Whilst we have emphasised above the importance of a debtor being able to rehabilitate himself and not face a lifetime of indebtedness, this has to be balanced against the interests of creditors, the normal expectation being that a person should pay the debts which he has incurred. In a conventional *désastre*, although the debtor benefits by being freed of his debts at the conclusion of the *désastre*, the creditors also benefit in that there are assets to be realised and shared equally amongst the creditors. If there are no assets (other than a modest future income) the creditors will not benefit in any way from a *désastre*. On the contrary they will be prejudiced in that, if there had been no *désastre*, they would have been able to continue to recover out of future income for an indefinite period, whereas, where there is a *désastre*, they will be unable to do so after its conclusion. (iii) The administration of a *désastre* by the Viscount incurs time and expense. In a conventional *désastre* the Viscount is recompensed out of the debtor's assets. Alternatively, if there are limited assets but the creditor is pressing for a *désastre*, the creditor indemnifies the Viscount in respect of his costs. In a social *désastre* of the type which we are considering here, there is no prospect of the Viscount recovering any costs. This also militates against frequent use of a social *désastre*. It would not be right for the Court to grant a substantial number of *désastres* which would lead to a large volume of work for the Viscount when there is no way of recovering the costs involved. Indeed there might be real difficulties in the Viscount

being able to service such *désastres* if the Court were to grant them frequently. Application to the facts 12. Mr Roach is 64. He is divorced with four adult children. In the early 1990's he was made redundant and remained unemployed for two years. His family were young at the time and he incurred debts seeking to maintain his family. From 1996 onwards he began to reduce his debts. He was employed by Normans Limited in 1998 in the window installation department and rose eventually to the position of assistant manager. Throughout his employment with Normans he kept up an agreed repayment programme in respect of his debts. It had been his intention to continue working at Normans until he was 68 by which time he would have paid off his debts completely. He then intended to retire to live modestly on his state pension. 13. Unfortunately, in January 2004 he suffered a heart attack. There were subsequent complications and he is now medically unfit to work. His employment with Normans was therefore terminated at the end of February 2005 and he is unfit to obtain alternative employment. He has therefore been unable to keep up the repayment schedule. His debts comprise of personal and bank loans and credit card debt together with income tax arrears. His total liability is just over £21,000. He has no capital assets and his income consists of incapacity benefit of £145.53 per week. When he attains 65 he will receive a combined Jersey and UK old age pension of £137.14 per week. It is clear that he will never be able to repay his debts. 14. The Court is satisfied that Mr Roach has behaved very responsibly. He has made every effort to pay off the debts over a considerable period and those debts originally arose out of an unfortunate event, namely redundancy. He had even planned to work beyond the normal retiring age in order to clear his debts completely. He has not spent money on luxuries and it is only the unexpected blow of becoming medically unfit to work which has led to his being unable to keep up his repayments and ultimately clear his debts. The matter has been outside his control. 15. The Viscount supports his application and in the circumstances we are in no doubt that this is one those exceptional cases where the Court should exercise its discretion in favour of Mr Roach to allow him to declare himself *en désastre*. 16. Mrs Lamy is 53. She is single and has no dependants. She was in an unfortunate relationship with a partner from 1993 to 2003. We do not need to go into detail about the nature of that relationship but it was clearly a very stressful and difficult time. Her financial problems began when she bought a car which was then vandalised by her partner's children. She sold it shortly afterwards but the sale price was insufficient to pay off the loan which she had taken out in order to buy the car. Her stress led her to overspend on credit cards. In particular she accepts that she tried foolishly to buy her lover's affection and used her credit card to take him on holidays etc. Following the end of the relationship she became depressed and continued to spend more on her credit cards than she could afford, thereby increasing her debt. 17. She has a responsible and important job which brings in £1,764 per month net of social security, pension contribution and union subscription. Her debts total just under £37,000 and comprise loans from her bank and finance companies, credit card debts and income tax arrears. In 2004 she took out two loans which were intended to consolidate her debts by clearing the then credit cards bills, overdraft etc. She accepts that, in relation to one of these loans (from Blackhorse Finance) she did not use the funds from the loan for the agreed purpose of paying off her credit card bill. Furthermore she has continued to incur credit card debts since then. In both 2003 and 2004 she went on holiday to Madeira and financed this through her credit card, thereby increasing her debts yet further. She too has no capital

assets. 18. The Viscount has not felt able to support Mrs Lamy's application and in our judgment this is not one of those cases where the Court should exercise its discretion in her favour. We have every sympathy for her in respect of the unfortunate relationship which she entered into but her conduct since then has been somewhat unfortunate. She has not shown the appropriate sense of responsibility in connection with her debts. She has obtained further loans to pay off existing debt but has used the funds for different purposes; she has gone on holidays abroad rather than concentrate on trying to reduce her debt; and she has not generally shown any real acknowledgement of the need to make determined efforts to try and reduce her debts. Her approach is to be contrasted with that shown by Mr Roach. 19. The sole purpose of a *désastre* in her case would be to enable her to be free of her debts after 4 years. The *désastre* procedure is not a mechanism whereby someone who has simply spent more than they have earned can automatically break free of that debt after 4 years. We do not think that she has shown the appropriate attitude towards her indebtedness and the need to try and reduce it through regular payments. 20. For these reasons the Court granted a declaration in respect of Mr Roach but refused the application of Mrs Lamy. Authorities *Re Désastre Overseas Insurance Brokers Limited* (1996) (JJ 457). Bankruptcy (*Désastre*) (Jersey) Law 1990. Russel I (5 th August 1994). Dessain & Wilkins - Jersey Insolvency Law in Practice (Second Edition) at page 46. Royal Court Rules 1982. *Re Royco Investment Company Limited* (1 st June 1989). Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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