

JERSEY / JUDGMENT

SO Holding v CDS3 and HM Viscount [2011] JCA 189A (29 September 2011)

[2011] JCA 189A

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Court of Appeal September 2011 Before : The Hon. Michael J. Beloff, Q. C., President; Dame Heather Steel, DBE, and; Michael S. Jones, Q. C. Between SO Holding AG (formerly known as "SO Finance AG", formerly known as "Horizon21 Private Equity Holding AG") Appellant And CDS3 Limited (formerly known as "Capital Dynamics Services III Limited") First Respondent And HM Viscount Second Respondent Application by SO Holding AG for a declaration in pursuance of Article 3 of the Bankruptcy (Désastre)(Jersey) Law 1990. Advocate A. D. Hoy for the Appellant. HM Viscount.

JUDGMENT

Jones ja:

Introduction

1. The appellant is a private limited company incorporated in Switzerland. By sale and purchase agreement, dated 1 June and 5 July 2007 ("the Agreement"), the appellant sold its holding of 310,000 registered shares in a company called Capital Dynamics Holding AG ("CDH") to Capital Dynamics Employee Participation Limited ("CDE"), for the sum of US\$25 million, to be paid in two equal instalments. Mr Thomas Kubr, the owner of a majority of the shares in CDH and having an address in Switzerland, was a party to the agreement, in terms of which he undertook to enter into a share pledge and pledge holder agreement, providing for 310,000 of his CDH shares to be pledged to the appellant as security for payment of the second instalment. The pledge was duly given on 30 November 2007, and the pledged shares were deposited with a pledge holder in Switzerland. On the same date, the appellant, CDE, Mr Kubr and Capital Dynamics Services III Limited ("the debtor company") entered into an Amendment Agreement, whereby it was agreed that all of CDE's rights and obligations under the Agreement would be assumed by the debtor company. The debtor company is a private limited company, incorporated in Jersey under the Companies (Jersey) Law 1991 . By 30 November 2007, as a result of a restructuring exercise which had been carried out by CDH, the shares to be sold and pledged under the Agreement numbered 3,100,000. The Agreement, the Amendment Agreement, and the share pledge and pledge holder agreement provide that they are governed by and are to be construed in accordance with Swiss law, and

that certain Swiss courts have exclusive jurisdiction in the determination of disputes. 2. Payment of the first instalment was duly made. Payment of the second was due by 30 June 2010. By letter, dated 23 June 2010, the debtor company, now called CDS 3 Limited, advised the appellant that it was not currently in a position to make payment, and could not give any indication of whether or when it would be able to pay. Proceedings in the court below 3. By letter of 10 March 2011, addressed to the Viscount, the appellant applied to have the property of the debtor company declared en désastre . The application was made by way of a demande , an affidavit and a statement of the debtor company's assets and liabilities, so far as known to the appellant, together with supporting documentation, all as required by the provisions of the Bankruptcy (Désastre) Rules 2006 . Thereafter, as a result of an exchange of correspondence between the appellant's solicitors on the one hand and the Viscount's department and its solicitors on the other, the appellant undertook:- (i) To give notice of, and formally convene the debtor company to the hearing of the appellant's application, so that it could be held inter partes ; (ii) To provide a full indemnity for the Viscount's fees and disbursements; and (iii) To place the Viscount in sufficient funds to enable him to initiate all procedures and activities consequent upon a declaration. 4. On 3 June 2011, the Royal Court heard the application, unopposed, the debtor company having chosen not to appear or be represented. At the conclusion of the hearing, the application was refused. The appellant appealed and, on 28 September 2011, the matter came before this court. The following day, we allowed the appeal. Our reasons for so doing are now explained. The désastre jurisdiction 5. The source of the Royal Court's power to make a declaration en désastre is to be found in the Bankruptcy (Désastre) (Jersey) Law 1990 . Article 6(1) provides as follows:- "The Court, after considering an application and the affidavit required by paragraph 3 of Article 3 to accompany it, may make a declaration." 6. The use of the word "may" suggests that, after considering the application, the court has a discretion whether or not to grant a declaration. The court below construed the Article in that way, and the appellant does not challenge the Royal Court's interpretation. There is, however, a difference of emphasis between them, to which I shall return. 7. Read in isolation, the terms of Article 6(1) might be thought to imply that the determination of an application for a declaration is a two-stage process

- (i) consideration of the application and the affidavit and (ii) exercise of discretion. Reading the relevant provisions of the Law as a whole, however, it is clear that there are three stages. After consideration of the prescribed material, the court may not move on to determine how its discretion is to be exercised, unless and until it is satisfied on that material that two conditions precedent are met. These are:- (i) that the person whose property is the object of the application is insolvent (and is, therefore, a "debtor" as defined by Article 1); and (ii) that the creditor has a valid liquidated claim against the debtor. (Article 3(1)) 8. The court below, correctly in my judgment, and for the reasons which it gives, expresses the view that "the 1990 Law is not a stand-alone codified statement of bankruptcy law in Jersey. The law amends and extends the existing law, and, subject to anything which is contained in the Law, the existing law continues in force". In the full judgment of this court in *In re Baltic*

Partners Ltd , which is reported in note form at [1996] JLR N 1C, Southwell JA, with whom Collins and Nutting JJA agreed, made the following observation:- "At common law the preconditions for such a declaration were that (1) the creditor had a valid liquidated claim against the debtor; (2) the debtor to the best of the creditor's knowledge and belief was insolvent, but had realisable assets, and (3) the creditor verified these matters by affidavit ... Article 3 of the 1990 Law provides (inter alia) that an application for a declaration may be made by a creditor of the debtor with a claim against the debtor of not less than such liquidated sum as shall be prescribed. The creditor's claim will usually have been established by a judgment of a competent court, often a summary

judgment.

A judgment is not a precondition. But if the creditor does not have a judgment in his favour, there must nevertheless be a liquidated sum undoubtedly due and payable by the debtor. The indebtedness must be certain, and not the subject of genuine dispute and arguable defence, set off or counterclaim. The indebtedness must be such as could form the basis of an immediate summary judgment." 9. I reproduce that passage in Southwell JA's judgment, not because I believe that it is necessary to have recourse to the common law (rather than the statute) in order to identify what a creditor must establish at the second stage, but because it demonstrates that the statutory scheme is firmly rooted in the common law. 10. If the court is not satisfied that the person in respect of whose property the declaration is sought is insolvent or that the creditor has a valid liquidated claim against that person, the court has no jurisdiction to make the declaration. In these circumstances, no question as to the exercise of a discretion will arise. On that analysis, I agree with the view expressed by Birt, Deputy Bailiff in Bridgen and Ports Trading Limited [2005] JRC 073, [2005] JLR N 21, in the following terms:- "It is clear that, even where the Court is satisfied that the applicant is undoubtedly a creditor and that the debtor is insolvent, there is a discretion in the Court as to whether to grant a declaration of désastre." (Paragraph 26) 11. The court below held that the circumstances of this case were such that it had jurisdiction to make a declaration as sought and that it had a discretion as to whether or not to do so. At that point, however, in my opinion the Royal Court fell into error in two respects. First, it held that, in a case such as this, where the applicant is the only known creditor, the court should make a declaration only if there is good reason to do so or if to do otherwise would cause an injustice to the applicant. (Draft judgment, paragraphs 22 and 23) Second, in determining how to exercise its discretion, it took into account the burden of work that the Viscount might have to shoulder if the declaration were made. (Draft judgment paragraph 25) The first was, in my view, an error of law, and the second involved errors of principle and fact. To explain my reasons for so concluding, it is necessary to consider the historical context in which the désastre jurisdiction sits. Development of the law of désastre 12. In *Re Overseas Insurance Brokers Ltd*.

(1966) JJ 547 *Le Masurier*, Bailiff said this:- "It would appear that the désastre is a creation of the common law of this Island and that the word as originally used was not a term of art but in this context meant a 'désastre financier' or financial crash and it was only as the law developed that it became associated with insolvency as a legal concept." (Page 549) 13. The

Bailiff defined the scope of a *désastre*, as developed up to 1966, in these terms:- "A *désastre* is a declaration of bankruptcy, the effect of which is to deprive an insolvent debtor of the possession of his moveable estate [but see paragraph below] and to vest that possession in Her Majesty's Viscount whose duty is to get in and liquidate that estate for the benefit of the creditors who prove their claims." (Page 552) 14. In its 1998 Consultation Paper on *dégrévement*, the Jersey Law Commission describes the *désastre* jurisdiction as having developed to meet changing social and economic conditions. Prior to its introduction, a creditor was at liberty to obtain an Act of Court authorising the sale of the debtor's moveables, the proceeds of which would be applied to the satisfaction of the debt owed to that creditor. If there were several creditors and not enough assets to satisfy them all, the first creditor to effect distraints would gain an advantage over the others. In a small business community, at a time when an individual debtor was likely to have relatively few creditors, all of whom would probably be aware of his deteriorating financial position, that was not regarded as a serious problem. The situation changed, we are told, with the growth of commerce in the 18th century. Not only might one trader have a great number of creditors, but trading reverses could cause a business to fail within a very short timescale. In these circumstances, the advantage that one creditor might gain over others by moving quickly was no longer regarded as tolerable. To address the problem, a procedural solution was developed. If satisfied that a debtor's affairs were in a state of collapse (*en désastre*), the court would hear all actions against him together, thus creating equality among creditors. This hearing came to be known as the *passation des causes*. Thereafter, the Viscount was responsible for sequestrating the debtor's goods and selling them for the benefit of the creditors. 15. The *désastre* procedure was codified in 1964 by the Royal Court ("*Désastres*") (Jersey) Rules of that year ("the 1964 Rules"). At that time, the declaration *en désastre* was made by the creditor or the debtor. The court's function was to receive and to confirm the declaration. (See, e.g. *In re the désastre of Barker* 6 Sep 1984 [1991] JLR N 2A, per Tomes, Deputy Bailiff) The 1964 Rules brought a significant change to the *désastre* process. The *passation des causes*, described by the Law Commission as "originally the main purpose of the procedure", was expressly abolished. (Rule 2) When the goods of a debtor were declared *en désastre*, the Rules required the Viscount to publish a notice in the press, giving every creditor a specified period of time within which to file a statement of claim. Provision was made for the claims to be investigated and adjudicated upon by the Viscount, with a right of appeal to the court. The 1964 Rules did not prescribe the form or content of the application. Once the procedure was in the hands of the Viscount, however, he might require creditors to produce such documents as may be necessary to substantiate his claim and/or an affidavit of proof of debt. (Rule 4(1)) Rule 4(2) provided that such affidavit "may be sworn before any person authorised to take affidavits in the country where it is made". It was clearly envisaged that there may be foreign creditors who would wish to enter the process. 16. The 1964 Rules were amended by the provisions of the Royal Court ("*Désastres*") (Amendment) (Jersey) Rules 1966 ("the 1966 Rules"). Significantly, a new Rule was inserted in the following terms:- "1A.-(1) The Court may refuse to receive the declaration '*en désastre*' of the goods

of a debtor-

- (a) where the declaration is made by the creditor, unless it stated that he has a claim against the debtor and that to the best of his knowledge and belief the debtor is insolvent but has realisable assets, and contains a statement of the grounds on which he believes the debtor to be insolvent;
- (b) where the declaration is made by the debtor, unless it states that he is insolvent but has realisable assets; and, in either case, the declaration is verified by affidavit." 17. The terms of the new Rule - that the court may refuse to receive the declaration 'en désastre' unless certain conditions are met - might arguably be taken to suggest that, provided that they were met, confirmation would automatically follow, by reference to the principle *expressio unius est exclusio alterius*. I need not consider that possibility further, however, because that Rule was superseded by the provisions of the 1990 Law. 18. The 1964 Rules and the 1966 amendment were revoked and re-enacted by the provisions of the consolidated Royal Court Rules

1968. The Rules now in force are the Bankruptcy (Désastre) Rules 2006 . 19. In the years preceding the enactment of the 1990 Law, it was recognised by the Royal Court that, not only had the désastre jurisdiction evolved, but that it was still evolving. In the *Re Overseas Ins. Brokers Ltd* . case, the Bailiff made the following observation:- "We 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 a status of equality between them, its scope has been enlarged over the years" (Pages 551-552) 20. Later in his judgment, the Bailiff discussed remedies which were available to creditors before "the evolution of the désastre ". (Page 552) In the course of doing so, he referred to the case of *Smith v. d'Auvergne* 1886, Ex. 210, p. 492 and continued as follows:- "The defendant in that case submitted that the declaration of a désastre was unjustified, because, *inter alia*, no question arose of preserving equality among creditors. The Court overruled that submission and held- "Que tout créancier a le droit, tant en vacance qu'en terme, de faire les diligences nécessaires pour empêcher son débiteur insolvable de vendre, aliéner ou autrement disposer de ses biens, soit mobiliers ou immobiliers. Que dans l'espèce lesdits Francis Owen d'Auvergne et uxor étant propriétaires fonciers, la seule marche que ledit Edmund Mower Smith peut prendre en vacance pour empêcher ledit Francis Owen d'Auvergne de disposer de ses biens mobiliers est en déclarant lesdits biens en Désastre". That judgment was confirmed on Appeal." 21. The evolutionary theme was adopted by the Royal Court in its analysis of the désastre process in *Jobas Limited v. Anglo Coins Limited and 14 Others* [1987-88] JLR 359. At page 365, Tames, Deputy Bailiff said this:- "The Viscount urged that, as part of the evolution of the désastre, he also has an investigative role with responsibilities and duties to protect the public interest and the good name and reputation of this Island. He put it thus: -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."

"This court recognises that the *désastre* procedure has further evolved and approves the wider role of the Viscount as he described it to us. If for this reason the Viscount appears not to act wholly impartially, because he is concerned that the interests of, as yet, undiscovered creditors should be protected, he is not to be criticised for it. In this court's view the position of the Viscount in a *désastre* is wholly exceptional and, in the exercise of its discretion, the court is not to feel bound by the principles established by the Rules of the Supreme Court and English cases." 22. In its present form, a declaration en *désastre* provides a number of advantages for a creditor which make it more attractive than other forms of procedure. Among those are that all the debtor's property and powers vest immediately in the Viscount and cannot, therefore, be alienated to the prejudice of the creditor. (Article 8) The court, on the application of the Viscount, may make a restoring order if the debtor has entered into a transaction at an undervalue during the period of five years immediately preceding the making of the declaration. (Article 17) Provision is made for restoration where the debtor has given a preference. (Article 17A) A duty is imposed on the debtor to aid the Viscount in the realization of the debtor's property "to the utmost of the debtor's power". (Article 18) Decision in the court below 23. Returning to circumstances of this case, when the application for a declaration was heard in the Royal Court, the appellant was the only known creditor of the debtor company. During the course of the hearing, there was some discussion about whether a declaration of *désastre* is only available to a creditor if it is shown that he is, or may be, one of a number of creditors. The Royal Court resolved that issue in these terms:- "22. ... where there is only one creditor, the Court still has jurisdiction to grant the declaration, but should recognise that there should be some reason for the grant of the declaration. There is no obviously convincing reason for a declaration of *désastre* where other methods of execution of a judgment debt are available to the creditor, perhaps at less administrative expense to the public purse. Where it is clear that there is no evidence of more than one creditor, in our judgment it is necessary for the creditor to establish good reason for the declaration, and merely establishing the insolvency and the fact that he is a creditor is not good enough." 23. It may be that there are circumstances where to refuse an application for *désastre* would cause an injustice to the applicant, perhaps because he did not have open to him the enforcement powers, or the powers to obtain information (with) which the Viscount is conferred by statute. It is, however, necessary to establish what that injustice might be if it is to go to the exercise of the court's discretion." 24. The difference in emphasis between the Royal Court's recognition that it has a discretion as to whether to grant or refuse a declaration, and the approach adopted by the appellant on that matter can be seen from the following passage in the appellant's written contentions:- "11. Article 6(1) of the Law provides that the Court "...after considering an application and the affidavit required by paragraph 3 of Article 3 to accompany it, may make a declaration" ... As such, the Royal Court rightly considered the grant of a declaration of *désastre* to a matter for the exercise of its discretion (see para [13]). (Appellant's emphasis) "12. The Court's discretion in this regard must, however, be exercised judicially. Moreover, the judicial exercise of this discretion involves the application, where the relevant debt is not disputed, of a strong, if not

irrebuttable, presumption that a declaration of *désastre* should be granted." 25. If I have correctly understood the Royal Court's reasoning and the appellant's contentions, the difference between them amounts to this: in the Royal Court's view, where there is only one known creditor, the court looks to him to persuade it either that there is "good reason" for the grant or that, if the declaration is not made, the creditor will suffer injustice: the appellant's position is that, once the jurisdictional door is open, the Royal Court must make the declaration sought; alternatively it should do so unless there is good reason not to do so. 26. In my judgment, with respect to the Royal Court, its formulation should be rejected. The Royal Court cites no authority in support of the proposition that the exercise of its discretion should be fettered in the way suggested, nor is anything to be found in the 1990 Law to support it. If it were a feature of the common law that a creditor is required to identify other creditors, or risk having his application for a declaration refused, it might be expected that there would be some reference to or indication of that requirement in the decided cases or the Law. Nor, in my view, is there any reason in principle why the court should approach the exercise of its discretion as held in the court below. The Royal Court suggests that other methods of execution of a judgment debt might cause less administrative expense to the public purse. The court has power, however, to protect the public purse. Article 5(2) of the Law provides, "in the case of an application by a creditor, the court may require the creditor to indemnify the Viscount against the costs of the *désastre* to the extent that it thinks fit." An example of the application of that provision is to be found in *In the matter of Buchanan Smith Limited (Désastre Application)* in which the Royal Court granted a declaration "on the understanding, and the order, that the Viscount will be indemnified against the costs of the *désastre* in full and if the Viscount requires more money on escrow, he will ask for it, and it will be paid." (

[2008] JRC 174) 27. The constraint which the Royal Court would place on the exercise of its discretion effectively adds another layer to the conditions which an applicant would have to meet in order to qualify for the grant of a declaration. Not only must the creditor come to court with evidence of a liquid debt and of the debtor's insolvency, he must also obtain evidence of the existence of another creditor or be able to establish "good reason" for the declaration. The practical consequence of the Royal Court's approach would be that, in order to avoid risking the loss of the advantages which a declaration brings, by failing to establish good reason, it would become necessary for applicants to take steps to discover the existence and identity of other creditors. Before applying for a declaration, they would thus have to do precisely what it is the function of the Viscount to do after a declaration is granted. It appears that, at common law, that was not a burden which the creditor seeking confirmation of a declaration en *désastre* was required to shoulder. In *Re Overseas Insurance Brokers Ltd*, in his exposition of the history of the *désastre*, the Bailiff said this:- "By 1817 a standard form of Act had been evolved. That stated that whereas a number of actions against the debtor appeared on the "table" and whereas one or more creditors had represented to the Court that the affairs of the debtor were "en *désastre*", the Court, in order to put all creditors on an equal footing, had postponed all

actions against the debtor to a later stated day and ordered that the Act be published." 28. Further, if a creditor in the position of the appellant were to choose an alternative form of enforcement as suggested by the court below, that could operate to the disadvantage of other, unknown, creditors who were unaware of the insolvency of the debtor and over whom the enforcing creditor would establish priority. In my view, that would defeat a central purpose of a *désastre* which is "to preserve a status of equality" among creditors. 29. In his written contentions for the appellant, in support of his argument that the fact that there is only one creditor "is not a good reason to depart from the *prima facie* position that a creditor, who has not been paid a debt which is not disputed, is entitled to a declaration of *désastre*", Advocate Hoy cited two cases which were not discussed during the hearing in the court below, although one of them, *Re Rosedale (J. W.) Investments Limited*

[1995] JLR 123, is considered in the Royal Court's draft judgment. That case concerned an application to the Royal Court by a single creditor to declare the goods and effects of an individual and five companies to be en *désastre*. Neither the grounds of opposition to the application nor the arguments of the parties are recorded in the judgment. It appears from the narration in the headnote, however, that the opposition to the application rested on a number of grounds, one of which was in the following terms:- "Nor could it be said that he was unable to "pay his debts" (plural) within art. 1(1) of the 1990 Law and in any case, the purpose of that Law was to prioritize the debts of multiple creditors whereas here there was only one. Accordingly he submitted that the application should not be granted." 30. As we have seen, Article 3(1)(a) of the Law requires an application for a declaration of *désastre* to be made by "a creditor of the debtor with a claim against the debtor of not less than such liquidated sum as shall be prescribed." Article 1(1) of the 1990 Law defines "debtor" as "a person who is insolvent" and "insolvency" means "the inability of a debtor to pay his debts as they fall due." The use of the expression "his debts" gave rise to what the Royal Court described as "a problem of interpretation". The problem and its solution were described by the court in the following passage, at page 131:- "... The definition of insolvency refers to more than one debt. This is the whole basis of the concept of a *désastre* as explained by Le Gros, *Droit Coutumier de Jersey* (1943) in the first sentence of his chapter "Du *Désastre*" (*ibid.*, at 75): "Le *Désastre* est une procédure qui a pour but d'établir l'égalité entre les créanciers d'un débiteur insolvable ...". That definition was refined in *Re Overseas Ins. Brokers Ltd.* (7), which stated (1966 J. J., at 552): "A *désastre* is a declaration of bankruptcy, the effect of which is to deprive an insolvent debtor of the possession of his moveable 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." ... "On the points of interpretation raised, Mr. Michel refers us to art. 2 of the Interpretation (Jersey) Law 1954, which states: "In this Law and in every other enactment, whether passed before or after the commencement of this Law, unless the contrary intention appears-

- (c) grammatical variations of words to which definitions are assigned shall be construed in accordance with the definitions." "On that basis we have no doubt that "insolvent" has the same definition as "insolvency." By para. (b) of the same article, "words in the singular shall include the plural and words in the plural shall include the singular." That raises a difficult concept for the purpose of the 1990 Law is to establish equality amongst creditors. If that were not so, why would the Viscount be given the power under art. 28 "from time to time [to] report to creditors on the progress of a 'désastre'"? Why would the Viscount have a duty under art. 36, when the désastre has been concluded, to "supply all creditors of the debtor... with a report and accounts relating to the 'désastre'"? No other creditor of either Mr. Shelton [the individual respondent] or the guarantor companies has been proved in court. Mr. Michel makes a point, however, that by paying builders, staff and all creditors except Rosedale, Mr. Shelton is preferring those creditors and making the financial situation of Rosedale untenable. We think that there is force in that argument. There is a suggestion (but no more than that) of a self-serving purpose." 31. The court held that the debtor was insolvent, on the view that "(d)efault in paying one debt is, in our view, sufficient evidence that the debtor is unable to pay its debts as they fall due" and continued:- "Mr Shelton is under an undisputed obligation to pay a liquid sum. He has not paid it. The creditor has applied for a déclaration and fulfilled the requirements of r.2 of the Bankruptcy (Désastre) (Jersey) Rules
1991. There is in law no reason for us not to make the order sought subject to one factor which we need to examine." 32. Under the heading "Discretion" , the "one factor" which the Royal Court then considered was whether or not to grant an adjournment to allow the individual debtor to pay the debt which lay at the heart of the application. The question how its discretion might be exercised was solely concerned with that issue. In the result, the court declined to grant the adjournment, and, instead, granted the declaration. 33. It is clear from the judgment why the Royal Court rejected the argument that an application for a declaration could not be granted unless there was more than one debt. The court does not give its reasons, however, for rejecting the submission that, since the purpose of the Law was to prioritize the debts of multiple creditors, there has to be more than one creditor. It does not explain, in terms, how the problem of the "difficult concept" was resolved. The court appears to have considered that the answer lay in the submission for the applicant that "by paying builders, staff and all creditors except Rosedale, Mr. Shelton is preferring those creditors and making the financial situation of Rosedale untenable." The court does not explain why that may have removed the difficulty, but it might be said that the debtor's preference of other debtors over Rosedale had created an inequality that a declaration of désastre would rectify. 34. In any event, in my view the Rosedale case is of limited assistance in determining the issue which is before this court. The Royal Court does not appear to have applied its mind in that case to the question whether, and if so how it should exercise its discretion when deciding whether or not to grant the application. 35. The second case, *Giles v Forrest* 1999/106 offers a little more help. Hamon, Deputy Bailiff presided, as he had done in Rosedale . Unlike the position in Rosedale , where it was known

that there was only one creditor, in Giles , as here, there was only one known creditor. The debtor opposed the application on the express ground that "a désastre cannot be declared where there is only one known creditor." The argument that may have been advanced in support of the submission is not, unfortunately, recorded in the judgment, and the point is dealt with shortly in the following passage at page 2:- "We have dealt with the first point in some detail in In Re: Rosedale -v- (JW) Investments Ltd

(1995) JLR 123 , where the headnote reads in part: "The fact that there was only one creditor, the applicant, and that only one debt was due provided sufficient evidence that the respondent was unable to "pay his debts as they (fell] due" as required by art. 1(1) of the Bankruptcy (Désastre) (Jersey) Law 1990. Although the Law was intended to provide mechanisms to treat multiple creditors with equality, its provisions nevertheless operated in the present circumstances since by art. 2(b) of the Interpretation (Jersey) Law 1954 all references to the plural included the singular." 36. The writer of the headnote has managed to put a construction on the judgment in Rosedale which eludes me, but the Royal Court was content to adopt it. In common with Rosedale , the case sheds no light on the question of how the exercise of the court's discretion is to be approached. What can be said, however, is that in neither case does the Royal Court suggest that, where there is only one known creditor, the court is in any way restricted in the exercise of its discretion. 37. How, then, should the court approach the exercise of its discretion? In support of its submissions, the appellant prayed in aid the English cases of Re Demaglass Holdings Ltd

[2001] 2 BCLC 633, Bowes v Directors of Hope Life Insurance and Guarantee Co

(1865) 11 HL Cas 389 and Harrison and another v Seggar

[2005] EWHC 411 (Ch) . These cases appear to provide support for the appellant's line of argument, but they were concerned with the application of certain provisions of the Insolvency Act 1986 and the Companies Act 1862, and I would be reluctant to import any principle which might be derived from them when applying the terms of a Jersey Law which sits in a common law setting which is special to Jersey. 38. Guidance on the exercise of discretion in désastre proceedings is to be found in Bridgen and Ports Trading Limited

[2005] JRC 073 . In that case, the Royal Court refused an application for a declaration on the ground that it was not satisfied that the applicant's status as a creditor was certain. (Paragraph 20) The Deputy Bailiff, Birt, went on in his judgment, however, to consider what the court would have decided if it had concluded that the applicant was a creditor, "(i)n case it is of assistance" . (Paragraph 21) I have quoted part of the relevant passage at paragraph 10 above, but, for convenience, I repeat it here. Under the heading "Exercise of discretion" the Deputy Bailiff said this:- "26. It is clear that, even where the Court is satisfied that the applicant is undoubtedly a creditor and that the debtor is insolvent, there is a discretion in the Court as to whether to grant a declaration of désastre. Although in the ordinary case the Court is likely to exercise its discretion in favour of granting a declaration where the necessary pre-conditions are met, it retains a discretion not to do

so. "27. We are satisfied that, even if we had concluded that Mr Bridgen achieved the necessary degree of certainty as a creditor, we would not have granted a declaration of *désastre* in this case. Our reasons are as follows:-" 39. In my view, the logic of that approach, which I respectfully endorse, is that where, as here, an applicant qualifies for the grant of a declaration by meeting the criteria specified in the 1990 Law, the question for the court will normally be whether there is anything in the facts and circumstances of the particular case which militates against the grant. If not, it will normally grant the application. I acknowledge that, in the Bridgen case, the indications were that there were unpaid creditors other than the applicant. Once jurisdiction to grant a declaration is established in accordance with the terms of Article 6 of the 1990 Law, however, it seems to me to be unsatisfactory to have two quite different approaches to the exercise of the court's discretion depending on whether the existence of other creditors is or is not known. In exercising its discretion in the way which I hold that it should, the court remains free to refuse to grant a declaration where the facts and circumstances of a particular case justify refusal. 40. Having dealt with the discretion point as a matter of principle, the court below gave the following reasons for refusing this application, having regard to the circumstances as known to the court:- "24. At the end of the day in this case, on the facts, the evidence before the Court is that if a declaration were ordered, the Viscount would be required to spend a good deal of administrative time and resources coupled with external expenditure in the retention of experts, in order to bring proceedings in a foreign country and enforce judgment obtained against assets situated in that jurisdiction essentially for the benefit of the one creditor. In our judgment the presumption ought to be that the creditor should take such proceedings himself, rather than rely upon the Viscount to do it for him. Once the *désastre* is declared, assuming it is not recalled, the Viscount has conferred upon him numbers of duties and rights which may extend beyond the position of the creditor who has sought the declaration in the first instance. The engagement of Jersey's resources in order to chase up private debt is not the obvious answer to this particular problem. The Viscount is engaged in the *désastre* procedure because he is the Executive Officer of the Royal Court concerned with the enforcement of judgments of the Royal Court. He has a wider statutory power as a result of the Law, but he is not at the beck and call of any creditor wheresoever resident or domiciled who may have claims in another jurisdiction against a debtor who happens to be incorporated in Jersey. We consider the Court has a discretion in these cases both the Law and public policy requires that consideration be given as to its exercise. It will not always be exercised to refuse the application for a *désastre* in these circumstances, but the application must be justified and nothing we have heard on the facts of this case suggests any reason for granting the application - indeed the reverse. There is certainly no assurance that simply because an undertaking is given to fund the Viscount's expenses in the short-term, that that undertaking will be renewed. It is almost certainly right that the funding will not extend to the internal resources of the Viscount which will be committed to the bankruptcy if it is declared." 41. The Viscount's department has a large number of functions within the context of the court system, but central to them is its responsibility

for ensuring that the decisions of Jersey's courts are carried out. It is funded for that purpose and, as noted in paragraph 26 of this judgment, Article 5(2) of the 1990 Law empowers the court to ensure that the Viscount is fully indemnified. As to the nature and extent of the work which the Viscount may have to do, a similar point was raised by the Viscount in the *Re Overseas Insurance Brokers Ltd* case, in opposing the application for confirmation of a declaration. He contended that the principal assets of the corporate debtor were monies due by a private individual and a loan account due by an associated company, and argued that, if the *désastre* procedure were to go forward, he would have to collect these monies. In rejecting that submission, the Royal Court said this:- "The nature and situation of the assets of [the debtor company] may present practical difficulties, but such difficulties cannot be relevant to the decision we have to make". (Page 49) In my view, these words are of equal application here. 42. At the conclusion of the hearing in this court on 28 September, we were of the view that the Royal Court misdirected itself with regard to the principles in accordance with which its discretion had to be exercised and that it took into account matters which it ought not to have done. Looking at the matter afresh, we were of the view that we should grant the application to declare the property of the debtor company *en désastre* and duly so ordered. (See *Abdel Rahman v. Chase Bank (C. I.) Trust Co. Ltd*

(1984) J. J. 127) 43. Coupled with its appeal, the appellant made an application to adduce fresh evidence, to the effect that there are now known to be three other creditors of the debtor company. In light of our disposal of the appeal, it was not necessary for us to address that matter. 44. The Viscount appeared in person at the hearing before us. We were greatly assisted by the insights provided by him into the historical context in which the modern *désastre* jurisprudence lies, and we are very grateful for his help. During the course of the discussion, we were informed that the Viscount's personal intervention was prompted by what had appeared to him to be a desire on the part of the appellant to seek costs against his office. Advocate Hoy explained that that was not his intention. Further, he conceded that the Viscount's costs in the appeal should be awarded against the appellant, and we so ordered. THE PRESIDENT: 45. I agree and have nothing to add. STEEL JA: 46. I agree. Authorities Companies (Jersey) Law 1991. Bankruptcy (Désastre) Rules 2006. Bankruptcy (Désastre) (Jersey) Law 1990. In *re Baltic Partners Ltd*

[1996] JLR N 1C. *Bridgen and Ports Trading Limited*

[2005] JRC 073 . *Bridgen and Ports Trading Limited*

[2005] JLR N 21. *Re Overseas Insurance Brokers Ltd.*

(1966) JJ 547 . Jersey Law Commission 1998 Consultation Paper on *dégrévement*. Royal Court ("Désastres")(Jersey) Rules 1964. In *re the désastre of Barker*

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Prepared on 23 October 2026 · Esheria