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FINDING RESCUE: CREATIVE ALTERNATIVES TO THE CLASSIC INSOLVENCY PROCEDURES IN JERSEY

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This article discusses how the absence of a rescue regime in Jersey insolvency law is driving changes in practice seen in a number of recent cases seeking to use provisions available in the Companies (Jersey) Law 1991 and the letter of request facility to effect rescue by other routes.

Introduction[1]

1 The Jersey law of insolvency, as defined,[2] includes a number of procedures owing their origins to the mixed legal heritage of the Island.[3] The roots of the customary law on the Island are derived from the law in force at the time the Channel Islands were part of the Duchy of Normandy,[4] subject to later borrowings from the continent and the domestic evolution of law and practice. This evolution has resulted in the creation of a number of autochthonous procedures, the *cession de biens* (including the voluntary and involuntary variants), the *remise de biens* and the *désastre*.[5] Many modern statutes, however, particularly in the commercial law arena, are modelled on their equivalents in the

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[1] This article is based on a CPD Lecture given on 31 May 2012 as part of a series organised by the Jersey Institute of Law, St Helier.

[2] The definition of "bankruptcy" in the Interpretation (Jersey) Law 1954, art 8 includes *cession de biens*, both voluntary and involuntary types (the latter also referred to as the *adjudication de renonciation*), *remise de biens*, a declaration *en désastre* and creditors' winding up.

[3] For an outline of the various stages through which Jersey law has progressed, see Nicolle, *The Origin and Development of Jersey Law* (5th ed) (2009, Jersey and Guernsey Law Review Ltd, St Helier).

[4] Continental Normandy (excluding the Channel Islands) was lost by King John in 1204, the result of which was to grace him with the sobriquet "*Sans-Terre*" (Lackland) by his contemporaries.

[5] Although the last of these is commonly referred to as a *désastre*, strictly speaking, the procedure results from an application to place the debtor's assets *en désastre* (in disaster).

United Kingdom. Touching the insolvency field, the Companies (Jersey) Law 1991[6] contains a Part 21 dealing with the winding up of companies. It contains three forms of winding up: summary (where the company is solvent) or creditors' winding up (where the company is not) as well as winding up on a just and equitable ground.[7] There is a complicated relationship between all of the procedures that are defined as being part of the law of bankruptcy. Firstly, the procedures in company law, applying only to corporate debtors, are normally required to give way to the *désastre*[8] except where a court deems it unnecessary because a liquidator, who is independent and under the same duties as the Viscount, is in charge of a process in which the interests of the creditors would be adequately protected.[9] Between the *désastre* and the other (older) procedures, all applicable to both individual and corporate debtors,[10] where an order relating to a *remise de biens* has been made, a *cession de biens* has taken place or the debtor's property has been adjudged as renounced, a *désastre* is no longer available as an option.[11] However, where there is a choice between the *désastre* and the older procedures, the latter should only be used where the administration of the debtor's property is likely to

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[6] Based on the Companies Act 1985 (United Kingdom). See Omar, *Company Law Study Guide* (2012, Institute of Law Jersey, St Helier); Dunlop, *Jersey Company Law* (2010, Key Haven Publications, Oxford).

[7] It must also be noted that these procedures, unlike their equivalents elsewhere, are not accessible to creditors, since both the summary and creditors' winding up are predicated on action by the directors or members resolving that a winding up take place although, in the latter procedure, creditors may have a monitoring role if they are able to appoint the liquidator. Only exceptionally, in relation to winding up on a just and equitable ground, does the Companies (Jersey) Law 1991, art 155 also provide for a right to petition the court to be given to the Minister for Economic Development or the Jersey Financial Services Commission.

[8] In fact, arts 146, 155 and 157 of the Companies (Jersey) Law 1991 prevent any company already subject to an order placing their assets *en désastre* from being the subject of liquidation proceedings, while arts 154A and 185B of the Companies (Jersey) Law 1991, require a summary or creditors' winding up to give way to a subsequent *en désastre* order.

[9] *Hotel Beau Rivage Co Ltd v Careves Invs Ltd* 1985–86 JLR 70.

[10] The Bankruptcy (Désastre) (Jersey) Law 1990 makes express provision for its application to corporate debtors by the inclusion of a specific Part 10 dealing with the situation of a corporate debtor. The position with respect to *remise de biens* and *cession de biens* rests on the assumption that Part 1 of the Schedule to the Interpretation (Jersey) Law 1954, in defining a person to include "any body of persons corporate or unincorporated", extends these procedures, originally designed for use with individuals, to companies.

[11] Bankruptcy (Désastre) (Jersey) Law 1990, art 5.

be a simple matter.[12] Bankruptcy law and all the procedures it contains are thus a necessary focus of those wishing to ascertain how debtors may be dealt with under Jersey law.[13]

2 *Cession de biens* (transfer of assets) is a procedure of customary law origin that was introduced in Jersey during the Middle Ages.[14] It is patterned on a procedure known to Roman Law (*cessio bonorum*), which was resurrected in the early Middle Ages, first in Italy and then elsewhere in Europe. In Jersey, *cession* was available to both local and foreign debtors who made a request to the court, provided no fraud or crime was involved. An exception was made for debts owed to the Crown, which were up to the Crown to forgive. A *cession de biens* could only be requested if a debt was owed and the debtor was being pursued in relation to it. A debtor would then have to make oath that it was for a need to avoid prison and by reason of pure poverty that the benefit of the court order was being sought.[15] Although only occasionally used today, the *cession de biens* is available as a procedure under which a debtor may voluntarily renounce all of his property for the benefit of creditors. Historically, *cession de biens* was a gateway procedure in that it terminated in a *décret* (decree), by which the court would transmit the debtor's immovable property to whichever of the creditors was prepared to accept it on condition that the creditor would pay off all prior secured claims. The *Loi (1832) sur les décrets* reformed the customary law practice of *cession de biens* and the use of the *décret* procedure, providing a partial statutory framework for this procedure.

3 A later procedure, titled *dégrèvement* (disencumberment of security), was introduced in 1880 and specifically designed to supersede the *décret* procedure.[16] Whereas under *décret*, all the debtor's immovable property was disencumbered of the attached security together as one lot, *dégrèvement* allowed for the

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[12] *Superseconds Ltd v. Sparta Invs Ltd* 1997 JLR 112.

[13] See Omar, *Law Relating to Security on Movable Property and Bankruptcy Study Guide* (2012, Institute of Law Jersey, St Helier), chaps 8–15; Dessain & Wilkins, *Jersey Insolvency Law and Asset-Tracking* (3rd ed) (2006, Key Haven Publications, Oxford), chap 5.

[14] Reference is made to a case dating back to 1592 in Le Gros, *Traité du Droit Coutumier de l'Ile de Jersey* (1943) (reprinted 2007, Jersey and Guernsey Law Review Ltd, St Helier), at 299.

[15] See Le Geyt, *Privilèges, Loix et Coustumes de L'Isle de Jersey* (c. 1698) (reprinted 1953, Bigwoods Ltd for the States of Jersey, St Helier), in Livre IV, Titre VIII.

[16] Introduced by the *Loi (1880) sur la propriété foncière*, which changed the way in which debts and obligations were secured by hypothecation and guarantees and the way in which secured property was dealt with.

disencumberment of security separately in relation to separate lots of immovable property.[17] The 1880 changes also introduced a liquidation procedure, applying to the debtor's movable property. This was replaced by a procedure introduced in 1904 titled *réalisation* (realisation),[18] which serves as a method for realising any movables not dealt with by either the *décret* or *dégrèvement*. The successful conclusion of the procedures to which a *cession de biens* leads normally confers upon the debtor a discharge from any further obligation.[19] However, in certain circumstances, where a *décret* or *dégrèvement* follows an order of the court at the creditor's behest determining that, in default of debts being paid or a *cession de biens* being applied for by the debtor, the debtor is deemed to have renounced his property,[20] a discharge will not occur and the debtor remains obliged for the debt underpinning the security.[21] In substantive terms, *cession de biens* is a liquidation-oriented procedure in that it results in a foreclosure of the debtor's property by adjudication in a creditor's favour of the entirety of that property.[22]

4 The *remise de biens* (handover/surrender of goods) is also a procedure of customary law origin, said to be based on the practice of *lettres de répit* (letters of respite) being issued by Royal fiat, a facility first granted by French monarchs as a matter of prerogative grace, the letters serving the purpose of preventing the debtor from being the subject of execution or distraint against his person or goods. Later, these letters were available by application to the courts in France, with the procedure subsequently being governed by an ordinance promulgated in 1673 in the reign of Louis XIV.[23] In Jersey, where the procedure was introduced, also in the late Middle Ages, a *remise de*

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[17] The *décret* procedure has largely fallen into desuetude as it relates to *propriété ancienne* (ancient property) only, which is defined as being immovable property acquired by the debtor prior to the *Loi (1880) sur la propriété foncière* coming into force. The last known *décret* is said to have taken place in 1917. *Dégrèvement* applies to *propriété nouvelle* (new property), *i.e.* immovable property vesting in the debtor after the 1880 law came into force.

[18] *Loi (1904) (Amendement No. 2) sur la propriété foncière.*

[19] Art 10, *Loi (1832) sur les décrets.*

[20] *Adjudication de renonciation* (adjudication of renunciation), also referred to as a *cession involontaire* (involuntary transfer).

[21] *Birbeck v Midland Bank Ltd* 1981 J.J. 121.

[22] This is one of the reasons why the Jersey Law Commission have recommended the abolition of *dégrèvement* in its Consultation Paper No 2 (November 1998), at para 4.3, a copy of which is available at: www.lawcomm.gov.je/consultation2. htm (last viewed 9 August 2012).

[23] See Saint-Alary-Houin, *Droit des Entreprises en Difficulté* (5th ed) (2006, Montchrestien, Paris), at para 11.

biens was available to debtors who had experienced hardship and ill-fortune, not their own fault, for up to ten years prior to an application being made to court for a year's grace from execution against their goods or person.[24] In its origins, the procedure is based on a principle of justice and fairness that permits a debtor to invoke the assistance of the court against a creditor intending to seize his property by provisionally staying the Act of Court authorising seizure, although the stay is usually limited.[25] In its modern incarnation, it provides a temporary respite granted by the Royal Court, during which two Jurats appointed by the court will realise as much of the debtor's property as is necessary to discharge the debts owed by the debtor with any unsold property being returned to the debtor. Furthermore, the court has stated that the rationale for *remise de biens* is to mitigate the rigours of the *décret* or *dégrèvement* procedures as well as to avoid the pressure to make *cession de biens* because of the risk of committal to prison. It allows the debtor time to effect an orderly realisation of his assets to pay the creditors.[26] In principle, therefore, there is a possibility that the debtor would recoup any funds not required to satisfy the creditors, although in reality the debtor has no choice as to what property is realised and in what order, making this a procedure that is more akin to liquidation in substance.[27]

5 The *Loi (1839) sur les remises de biens* introduced changes to this procedure in that, prior to its enactment, a debtor was required to satisfy the court that the debtor's immovable property was sufficient for the satisfaction of the debtor's total liabilities.[28] The current position, as introduced by this law and later refined by judicial commentary, is that the court has no jurisdiction to grant a *remise de biens* unless it is satisfied that there will be a credit balance, however small, for distribution amongst the ordinary creditors, the value of the

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[24] Le Geyt, note 15 above, in Livre IV, Titre VII, art 1 speaks of the procedure being akin to the French one (*à peu près comme on obtient en France*). Note that this procedure is not accessible to creditors as it can only be initiated by the debtor.

[25] Le Gros, note 14 above, at 371.

[26] *Re Mickhael* [2010] JRC 166A.

[27] This also explains why parties subject to an *adjudication de renonciation* and subsequent *dégrèvement* often seek to apply for a *remise de biens*, as they are permitted to do up till the moment the property vests in the creditor taking it (referred to as the *tenant après dégrèvement*). They are not usually successful as illustrated by cases such as *Re Mickhael* [2010] JRC 166A and *Re Gibbins* [2011] JRC 033. *Re Venton* [2011] JRC 103 also shows the preference, equally unsuccessful, by debtors for the *remise de biens* as opposed to a *désastre*, as the costs of the latter procedure are greater.

[28] See Benest & Wilkins, *Can we be at ease with the Remise?* (2004) 8 JL Rev. 42.

debtor's entire property being taken into account.[29] However, irrespective of any moveable property the debtor may have, the qualification for entry to a *remise de biens* remains that the debtor must be *fondé en héritage* (*i.e.* must hold immovable property). Given the definition of a *corps de bien-fonds* (immoveable property) in the law,[30] it is probable that this qualification only refers to property in Jersey. In fact, a court has recently doubted whether there was a power to order a *remise* in the case of foreign immoveable property, thus effectively limiting access to the procedure to only those debtors with Jersey property.[31] A successful *remise de biens*, however, does result in the debtor obtaining a discharge from all liability.[32] An unsuccessful *remise de biens*, either because the secured creditors are not paid or the assets are insufficient to allow the payment of a dividend, however small, to the unsecured creditors, results automatically in a *cession de biens*. This is because the placing of the debtor's property in the hands of the court is deemed to operate as a *cession conditionnelle* (conditional transfer), the condition being the ordering of a *remise* and it being successful.[33] In this instance, a *décret* (if available), *dégrèvement* and/or *réalisation* will follow with the consequence being that the debtor obtains a discharge.[34]

6 The main bankruptcy procedure in Jersey law is now the *désastre*. In the late 18th and early 19th centuries, a procedure evolved in Jersey customary law in which all claims by creditors of a common debtor would be dealt with in a single set of proceedings. The first recorded *désastre* is said to have occurred in 1811 involving a person called Le Maistre, although Le Gros states that the failure of the trading firm Jean Fiott & Co in 1797 led to pressure for the introduction of a procedure that would place creditors *sur un pied d'égalité* (on an equal footing).[35] The function of a *désastre* procedure is to safeguard the interests and rights of creditors. Furthermore, in light of the debtor being deprived of the possession of his goods, a *désastre* procedure requires the appointment of a person by the court to have the custody

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[29] *Re Shield Invs (Jersey) Ltd* 1993 JLR *N*–3.
[30] *Loi (1880) sur la Propriété Foncière*, art 1.
[31] *Re Control Centre General Partner Ltd* [2012] JRC 080 (18 April 2012).
[32] *Re Barker* 1987–88 JLR 23.
[33] *Le Maistre v Du Feu* (1850) 171 Ex 508; *Re Santer & Santer* 1996 JLR 233.
[34] The cases referred to, note 27 above, also provide another reason for the application for a *remise de biens*, which is to obtain the discharge that is not available in the case of an *adjudication de renunciation*.
[35] Le Gros, note 14 above, at 75. The procedure may last for up to 12 months and may only be extended beyond this period if the Jurats recommend it and the creditors consent: *Re Barker* 1987–88 JLR 4.

of these goods.[36] In Jersey, the Viscount, an officer of the Royal Court, undertakes this role.[37] The procedure of *désastre* was initially confined to the debtor's movables, largely because of the focus of the older procedures on immoveable property. However, the procedure was extended to cover immovable property by the law that reforms and sets out this procedure, the Bankruptcy (Désastre) (Jersey) Law 1990.[38] The *désastre* procedure has now become the pre-eminent procedure in Jersey law for creditors wishing to deal with insolvent debtors and is accessible to both debtors and creditors, because it may be initiated by either.

7 Once a *désastre* is commenced, the Viscount administers the assets of the debtor and the process by which creditors prove the debts owed them pending the realisation of the assets and distribution of a dividend. The Viscount is given wide powers to deal with the assets, including the power to apply to court to set aside transactions. There are certain circumstances, however, in which it is not possible for a *désastre* to take place: for example, where an order relating to a *remise de biens* has been made, a *cession de biens* has taken place or the debtor's property has been adjudged as renounced.[39] Similarly, a creditor who wishes to take proceedings against the estate of a deceased debtor may not use the *désastre* procedure.[40] Those debtors eligible for proceedings are defined in the law, the terms of which are fairly wide and will enable jurisdiction to be exercised over local and foreign debtors alike.[41] The conclusion of a successful *désastre* normally sees a debtor discharged after a period of four years.[42] In substantive terms, a *désastre* procedure is also liquidation-oriented,

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[36] *Ibid*, citing *Godfray v Le Couteur* (1858).

[37] The office is an ancient one, being mentioned in chap 5 of the *Grand Coutumier de Normandie* (c. 1254–1258), for which see de Gruchy (trans Everard), *Le Grand Coutumier de Normandie* (1881) (reprinted 2009, Jersey and Guernsey Law Review Ltd, St Helier), at 18–19.

[38] The law is not, however, a code and regard must continue to be had to the customary law governing *désastre*, as confirmed in the case of *Re Baltic Partners Ltd* 1996 JLR *N*–1c.

[39] Bankruptcy (Désastre) (Jersey) Law 1990, art 5.

[40] *Ibid*, art 4(2). However, in *Crill v Alpha Asset Fin* 2009 JLR *N* [8], the court supported a procedure modelled on the Bankruptcy (Désastre) Rules 2006 with the executor dealing with claims in a manner akin to the Viscount in a *désastre.*

[41] *Ibid*, art 4(1).

[42] *Ibid*, art 40, which only applies in the case of individuals, while art 38(2) provides that a corporate debtor is dissolved once the Registrar of Companies has received notice that the final dividend in proceedings has been paid.

although the law foresees the possibility that the debtor may have the benefit of any surplus that may arise, just as in the *remise de biens*.[43]

8 The summary, therefore, is that there are no Jersey procedures that are, strictly speaking, rescue in the way that term is understood elsewhere.[44] *Cession de biens*, *remise de biens* and *désastre* all focus on the repayment of creditors with only the latter two allowing for the possibility of a surplus to accrue to the debtor. While this may be advantageous for the individual debtor who normally obtains a discharge at the end of the procedure and may thus obtain a fresh start,[45] the needs of corporate debtors are different. For many, the limitation of choice to procedures that substantively deliver liquidation-type outcomes means a finality for their business, regardless of the origins of the insolvency.[46] For these debtors, rescue, which may be understood as giving the debtor time to allow the debtor (and/or an insolvency practitioner) time to negotiate with the creditors for a solution that favours the continuity of the business, cannot seemingly be provided through the procedures existing in Jersey. Both *cession de biens* and *remise de biens* were designed before companies became prevalent as a means for carrying out business and are not well adapted to corporate debtors. Furthermore, although *remise de biens* has been described as having a suspensory (or moratorium) effect,[47] it does not achieve the same objectives as procedures labelled as rescue elsewhere. In fact, the differences between Jersey procedures and others, especially United Kingdom administration or corporate voluntary arrangements, have been the subject of some comment by the Jersey courts.[48] Furthermore, proposals issued by the Jersey Financial Services Commission ("JFSC") in 1999 for a modern suspensory procedure have failed to progress and the matter remains pending.[49]

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[43] *Ibid*, art 37(6).

[44] See Omar, *The demise of the Remise in Jersey law: greatly exaggerated?* (2011) 14 J&G L Rev 83, where the point is noted (at note 62 and associated text).

[45] Except, of course, in the case of an *adjudication de renunciation* (*cession involontaire*).

[46] As previously mentioned, note 42 above, for corporate debtors in *désastre*, Bankruptcy (Désastre) (Jersey) Law 1990, art 38(2) dictates a dissolution. Although the same is not provided for in the case of a *cession de biens* or *remise de biens*, the transfer or liquidation of the company's assets would undoubtedly be accompanied by a winding up of the remaining shell.

[47] Jersey Law Commission Consultation Paper No 2, note 22 above, at para 2.5.1.

[48] Noted below in the cases of *Re REO (Powerstation) Ltd* [2011] JRC 232A (7 December 2011); *Re Control Centre General Partner Ltd* [2012] JRC 080 (18 April 2012).

[49] Benest & Wilkins, note 28 above, at para 20.

9 The question arises therefore, if a Jersey debtor were to require the application of rescue proceedings to its business, in the absence of appropriate local legislation, how would it achieve this? There are, it seems, a number of possible solutions. In the case of corporate debtors in particular, those that are still solvent, however close to the insolvency threshold they are, may be able to take advantage of the scheme of arrangements procedure,[50] which allows for a court-directed procedure to produce a plan with any number of possible outcomes, including the sale of the business, the restructuring of capital and other obligations, a change in management and/or the injection of new capital. The procedure has undergone a renaissance in Jersey, where it has been the subject of judicial pronouncement in a number of recent cases.[51] The procedure is also nowadays seen as potentially applicable to those companies that are very close to the threshold of insolvency (even possibly technically insolvent) and its use may well expand in this direction.[52] The main advantage of the scheme of arrangements, apart from its general flexibility, is to avoid the formality of insolvency procedures and also their usual outcome, which is the dissolution of the company, although they are also available in the context of a winding up. Recent changes to the merger framework in Jersey,[53] including the introduction of the possibility of mergers on a cross-border basis as well as with non-corporate bodies available from 2011 onwards,[54] also permit insolvent companies to merge subject to court permission being obtained. This article looks, however, at two other avenues, the use of the just and equitable winding-up procedure and the letter of request framework to obtain assistance from outside Jersey through two recent cases illustrating resort to these avenues.

A. Just and equitable winding up in the "creditors' interests"

Re Horizon Invs[55]

10 There appears to be an increasing trend of using the just and equitable winding-up provision of company law (art 155) by invoking the existence or potential of a benefit to creditors as grounds for the

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[50] Companies (Jersey) Law 1991, arts 125–127.

[51] *Re Vallar* [2011] JRC 051; *Re Polyus Gold Intl Ltd* [2011] JRC 230; *Re George Topco* [2012] JRC 059. The second of these cases and the use of the scheme of arrangements generally was also noted in the CPD lecture on which this article is based.

[52] *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10.

[53] Companies (Jersey) Law 1991, art 127A, *et seq*.

[54] Companies (Amendment No 5) (Jersey) Regulations 2011.

[55] *Re Horizon Invs (Jersey) Ltd* [2012] JRC 039 (Clyde-Smith, Commr, and Jurats Clapham and Crill).

initiation of proceedings by the Jersey authorities to wind up Jersey entities. In company law, winding up on just and equitable grounds is available on an application to court made by the company, a director or member of the company,[56] the Minister for Economic Development or the JFSC.[57] Under this procedure, the court which orders the winding up may also appoint a liquidator and direct the manner in which the winding up is to be conducted.[58] A recent case continues this trend and presents a particular application in the case of regulated business, especially in the financial services sector, where concerns over reputation and public confidence require a particular treatment of stakeholder interests.

11 The facts arise from an application by Horizon Investments (Jersey) Ltd, a company engaged in the business of investment management, which was regulated by the JFSC to undertake investment and fund services business under the Financial Services Commission (Jersey) Law 1998.[59] The company first obtained a licence to carry out this business in November 2000 and appeared to carry on business satisfactorily until April 2011 when, following a visit by the JFSC, certain issues with respect to the conduct of that business were identified. A formal visit ensued in May 2011 following which the JFSC issued a report identifying key concerns it had in relation to the way the company was carrying out its business. The JFSC also issued directions for the operation of the company's business and a post-examination monitoring schedule in order to record the improvements it required, with the company working through the remediation steps the JFSC set out.[60] Later, however, following a review by the JFSC into the group of companies to which the company in question belonged (through a shared ownership structure), further problems were identified, especially in relation to actual and potential conflicts of interest. At about the same time, the company ceased being able to comply with the JFSC's Investment Business Code of Practice, in particular its strictures on maintaining adequate financial resources, and was still in breach of these requirements at the time of the application. Although the JFSC had intimated to the company at a meeting in October 2011 that they were considering whether to bring an application under art 155, it was felt preferable that the company's directors take the necessary action, pending which they focused their efforts on an orderly winding up of the company's business and

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[56] Companies (Jersey) Law 1991, art 155(2).
[57] *Ibid*, art 155(3).
[58] *Ibid*, art 155(4).
[59] *Re Horizon Invs*, at para 3.
[60] *Ibid*, at paras 9–10.

secured an agreement to sell their client assets to Spearpoint, a Jersey company engaged in similar business.[61]

12 As part of a business sale agreement, entered into in December 2011, the company contracted with Spearpoint and another for the sale of the company's client assets and the transfer of the relevant investment clients at the effective date of the contract or shortly thereafter.[62] Spearpoint would also take on some of the company's employees.[63] As the employees would then no longer be in the company's employ, the agreement also provided that Spearpoint would provide certain oversight services to clients who did not move on the effective date of the contract until such time as they transferred to Spearpoint or to a third party provider, given that the company would no longer be able to provide those services.[64] There remained at the date of the hearing a number of clients who had yet to transfer to Spearpoint or to another provider, although the company was no longer actively carrying on its investment business, and it was anticipated that, given its financial position, the company would cease to trade following completion of these transfers, subject to a limited amount of outstanding income yet to be received, part of which was conditional on the completion of the transfer of client entities.[65] Apart from a pre-existing subordinated loan, a guarantee obligation and some trading debts, the company's liability position was also likely to worsen given the possibility of claims against it for misconduct of client business and it was unlikely to have its professional indemnity insurance policy (part of a group policy) renewed.[66] This would place the company in an insolvent position on a balance sheet basis with no prospects of further income.[67]

13 The company's directors were of the view that a just and equitable winding up would allow them to complete the transfer of client entities and that this would have little or no impact on the position of its creditors overall. The JFSC also indicated that it would be minded to bring proceedings if the directors did not decide to act, another factor in their bringing the application.[68] Of the parties notified of the application (the Viscount, Attorney-General, the JFSC, creditors and shareholders), only the Viscount and JFSC replied, the former merely

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[61] *Ibid*, at para 11.
[62] *Ibid*, at para 12.
[63] *Ibid*, at para 13.
[64] *Ibid*, at para 14.
[65] *Ibid*, at paras 15–16 and 19.
[66] *Ibid*, at paras 22–26.
[67] *Ibid*, at paras 20–21 and 27.
[68] *Ibid*, at paras 28–29.

to note the absence of any comment to make.[69] Deloitte LLP, who were commissioned to undertake a review into the company's finances, concluded it would be in the best interests of the company and its creditors for there to be a just and equitable winding up and indicated that two of its employees would be available for appointment as liquidators in such a procedure.[70]

14 The directors couched the grounds of their application in the following terms:

(i) There was a clear public interest in allowing for client entities yet to transfer to do so in an orderly fashion without adverse publicity for the financial services industry on Jersey;

(ii) A just and equitable winding up would be appropriate to allow for the continuation of the company's regulated business in order to effect the transfers concerned;

(iii) As the company's employees had been taken on by Spearpoint, the company no longer had sufficient resources to complete these transfers and would require the assistance of a suitably-qualified liquidator to do so; and

(iv) It was in the interests of all involved for oversight by a liquidator directly accountable to the court.[71]

15 The JFSC supported the application and took into account similar factors, also noting the differences between the art 155 procedure and other available procedures. It stated that:

(i) There was a need for the company to continue trading to carry out the orderly transfer of client entities, which would also represent the only real prospect of further income being available to the company. The Guiding Principles by which the JFSC operated[72] would require the protection of the interests of these clients, which could be done through the use of the flexible route represented by art 155;

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[69] *Ibid*, at paras 30–31.
[70] *Ibid*, at paras 32 and 34.
[71] *Ibid*, at para 33.
[72] Financial Services Commission (Jersey) Law 1998, art 7 states these to be: "(a) the reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey; (b) the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters; (c) the best economic interests of Jersey; and (d) the need to counter financial crime both in Jersey and elsewhere."

(ii) An art 155 appointment would also result in a suitably qualified and experienced liquidator being appointed and answerable to court, the proposed liquidators being eminently suitable as they were engaged within the company's business and had a working knowledge of the issues needing to be addressed;

(iii) An art 155 winding up was preferable, in view of the company's insolvent status, to the creditors' winding-up procedure, under which the company would be required to cease to carry out its business except as far as may be required for the purposes of the winding up, thus limiting the scope of the liquidators' capacity to act in the best interests of clients.[73] There would also be a statutory framework and timetable to follow which could impede the process of transfer as well as the possibility of a conflict between creditors and shareholders as to the choice of a liquidator; and

(iv) A *désastre* procedure would also be unattractive given the limited assets available and the high probability that the Viscount would be required to spend time and resources investigating the company's business and would perhaps need to engage external advisers and service providers, thus increasing the burden on the estate.[74]

16 At the hearing before the court, the court considered that it was appropriate to exercise jurisdiction under art 155 for the reasons put forward by the company and the JFSC.[75] In doing so, it was mindful of its case-law under this provision extending over a number of years. *Re Leveraged Income Fund Ltd*[76] confirmed, as art 155 was directly derived from s 122(1)(g) of the Insolvency Act 1986 (United Kingdom), the permissibility of having regard to case-law from the jurisdiction to guide Jersey courts as to the interpretations placed on the meaning of the words "just and equitable", but also stated that modern uses might require a more flexible interpretation.[77] This more modern view was subsequently confirmed in *Re Belgravia*[78] and *Bisson v Bish*.[79] Furthermore, in *Re Poundworld*,[80] the court

[73] Companies (Jersey) Law 1991, art 159(1).
[74] *Re Horizon Investments*, at para 35.
[75] *Ibid*, at para 43.
[76] *Re Leveraged Income Fund Ltd* [2002] JRC 209.
[77] *Re Horizon Invs*, at paras 36–37.
[78] *Re Belgravia* [2008] JRC 161.
[79] *Bisson v Bish* 2008 JLR *N* [46].
[80] *Re Poundworld (Jersey) Ltd* 2009 JLR *N* [12].

established that it must consider what was in the best interests of the creditors and extended the scope of "just and equitable" to include what was convenient and would expedite the procedure. This might result in making this type of winding up a substitute for the usual creditors' winding-up procedure, although originally it was intended as an exceptional procedure for use in problematic cases, such as where the company was being run as a quasi-partnership,[81] where there was deadlock in management[82] or where the company's substratum (fundamental purpose) had gone.[83] The court was of the view, however, that insolvent companies should normally be wound up by a creditors' winding up and the court should be cautious before ordering a just and equitable winding up in the ordinary case of an insolvent company. In the *Re Poundworld* case, it was appropriate to do so, as it was clearly in the best interests of all the creditors for liquidators to be authorized to seek to secure the stock as soon as possible and to continue to trade to dispose of it on a retail basis.[84]

17 This line of authority was continued in *Re Centurion*,[85] on facts similar to the present case, where the company was licensed to carry on trust company business and, *inter alia*, managed assets on behalf of third parties held in trusts and companies and had been the subject of close regulatory attention by the JFSC, which had required the appointment of the applicants in the case as directors in order to bring Centurion's corporate governance in line with the Code of Practice for trust company business. A sale and revenue sharing agreement with Trustcorp Services Ltd had been proposed so as ultimately to bring the company's business to an end. As on both the balance sheet and cash flow tests, the company was insolvent, there was no prospect of it trading out of its current situation and there was no intention that it should do so. The winding up of the company was therefore inevitable, although three options were available, that of a creditors' winding up, a *désastre* or a winding up on just and equitable grounds. The court accepted that a just and equitable winding up was the most appropriate remedy for the following reasons, in particular that:

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[81] *Bisson v Bish* 2008 JLR *N* [46], applying *Ebrahimi v Westbourne Galleries* [1973] AC 360.

[82] *Jean v Murfitt* 1996 JLR *N*–8c (compare *Re Yenidje Tobacco Co Ltd* [1916] Ch 426).

[83] *Re Leveraged Income Fund Ltd* [2002] JRC 209 (compare *Re German Date Coffee* (1882) 20 Ch D 169).

[84] *Re Horizon Invs*, at paras 38–39. This view was also followed in *Re Charles Le Quense (1956) Ltd* [2011] JRC 155, noted at para 40.

[85] *Ibid*, at paras 41–42, discussing *Re Centurion Management Servs* [2009] JRC 227.

(i) While the business was being transferred, any liquidator appointed would continue to incur liability for transactions entered into by the company and there was an urgent need to appoint a liquidator, particularly one familiar with the company;

(ii) A creditors' winding up would not necessarily allow for the interests of the company's clients to be taken into account during the winding up, particularly bearing in mind the limitations on business able to be conducted under company law;[86]

(iii) Although a *désastre* could be declared immediately, the Viscount was in no better position to deal with the winding up of the company than a liquidator, especially given the complexities of running a trust company business;

(iv) The company's business clients would have more confidence in a just and equitable winding up; and

(v) With the transfer of the business, the company's substratum had also gone.

18 The court also held, applying *Re Belgravia*,[87] that that a just and equitable winding up was the appropriate way of proceeding for these and a number of reasons it singled out, including the need for flexibility, the avoidance of conflict with the creditors, the need to protect the interests of the investors and the need for the appointment of an appropriately experienced liquidator.

19 This is a noteworthy judgment by the Jersey court for two reasons. First, it illustrates the continuing evolution of the just and equitable winding-up procedure with the courts adapting the definition of just and equitable to novel fact situations. Here, benefit to creditors and the administration of the process itself are now legitimate considerations for the courts to exercise discretion, in addition to the classic grounds on which the procedure could be ordered. This shows the adaptability of insolvency procedures, including winding up of this type, to the needs of the modern age and the sophistication and complexity of ways of carrying out business. Secondly, the result of this case appears to sanction a procedure akin to the "enhanced liquidation" facility available in administration in the United Kingdom.[88] It incidentally

[86] Companies (Jersey) Law 1991, art 159(1).
[87] *Re Belgravia* [2008] JRC 161.
[88] Insolvency Act 1986, r 3(1)(b), Schedule B1 (United Kingdom), which states one of the purposes of administration to be: ". . . achieving a better result for the company's

seems also to enable a rescue of the business, as opposed to a rescue of the entity, by using the flexibility of the procedure itself to sanction a transfer of the business, which is particularly useful in the financial and trust company sectors where client interests are at stake. The reputational concerns, given the importance of the financial services sector in Jersey, are clearly also a factor here and appear to prompt the court to consider how the procedure itself may serve to ease the transfer of these stakeholders from one company to another with the minimum disruption to their interests.

20 Compared with the limitations attached to the other procedures that might be available, the just and equitable winding up clearly offers the possibility of consideration of the creditors' interest, although the procedure itself cannot be initiated by them. Set in the wider context of the absence of a rescue regime in Jersey law, the innovative use of the art 155 facility shows the capacity of the Jersey courts to respond to practice developments aimed at offering a wider range of choices for insolvency procedures than are available under current legislation. Since this case was decided, the line of authority seen here has been followed in *Re Horizon Nominees Ltd*,[89] where two related companies that were themselves subsidiaries of a third that had been earlier placed in a just and equitable winding up, for reasons very similar to those recited above, were the subject of an application to be made subject to the procedure.[90] The interesting element in this case was why the liquidators of the parent required separate orders for a just and equitable winding up in the case of its subsidiaries, given that they had the means of controlling the subsidiaries through the use of the voting power available to the parent company.[91] The court here requires good reason for this to be the case, but accepts the argument that the liquidators would be unwilling to accept appointments as directors of the subsidiaries, they not being insured for delivery of those services. Furthermore, given that a creditors' winding up was not appropriate (in the absence of any creditors), the summary winding up that would have to be initiated by the companies concerned were subject to an important limitation on their ability to carry on business except as absolutely necessary to realise assets, discharge liabilities and make distributions.[92] This would prevent the orderly transfer of the client

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creditors as a whole than would be likely if the company were wound up (without first being in administration)."

[89] *Re Horizon Nominees Ltd* and *Re Horizon Corporate Directors Ltd* [2012] JRC 113 (7 June 2012).

[90] *Ibid*, at paras 1–4 and 9.

[91] *Ibid*, at paras 10–11.

[92] *Ibid*, at para 12, referring to Companies (Jersey) Law 1991, art 148.

business except as directed by the court, which would subject the procedure to further delay and expense.[93] The court also accepted the clear public interest, especially in the case of a regulated business, in ensuring the transfer of the client business in a "cost-effective, efficient and orderly manner" and granted the request to open proceedings in respect of the subsidiaries.[94]

B. "Passporting" insolvency through the use of the letter of request

Re REO (Powerstation) Ltd[95]

21 Many jurisdictions within the Commonwealth share a co-operation provision contained in the laws dealing with insolvency that descend from a common legislative ancestor first introduced in the United Kingdom in relation to personal insolvency.[96] The provision was revised and extended to corporate insolvency matters in 1986 in the shape of s 426 of the Insolvency Act 1986 (United Kingdom). The provision is designed to co-ordinate proceedings and enable the courts within the Commonwealth to request other courts to assist in the management of insolvency proceedings within their own jurisdiction, the making of an order being deemed sufficient authority to enable the other court to exercise the jurisdiction it would if the matter were before it for consideration. Section 426 offers the possibility of such co-operation, specifically noting assistance to courts in the Channel Islands in the body of its text.[97] A recent case continues the trend, first

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[93] *Ibid*, at para 13.

[94] *Ibid*, at paras 14–15.

[95] *Re REO (Powerstation) Ltd* [2011] JRC 232A (Bailhache, Deputy Bailiff, and Jurats Fisher and Olsen).

[96] Bankruptcy Act 1849, s 220 (United Kingdom), later re-enacted variously as Bankruptcy Act 1869, ss 73–74 (United Kingdom); Bankruptcy Act 1883, ss 117–118 (United Kingdom); Bankruptcy Act 1914, s 22 (United Kingdom).

[97] The relevant parts of Insolvency Act 1986, s 426 (United Kingdom), read as follows:

> "(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4), a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.
>
> . . .
>
> (11) In this section "relevant country or territory" means—

seen in 2002, by providing that the Jersey courts may seek the assistance of the English courts under this provision where a sufficient reason presents itself, including where Jersey law would not provide adequately for a procedure capable of applying to the debtor. The method for seeking assistance is for the court to issue a letter of request to that effect addressing it to the court from which assistance is to be obtained.[98]

22 The facts arise from debts owed by a number of companies in the REO Group to the Bank of Scotland plc and the Governor and Company of the Bank of Ireland. These debts were payable on 21 November 2011 and were defaulted upon. On the basis of the cash-flow test, the companies were clearly insolvent.[99] On the basis of an affidavit filed on behalf of the Bank of Scotland, the group companies indebted to it were also shown to be balance-sheet insolvent, arguably all the companies in the group being in this position.[100] The main assets of the companies concerned were real estate properties in London.[101] The creditors applied to the Royal Court for a letter of request to be issued to the High Court in England and Wales requesting, on the basis of s 426, that administration proceedings under Schedule B1 of the Insolvency Act 1986 be opened in respect of the group companies.[102] The application was made on notice to the companies, who indicated they did not wish to resist the application concerned, albeit reserving their rights before the English courts, and to the Viscount, who did not make any observations in the matter.[103]

23 At the hearing before the court, the court was minded first to note that, although *désastre* proceedings under Jersey law were in theory available, such proceedings were not contemplated here and it was in fact argued that *désastre* proceedings would not be in the best interests of the companies or of their creditors. As such, it was feasible for administration proceedings in the United Kingdom to be opened on the

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(a) any of the Channel Islands or the Isle of Man, or
(b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument."

[98] The corresponding Jersey provision, Bankruptcy (Désastre) (Jersey) Law 1990, art 49, also requires a letter of request to be issued compliant with the requirements of Jersey law, for which see *Re Dick* 2000 JLR *N*—4a; *Re Williams & Clark* [2012] JRC 076.

[99] *Re REO (Powerstation) Ltd*, at para 20.

[100] *Ibid*, at para 21.

[101] *Ibid*, at para 22.

[102] *Ibid*, at para 1.

[103] *Ibid*, at paras 2–3.

basis of a letter of request being issued to that effect.[104] The court here assumed that as the United Kingdom was a prescribed country for the purposes of Jersey's own co-operation measure and that Jersey was a relevant country or territory for the purposes of s 426, the request by the Jersey court would receive "sympathetic consideration".[105] The court was of the view that its jurisdiction to make such a request was established "both on authority and on principle", given the fact of previous applications having been made on the basis of the Bankruptcy Act 1914, s 122 (United Kingdom), the immediate legislative predecessor of both Jersey's co-operation provision and s 426.[106] The Jersey court points to *dicta* by Goulding, J[107] and Chadwick, J[108] to the effect that, in the interests of comity, the English courts would give assistance to the Jersey court, absent good reason to the contrary.[109] Indeed, the view is taken that the English courts would not normally feel themselves bound by any duty to scrutinise the content of the request once they were satisfied that the case fell within the ambit of the co-operation section and would not otherwise offend against any mandatory rules of public policy. Similarly, in relation to the specific request made to open administration proceedings, an English court would satisfy itself that one of the purposes of administration proceedings could be fulfilled pursuant to such a request and would make such an order to give effect to the mandatory requirements of the co-operation provision.[110] Thus, it was "entirely proper" for the Jersey court to issue the letter of request.[111]

24 In determining this, the court noted previous instances in which letters of request had been issued to allow for the opening of proceedings in the United Kingdom in respect of Jersey companies.[112] In *Re OT Computers*,[113] the company, which was insolvent, owned a substantial information technology business in the United Kingdom. The Jersey court agreed to issue a letter of request to permit the High

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[104] *Ibid*, at para 9.
[105] *Ibid*, at para 9.
[106] *Ibid*, at paras 5–6.
[107] *Re a Debtor (ex p Viscount of the Royal Court of Jersey)* [1981] Ch 384, at 402D.
[108] *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394, at 398–399. Incidentally, it is this case that established that United Kingdom administration proceedings could be extended to a foreign company pursuant to a letter of request. Company voluntary arrangements were also held to be capable of extending to a foreign company in *Re Television Trade Rentals Ltd* [2002] EWHC 211.
[109] *Re REO (Powerstation) Ltd*, at paras 7–8.
[110] *Ibid*, at para 22.
[111] *Ibid*, at para 24–25.
[112] *Ibid*, at para 10.
[113] *Re OT Computers Ltd* 2002 JLR *N* [10].

Court in London to extend assistance under the terms of s 426. This would occur by the issuing of an administration order to permit the company's assets to be sold at the most advantageous price and to safeguard the position of the 950 employees. The court was also persuaded by the application of the centre of main interests ("COMI") test that the closest connection of the company concerned was with the United Kingdom by virtue of its extensive operations there. Jersey commentators are of the view that this was a ground-breaking decision inasmuch as the court used its inherent and insolvency jurisdictions to seek assistance via s 426 because the insolvency procedures available in Jersey were not likely to achieve as good a result for the creditors and, furthermore, that concurrent procedures would in addition simply duplicate costs unnecessarily.[114] Regrettably, administration proceedings failed and, in a later hearing, the court was invited to issue a second letter of request to enable the company to become subject to compulsory liquidation in the United Kingdom and did so on the grounds that this would be in the creditors' interests.[115]

25 The precedent set by these cases was followed in later instances.[116] In 2009, in *Re Bank of Ireland*,[117] the bank concerned was the major creditor of two insolvent Jersey companies which owned property in the United Kingdom. Although fixed charge receivers had been appointed, it was felt desirable to open administration proceedings to enable the sale of the property to take place at a later date when market conditions were improved. The court agreed to issue a letter of request to facilitate this on condition that the Jersey Comptroller of Income Tax be granted the same priority creditor status as enjoyed in Jersey.[118] Similarly, in 2010, in *Re Anglo Irish Asset Finance*,[119] the bank asked the Jersey court to issue a letter of request inviting the courts in England and Wales to place a Jersey company, over which the bank had already appointed receivers, in administration, by reason of the more extensive powers of administrators compared with receivers. The court held that it had an inherent jurisdiction to issue a letter of request and accepted that the law in relation to administration offered better prospects for a return for creditors. Although the company had no prospects of rescue as a going concern, the administration would certainly achieve the third objective of that procedure set out in the

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[114] Dessain & Wilkins, note 13 above, at para 5.5.4.2.1(g).
[115] *Re OT Computers Ltd* 2004 JLR *N* [4.]
[116] *Re REO (Powerstation) Ltd*, at para 11, discussing the two cases that follow.
[117] *Re Governor & Company of the Bank of Ireland* [2009] JRC 126.
[118] Bankruptcy (Désastre) (Jersey) Law 1990, art 32(1)(b) and (c).
[119] *Re Anglo Irish Asset Finance* [2010] JRC 087.

United Kingdom statute.[120] The making of an order would also allow the bank to have more confidence in the outcome and to inject some financing with the prospect of a better recovery.

26 The court also pointed to its inherent jurisdiction to make such an order, referring to two earlier cases of the Jersey Court of Appeal,[121] partly in a bid to forestall any objection that might be taken in proceedings in London by the debtor companies.[122] It also noted that the Jersey procedure of *désastre* began as an exercise of curial discretion to achieve equity between creditors of a common debtor and whose roots lie in the inherent jurisdiction of the court to achieve this.[123] Referring to the *remise de biens*, the court observes that whether to grant the order sought is very much a question for the court's discretion, subject to the constraints set out in previous judgments of the court creating authority. The court remarks, *obiter*, that it would unlikely on the facts in the instant case to grant such an order even if an application were made, given issues as to whether jurisdiction were available and whether the asset value would exceed the secured debt to be able to effect a dividend to the unsecured creditors.[124] It also states that administration is likely to provide a "more satisfactory remedy" on the basis that the first two of the hierarchy of objectives in the United Kingdom text were analogous to the objectives of a *remise de biens* and therefore indicated a consistency of approach between the Jersey and United Kingdom insolvency processes.[125]

27 The court stated that it was prepared to contemplate issuing a letter of request in the interests of the creditors or the debtor and/or in the public interest. In relation to this last point, the court was of the view that what it termed "a satisfactory methodology" for dealing with the interests of the debtor and the creditors fell within the scope of public interest, to which was allied the general reputation of the Island as a financial centre. Key to the court's decision to issue a letter of request was the view that a major insolvency affecting a group of Jersey companies with the potential effect of damage to creditors required to

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[120] Insolvency Act 1986, r 3, Schedule B1 sets out the purposes as: (a) the rescue of the company as a going concern; (b) achieving a better result for the creditors than would be the case in liquidation; and (c) the making of a distribution to one or more preferential or secured creditors.

[121] *Finance & Economics Cttee v Bastion Offshore Trust Co* 1994 JLR 370; *Re X* 2003 JLR 111.

[122] *Re REO (Powerstation) Ltd*, at paras 12–14 and 17.

[123] *Ibid*, at para 15.

[124] A requirement firmly established in *Re Shield Invs (Jersey) Ltd* 1993 JLR *N*—3.

[125] *Re REO (Powerstation) Ltd*, at paras 22–23.

be dealt with by the most satisfactory remedy available, which it saw in this case to be the opening of administration proceedings in the United Kingdom.[126] The court does underline two propositions in particular: that it lends its assistance in appropriate cases to a process that allows for the suspension of formal proceedings against debtors in order to allow for an orderly realisation of assets and that its inherent jurisdiction to so, while exercised in the past in "a number of different respects", is quite certain insofar as insolvency matters are concerned.[127]

28 This is a very interesting judgment by the Jersey court. As discussed earlier, at the root of the problem illustrated by this case is the fact that there are no Jersey procedures that are, strictly speaking, rescue in the way that term is understood elsewhere. What this case does illustrate, however, is the creativity of the Jersey courts in their use of the letter of request procedure to enable the rescue of Jersey companies through the facility offered by the courts in the United Kingdom, with which Jersey companies often have close financial and trading connections. Furthermore, the availability of highly-regarded corporate voluntary arrangements and administration procedures in the United Kingdom and benefits for companies incorporated elsewhere is undoubtedly also a factor promoting resort to this facility. This "passporting" procedure has evolved precisely because the s 426 framework has offered a potential solution to the problem.[128] It is not surprising therefore that the trend illustrated by this case has been continued in the more recent decision of *Re Control Centre*,[129] where the company, despite its ownership of a number of commercial properties in England, could not demonstrate that its COMI was located within the jurisdiction so as to permit the courts there to exercise jurisdiction outright.[130] As a result, it was necessary for the Jersey court to issue a letter of request to enable an application to be made to authorise the appointment of administrators to replace the receivers that had been into place on the basis of the security held by the creditor so as to permit the office-holders to exercise the wider powers they enjoyed under United Kingdom legislation.[131] Again, in this case, there is a consideration of Jersey procedures. In relation to

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[126] *Ibid*, at para 18.
[127] *Ibid*, at para 16.
[128] In the case of companies elsewhere in Europe, manipulation of the COMI to locate it in the United Kingdom also enables the application of the United Kingdom rescue procedures.
[129] *Re Control Centre General Partner Ltd* [2012] JRC 080 (18 April 2012).
[130] *Ibid*, at paras 6 and 11.
[131] *Ibid*, at paras 9 and 12.

désastre, the court notes two things: that the procedure itself has a "sudden-death nature" that usually involves the end of business activity and that, were the Viscount appointed and required to engage professionals in the United Kingdom to realise the business' assets, their powers would be constrained to the same extent as the Viscount's. This makes the *désastre* less palatable than the "rescue and work-out features of administration" the court highlights.[132] In relation to *remise de biens*, although the court suggests the procedure is comparable with administration, it underlines the creditor's lack of access to the procedure and, in any event, suggests the procedure cannot extend to foreign located immoveables.[133] Thus, the issue of the letter of request is necessary, particularly given the primary objective of the administrator in seeking to effect a rescue, but more notably the "considerable advantage" in having United Kingdom-based office-holders carrying out an assessment of the options available to them so as to achieve the best value for creditors in relation to assets whose *situs* was in the United Kingdom.[134]

Summary

29 What the two cases featured here illustrate and those that follow them is how practitioners ultimately create solutions based on the needs of clients to which the courts craft appropriate remedies within the framework of the law. This often provides the occasion for an assessment of the law, its deficiencies and lacunae. It also allows for a reassessment of parts of the law hitherto used for different purposes, but which could be engineered to respond to novel fact situations. This has been the fate of the scheme of arrangements, which is increasingly used in a number of jurisdictions in the Commonwealth as a means of palliating the absence of appropriate procedures for the rescue of businesses.[135] The same may well be true of the new merger framework in Jersey, which could see a demand for domestic and cross-border mergers involving insolvent entities. Nevertheless, with respect to the just and equitable winding up, it appears that Jersey courts are treading down a path of their own creation. In defining the interests of creditors and the good administration of the procedure itself as reasons to authorise the granting of orders, the courts are

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[132] *Ibid*, at para 15.
[133] *Ibid*, at para 16.
[134] *Ibid*, at paras 12 and 23.
[135] See Kawaley, *Cross-Border Insolvency in the British Atlantic and Caribbean World: Challenges and Opportunities*, chap 14 in Wessels & Omar (eds), *Insolvency and Groups of Companies* (2011, INSOL-Europe, Nottingham), at 173 (referring to a similar practice in the Caribbean).

effectively taking on board the needs of creditors who, paradoxically, have no access to this procedure or indeed any of the variants of winding up contained in companies legislation. The particular use that the just and equitable order now finds in the context of the financial services industry, which has not been immune to the global tide of recession, to enable the equivalent of a work-out to take place and the orderly transfer of client business, is an extension of this concern for creditors and stakeholders in the process. Similarly, a concern for benefitting and ensuring greater value for creditors, including through achieving rescue, is inherent in the reasoning in many of the cases involving letters of request for the application of United Kingdom procedures to Jersey companies.

30 Nevertheless, ultimately, what both trends reveal is the lack of a rescue-type procedure in Jersey, which undoubtedly needs to be remedied before long.[136] The Jersey Law Commission has made its views on the older procedures felt, while the law on *désastre* is reaching the age when it might usefully be revised to keep it in tune with the needs of the ever-evolving business environment and changes to the conception of insolvency law. The development of a more modern domestic insolvency regime in Jersey is the logical next step, whether the procedure is ultimately inspired by those available elsewhere or proceeds from an autochthonous basis. It is to be hoped that developments will not be long in coming and that a reassessment building on and going beyond the earlier work of the Jersey Law Commission will take place in due course.

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[136] Of interest here may be the fact that Guernsey has introduced United Kingdom-style administration in the Companies (Guernsey) Law 2008.