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A JERSEY PERSPECTIVE ON CROSS-BORDER INSOLVENCY: ARTICLE 49 AND RECEIVERS

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Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 authorises Jersey courts to extend cooperation to foreign courts sending a Letter of Request to that effect. The recent case of Re Estates & General Developments Ltd (in liquidation) *has reinforced the utility of this provision in the case of a foreign creditor seeking to recover secured immovable property.*

Introduction

1 A co-operation provision in cross-border insolvency cases was introduced into Jersey law for bankruptcy and insolvency matters in the shape of art 49 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 ("art 49"). Article 49 can be described as the first such provision to offer a specific autochthonous regime enabling assistance to be given to overseas courts in cross-border cases.[1] The Report accompanying the Draft Law stated that the opportunity had been taken to draft a co-operation provision to permit the Royal Court to assist the courts of prescribed countries. The report also stated that, in due course, the

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[1] The article appeared as art 48 in the law as enacted, but was amended and renumbered by the Bankruptcy (*Désastre*) (Amendment No 5) (Jersey) Law 2006, art 22 (in force 1 August 2006). Prior to this, the Bankruptcy Act 1914, s 122 (United Kingdom) was, in theory, of application as "Imperial" legislation to all Crown Dependencies, including Jersey, British colonies and territories. Its repeal by the Insolvency Act 1986, s 426 (United Kingdom) ("s 426") was perhaps the move that inspired the Jersey authorities to provide a domestic provision as an updating measure within the scope of the bankruptcy law reform that saw the enactment of the Bankruptcy (*Désastre*) (Jersey) Law 1990. Article 49 and s 426 resemble each other and are part of a family of cooperation provisions that can trace their common ancestry back to the Bankruptcy Act 1849, s 220 (United Kingdom). For a detailed account of Jersey cross-border insolvency, see Dessain & Wilkins, *Jersey Insolvency Law and Asset-Tracking* (4th ed) (2012, Key Haven Publications, Oxford), Chapter 6.

United Kingdom and possibly other countries and territories would be prescribed for the purposes of reciprocal aid with the application of the rules of private international law being preserved. The report also mentioned, as an example of such a rule, the longstanding common law prohibition on the enforcement of foreign revenue claims.[2]

2 As originally enacted, the provision stated that—

> "(1) The court shall assist the courts of such countries and territories as may be prescribed in all matters relating to the insolvency of any person to the extent that it thinks fit.
>
> (2) For the purposes of paragraph (1), a request from a court of a prescribed country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction.
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> (3) In exercising its discretion for the purposes of this Article the court shall have regard in particular to the rules of private international law."

3 The amendments in 2006 renumbered the provision itself, but left the third paragraph untouched, while adding a fourth to provide powers for the Minister to prescribe what is to be regarded as a "relevant country or territory", the word "relevant" having replaced "prescribed" in paras 1 and 2. The major change in the amendments was the rewording of para 1 to replace the mandatory "shall" with a more directory "may" as well as to include reference to the fact that that a court may have appropriate regard to the provisions pending of any model law on cross-border insolvency prepared by the United Nations Commission on International Trade Law ("UNCITRAL"), this being a reference to the UNCITRAL Model Law on Cross-Border Insolvency 1997 ("Model Law").[3] The Model Law's provisions, numbering some 32 articles, are divided into four key areas: the scope of the instrument, rules for access by representatives of foreign

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[2] Report lodged *au Greffe* on 18 July 1989 by the Finance and Economics Committee, at 18.

[3] The Model Law has been adopted by approximately 20 countries and territories, including the United Kingdom, where it is given effect in England and Wales and Scotland by the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), made under the authority of the Insolvency Act 2000, s 14 (United Kingdom), and, in Northern Ireland, by the Cross-Border Insolvency Regulations (Northern Ireland) 2007 (No 115), made under the authority of the Insolvency (Northern Ireland) Order 2002, art 11 (SI 2002/3152).

insolvency proceedings, including the treatment of foreign creditors, the effects of domestic recognition of foreign procedures and rules for co-operation and for co-ordination of simultaneous proceedings in several jurisdictions over the same debtor. The Model Law may be said to represent the current international consensus as to the conduct and treatment of cross-border cases.[4]

4 Currently prescribed for the purposes of art 49 are Australia, Finland, Guernsey, the Isle of Man and the United Kingdom.[5] The inclusion of the word "possibly" in the Report seems to suggest that there were doubts at the time about extending recognition from the outset in the law to particular territories beyond a limited list. In fact, although the United Kingdom, Guernsey and the Isle of Man were the first to be prescribed, the list has not grown by much in the intervening years.[6] Cavey[7] has suggested that non-prescribed jurisdictions might wish to consider whether there are "special benefits" from seeking to qualify under the art 49 jurisdiction. For those jurisdictions that are not on the list though, resort may be had to the customary law and the inherent jurisdiction of the court to extend assistance to countries and territories that have not been prescribed for the purposes of art 49. In such cases, the courts will use principles of comity they have developed to give effect to requests for assistance emanating from other jurisdictions.

5 Examples of non-art 49 cases include *In re F & O Finance AG*,[8] in which a Swiss court could still receive assistance as the Jersey court deemed itself to have an inherent jurisdiction enabling it to assist in foreign insolvencies. A Jersey court was likely to recognize the appointment of a foreign insolvency office-holder who was administering a bankruptcy arising in a foreign jurisdiction where there was a valid connection between the debtor and the law under which the insolvency occurred, reflecting the customary law's adherence to the same private international law rules mandated in the case of art 49.

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[4] It has certain resemblances to the European Insolvency Regulation (Council Regulation (EC) No 1346/2000 of 30 May 2000), which does not, however, apply in Jersey.

[5] Bankruptcy (*Désastre*) (Jersey) Order 2006, art 6.

[6] Anecdotal evidence suggests that recognition is a matter of expediency to enable the extension of assistance to deal with particular insolvent debtors and exclusion is not necessarily a reflection of the probity of the jurisdiction concerned.

[7] Cavey, "Article 48 Applications in Bankruptcy—A Practitioner's Guide", (2002) 6(2) *JL Rev* 203.

[8] In re F & O Finance AG 2000 JLR N–5a.

Assistance would be forthcoming especially where there was evidence that assistance under a similar request made in the opposite direction would be reciprocated. In *Montrow*,[9] the court held that the principles under which assistance is given to foreign bankruptcy courts by the courts in England and Wales applied by analogy to requests for assistance to Jersey courts under the customary law. Under these principles, the request for assistance was a weighty factor to be taken into account by the Jersey court but was not conclusive as to the manner in which the discretion of the court should be exercised; the Jersey court might be expected to accept without further investigation the views of the requesting court as to what was required for the proper conduct of the bankruptcy or winding up and it would not normally be appropriate for the Jersey court to inquire into the basis for the views expressed by the requesting court.

6 Under art 49, the subject matter of orders that may be typically sought include for the recognition of office-holders, for disclosure of assets or information (especially documents), for the examination of witnesses, to prevent disclosure ("gagging" orders), for freezing assets (including bank accounts), restricting how information that is obtained may be used, delaying publication of the court order until further enquiries have been made as well as ancillary cost issues.[10] In what is said to have been the first case in Jersey under art 49,[11] the administrative receiver of an English company obtained a Letter of Request asking the Jersey court to order the examination of certain parties and to require the production of documents relating to certain Liberian companies. Some supporting information accompanying the Letter of Request was certified by the English court as confidential. The parties resisted the application generally and asked for production of the confidential information. The court held that, were it of the opinion that the matter could not be disposed fairly and properly without that disclosure, then the onus would fall on the receiver to show that disclosure should not be made. Nevertheless, the court felt that sufficient information had been provided to the parties to enable them to know why the examination and production of documents were requested and on the basis of which they could contest the application.

7 The view taken in this case appears consonant with the approach taken with regards to s 426 in the United Kingdom. In one of the first

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[9] *In re Montrow Intl Ltd* 2007 JLR *N* [49], applying *Hughes v Hanover* [1997] 1 BCLC 497.

[10] See Cavey, note 7 above.

[11] *Ibid*, citing *In re C Ltd* 1997 JLR *N*–8b.

cases on s 426, *Re Dallhold*,[12] where a request had been made by an Australian court for assistance, the English court stated that the purpose of the co-operation provision was to give to the requested court a jurisdiction that it might not otherwise have in order that it could give the assistance to the requesting court. The first step in such cases was to identify the matters specified in the request. Secondly, the domestic court should ask itself what would be the relevant insolvency law applicable by it to comparable matters falling within its jurisdiction. Thirdly, it should then apply that insolvency law to the matters specified in the request. The result was that an English court could act on a request by the Federal Court of Australia by applying to the matters specified in the request provisions of English insolvency law, including the provisions relating to administration.[13]

8 In Jersey, Dessain's view of the provision is that, although the recognition appears to be automatic, the wording of art 49, particularly where it is subject to whether the court thinks it fit to act, means that there is a discretion to apply the rules of private international law. This will be dependent on a number of factors, including the views of the court as to jurisdiction, the title to property (presumably as a connecting factor for the exercise of jurisdiction or the determination of the proper law in relation to that property), the choice of law as well as public policy.[14] Furthermore, the Jersey authorities appear to prefer

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[12] *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621. The purposive approach taken in the case has been followed in *Re Business City Express* [1997] 2 BCLC 510, *Hughes v Hannover Ruckversicherungs-AG* [1997] 1 BCLC 497 and many other cases subsequently.

[13] Then s 8, now Schedule B1, Insolvency Act 1986 (United Kingdom). The availability of corporate voluntary arrangements for overseas companies under a Letter of Request was not, however, confirmed till much later in the case of *Re Television Trade Rentals Ltd* [2002] EWHC 211. One of the possible reasons for the Australian court making the request was the fact that a rescue procedure was not then available in Australia, not in fact being introduced till 1993. A similar lack of a rescue procedure in Jersey also appears to be behind comparable requests for the extension of United Kingdom administration to Jersey companies in cases such as *In re OT Computers Ltd* 2002 JLR *N* [10], *Re First Orion Amber Ltd* [2009]JRC126, *Re St John Street Ltd (or Representation of Anglo Irish Asset Finance)* [2010]JRC087, *In re REO (Powerstation) Ltd* [2011]JRC232A and *Re Control Centre General Partner Ltd* [2012]JRC080, and *Re Tarnbrook (Jersey) Ltd* [2012]JRC046.

[14] See Dessain, Jersey: Issues on Cross-Border Insolvency (1998) 11(4) Insolvency Intelligence 25, at 27.

that art 49 requests for assistance are made following consultation with them to determine how the requests might be drafted in line with provisions of Jersey procedural and substantive law.[15] In *In re Dick*,[16] the court stated that an application for an order in aid to fulfil a Letter of Request should not be made until the applicant has consulted with the Viscount's Department, thus ensuring that the order sought is drawn in terms suited to Jersey procedural legislation and court rules.[17] Furthermore, a Letter of Request should issue in proper form as a letter addressed by a court to another and not simply be contained within the body of a judgment or annexed to it.[18]

9 The brevity of art 49 makes the analysis of what reported case law there is particularly important, including the interplay between orders sought in various proceedings and the proceedings themselves.[19] Apart from those already mentioned, other reported cases include *Warner*,[20] where, on a request by a foreign court for assistance in an insolvency, the court held that it may provide assistance under art 49 even if there were a Jersey bankruptcy. It could, however, refuse the request if it were hopelessly bad under the foreign law or if there were a reason of Jersey public policy not to grant the assistance sought. In this case, involving an Australian trustee in bankruptcy of a deceased person's estate, the court also stated that the issue of a grant of probate in Jersey was not necessary as the deceased's property had already vested in the trustee.

10 In relation to the foreign revenue issue, although the rule in *Government of India v Taylor*[21] was confirmed subsequently in *In re*

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[15] Cavey, note 7 above; see also Wilkins & Dessain, *A Guide to the Obtaining of Evidence in Jersey* (1999) 3 *JL Rev* 280, which helpfully sets out a checklist of what is required for a Letter of Request under the Service of Process and Taking of Evidence (Jersey) Law 1960, applicable in civil and commercial matters (including bankruptcy).

[16] *In re Dick* 2000 JLR *N*–4a.

[17] Now enshrined as Practice Direction RC 05/17. A handy guide to what is required is published as "Article 49 Applications in Bankruptcy: A Practitioner's Guide", available via the website of the Viscount's Department at http://www.gov.je/Goverment/NonexecLegal/Viscount/Pages/index.aspx.

[18] Re Williams & Clark [2012]JRC076.

[19] Cavey, note 7 above, suggests that by 2002, when her article was published, requests from advice as to applications under art 48 (now 49) had increased noticeably, a feature not necessarily reflected in the reported case law.

[20] Warner v Equity Trust (Jersey) Ltd 2008 JLR N [1].

[21] Government of India v Taylor [1955] AC 491.

Bomford,[22] the court stated that it would be unfair to refuse assistance merely because the tax authorities are the most substantial of a number of major creditors. It appears, therefore, to be the case that where the tax authorities are the only claimant or the only creditor to pursue proceedings, assistance would be refused.[23] *In re Charlton*,[24] where Letters of Request were issued to the Jersey courts to enable the gathering of evidence for use in a prosecution for alleged tax evasion, conviction in which would result in a liability for payment of the tax, is authority that the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983 has partially abrogated the rule insofar as evidence gathering is concerned, even if one of its by-products is to enable tax gathering to take place.[25] More recently, in *In re Williams*,[26] the court was invited to give assistance to the High Court in England and Wales by recognising the appointment of a trustee in bankruptcy and giving him the authority to obtain documents and information from a Jersey trust company. In this case, HMRC was by far the largest creditor accounting for 99.8% of all claims in the bankruptcy. The court held that the giving of assistance under art 49 was discretionary and the court was required to have regard to the rules of private international law, under which the court had no jurisdiction to entertain an action for the enforcement either directly or indirectly of a penal, revenue or other public law of a foreign state, the rule in *In re Tucker*[27] being followed. There was no distinction, the court felt, between collecting assets and seeking information to recover assets. However, following *In re Bomford*,[28] the court felt it incumbent to provide assistance, given that there was another creditor, whose debt,

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[22] *In re Bomford* 2002 JLR *N* [34].

[23] Cavey, note 7 above, also cites *Re Hoare* (7 November 2001) (unreported) and *Re Carman* (3 April 2002) (unreported) as cases in which the presence of a foreign revenue authority was a matter for the court as to whether the application should be granted, suggesting that practitioners considering an art 48 (now 49) application should consider the extent to which the foreign revenue authority was a claimant in the debtor's insolvency.

[24] *In re Charlton* 1993 JLR 360.

[25] The court was mindful also of the persuasive precedent of *Re State of Norway (Nos 1 & 2)* [1990] 1 AC 723, which post-dated *In re Tucker* (note 27 below) and which states that a court, while refusing to enforce a foreign revenue law, might, out of comity, assist in the gathering of information to permit foreign state authorities to enforce their revenue laws in that state.

[26] *In re Williams* 2009 JLR *N* [16].

[27] *In re Tucker* 1987–88 JLR 473.

[28] Note 22 above.

although small in comparison with that owed to HMRC, might be regarded as a substantial sum by that creditor.

11 The issue of enforcement of proceedings containing a penal element, such as a possible disqualification of company directors taking place elsewhere, has also been considered by the Jersey courts. In one case, on the application of the liquidator of an English company, a Jersey trustee was ordered to disclose certain documents and information.[29] The liquidator had given an undertaking to the court that the documents and information disclosed by the trustee would only be used "for the purposes of the company's liquidation", but had not disclosed his statutory duty to assist the United Kingdom authorities under the Insolvency Act 1986 (United Kingdom) and the Company Directors Disqualification Act 1986 (United Kingdom). Nor had the liquidator disclosed that, in fact, a request for assistance by the United Kingdom authorities had already been received. On an application for leave to amend the undertaking to permit the disclosure, the court held that the disclosure did not fall within "the purposes of the company's liquidation". As the liquidator had persuaded the court that the disclosure orders should be made, overriding the trustee's duty of confidentiality, he should have taken the greatest possible care to observe his undertaking. The court was of the view that, when applying for disclosure, he should have informed the court of his statutory obligations as an English liquidator and of the specific request for assistance which he had received, so that those obligations could be taken into account in the contents of the order and the drafting of his undertaking. The liquidator had, however, acted in good faith and in the circumstances the court granted leave to amend his undertaking to allow the trustee to supply the documents to the United Kingdom authorities.

Casenote: *Re Estates & General*[30]

12 A recent case emanating from Jersey has also reinforced the utility of art 49 in a situation where recognition was sought of the appointment of fixed charge receivers in the United Kingdom and of their capacity to deal with immovable property located in Jersey. As the Jersey court noted, it was apparently the first time that a local court had been called upon to entertain such an application by fixed charge

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[29] In re AG (Manchester) Ltd 2005 JLR N [13].

[30] *Re Estates & General Devs Ltd (in liquidation)* [2013]JRC027 (4 February 2013). Available via the Jersey Legal Information Board website at http://www.jerseylaw.je.

receivers in relation to Jersey immoveable property.[31] The company concerned, Estates and General Developments Ltd, was incorporated in England and Wales to hold immovable property assets on behalf of its holding company Estates and General Ltd, which itself was formed to carry out business as a property investment company.

13 The immovable property assets concerned were acquired in 2006 in St Helier, Jersey.[32] The parent company had issued a trust deed in 1983, subsequently amended and supplemented by a number of other trust deeds, on the basis of which two classes of mortgage debenture stock had been issued. The stock was secured by way of floating charge over the company's assets and had been floated on the London Stock Exchange. The trust deed (as amended) contained a power for the trustee (Capita IRG Trustees Ltd) to appoint receivers on behalf of the stockholders subject to the terms of the deed. The subsidiary company, which was the subject of the instant application, had become a party to the trust deed by means of the tenth supplemental trust deed and had granted the trustee a first ranking judicial hypothec over the property situated in Jersey, together with a first floating charge over its undertaking and all of its further property and assets as further security for the stock.[33]

14 The inevitable happened: both companies ended up in financial difficulties and were placed in liquidation by resolution of the shareholders on 21 January 2011 with the same office-holders being appointed.[34] Subsequently, on 8 February 2011, the trustee exercised its power to appoint joint administrative receivers of the parent company.[35] They then appointed, on 11 March 2011, the same persons

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[31] *Ibid*, at para 1. Jersey courts have had occasion to deal with administrative receivers appointed under a floating charge before, as in *In re C Ltd*, note 11 above. In fact, as early as the case of *Re Shephard Hill & Co Ltd en désastre* (7 December 1990) UJ 112, cited by Dessain and Wilkins, note 1 above, at para 5.22.1, a declaration of *en désastre* was made on a protective basis in order to safeguard creditors and property within Jersey while an application by English receivers for recognition in Jersey was adjourned *sine die* pending the resolution of jurisdictional questions in relation to the property.

[32] *Ibid*, at para 3.

[33] *Ibid*, at para 4. Note that Security Interests (Jersey) Law 1983, art 12 preserves the capacity of an individual (resident or domiciled in Jersey) or locally formed entity (company or limited liability partnership) to enter into a security obligation under foreign law over property situated outside Jersey.

[34] *Ibid*, at para 5.

[35] *Ibid*, at para 6. Despite the apparent abolition of administrative receivership by the Enterprise Act 2002 (United Kingdom), it is in fact preserved in

as fixed charge receivers over the property belonging to the subsidiary company and that was subject to the deed.[36] A Letter of Request was subsequently issued on 5 April 2011 by the Registrar in Bankruptcy in the High Court requesting the Jersey court to ratify and recognise these appointments and grant the powers necessary for securing and realising the property concerned.[37] Owing to delay occasioned by the need to deal with other property belonging to the group companies, an application was only forthcoming before the Jersey courts in connection with the request late in 2012.[38]

The judgment[39]

15 The Jersey court first had to understand the nature and extent of administrative and fixed charge receiverships in relation to both companies. Appreciating the administrative receivership to be essentially an appointment (under a floating charge) in relation to all or substantially all of a company's property, together with the power to manage its affairs, the fixed charge receivership was noted as being a more restrictive appointment in relation to specified property with powers only available in relation to that property.[40] The court also noted that the charge-holder's entitlement to appoint arose pursuant to contract, which also determined the instances of default giving rise to a right to the making of an appointment. Such appointments, not at the behest of a court, did not prevent the appointment of a liquidator (nor *vice versa*), although the liquidator was not entitled to deal with any assets subject to the fixed charge, which were solely within the prerogative of the receiver.[41] However, although normally a receiver is deemed to be an agent acting on behalf of the debtor/charger (so as to avoid the charge-holder being liable for his acts), the appointment of a liquidator terminates the agency and the receiver holds the property as principal under the terms of the contract.[42] These powers will normally

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certain cases, including financial arrangements entered into prior to the Act coming into force (the so-called "grandfathering" clauses).

[36] *Ibid*, at para 7.

[37] *Ibid*, at para 8.

[38] *Ibid*, at para 9.

[39] *Coram* Sir Michael Birt (Bailiff) and Jurats Le Cornu and Liston.

[40] *Re Estates & General*, at paras 10–12. It should be noted that floating charge type security does not exist in Jersey, only fixed charge type security (hypothecs over immovables, charges and liens over movables as well as security interests over intangible property under the law mentioned, note 33 above) being available.

[41] *Ibid*, at para 13.

[42] *Ibid*, at para 14.

include powers to manage and sell the asset(s) concerned to the exclusion of the liquidator's capacity to affect the property.[43] In the instant case, the issue thus arose as to what powers might be exercised in Jersey in relation to the asset owned by the subsidiary company, consisting of immovable property in St Helier.

16 The court next turned to consider the impact of an art 49 application. Although the court's view was that the instant application did not fall within the usually contemplated situation of a court opening an insolvency procedure in respect of a debtor and then requesting assistance in respect of the conduct of those proceedings, it was nonetheless a Letter of Request from a court within the meaning of the provision and related, despite the appointment being made as a matter of contract, to the insolvency of a debtor, the evidence in relation to both companies being clear on this point.[44] In appreciating the extent to which assistance could be forthcoming in the specific instance of the appointment of a receiver, the court found it helpful to consult the standard work on private international law in the United Kingdom.[45] In dealing with the position of a receiver acting outside the United Kingdom, the work observed firstly that a receiver appointed in respect of a floating charge will be able to exercise powers in a foreign jurisdiction only to the extent that the foreign jurisdiction recognises the validity and effect of the charge as well as the receiver's power to act.[46]

17 In this connection, failure to obtain recognition might ensue if the charge were repugnant to the law of the location (*lex situs*) of the assets or ineffective because of a failure to comply with mandatory rules applicable to such assets within the jurisdiction, the example being given of registration rules. A final problem referred to was the possibility that the receiver's capacity to sue might not be recognised in the local court, because although the law of the state of incorporation would deem him an officer of the company, there was no guarantee that this position would be accepted in the foreign jurisdiction, particularly should there be some prejudice to local

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[43] *Ibid*, at para 15. Thus, it may be said that the existence of an appointment has the effect of "separating" the asset from the general estate available to all creditors and vesting it in a person acting for the charge-holder (but not its agent).

[44] *Ibid*, at paras 16–17.

[45] *Ibid*, at para 18, citing Dicey, Morris and Collins, *The Conflict of Laws* (15th ed) (2012, Sweet and Maxwell, London).

[46] Dicey *et al*., *ibid*, at para 30–134 (in Volume II).

creditors.[47] In this light, the Jersey court accepted that the charge was not repugnant as a judicial hypothec had been obtained and had been registered under Jersey law. The Jersey court was also inclined to accept the analysis of the position of the receiver and subjection to English law to determine the powers and capacity available to such office-holders. As there did not appear to be any local creditors and the receivers had undertaken to advertise for any claims to come forward, while also liaising with the Comptroller of Income Tax in respect of any outstanding dues, there did not appear to be any reason not to grant the order.[48]

18 However, the Jersey court was also concerned at the impact recognition of the receiver's capacity and powers would have in relation to the property concerned, particularly as local creditors holding a judicial hypothec would not have similar powers in relation to immovable property and the court could not confer these powers upon them.[49] The only ways available locally for a creditor to effect execution over immovable property would be to pursue one of two options:

(1) To obtain judgment (with prior leave to serve out of the jurisdiction in this case also being necessary) and on that basis apply for an *Acte Vicomte chargé d'écrire* to notify the debtor of the judgment and giving time to pay. Upon any further (likely) default, only then could a creditor go to court to have the chargor's property declared to have been effectively renounced (*adjudication de renonciation*), which would then be followed by a *dégrèvement* procedure,[50] in which the property would be adjudicated to whichever of the creditors was prepared to take it subject to paying off all prior secured interests;[51]

(2) To apply, on the basis of a liquidated sum owed by the debtor of at least £3000, for the debtor to be declared *en désastre* and the property to be sold by the Viscount within a collective liquidation type procedure.[52]

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[47] *Ibid*, at para 30–135.

[48] *Re Estates & General*, at paras 19–22 and 29(ii).

[49] *Ibid*, at para 23.

[50] The essential purpose of this procedure is to purge (discumber, in Jersey usage) the land of security and make it more readily saleable.

[51] Re Estates & General, at para 24.

[52] *Ibid*, at para 25. For an outline of the various Jersey bankruptcy procedures, see, by this author, *Law relating to Security on Movable Property and Bankruptcy Study Guide* (2012, Institute of Law Jersey, St Helier), Chapters 8–15; Dessain & Wilkins, note 1 above, Chapter 5.

19 Either way would engage the charge-holder in a lengthy and time consuming process and, in the case of the *désastre*, also require the payment of the Viscount's fees for the asset disposal, which would come at a cost to the charge-holder, given that the value of the asset was considerably less than the amount secured by the judicial hypothec. A third method, involving the companies' liquidators seeking recognition before the court, was canvassed, but dismissed for reasons that the liquidators had no standing under English law to deal with the property subject to a receivership.[53] Although the *dégrèvement* and *désastre* were options for proceeding, the court viewed these as disadvantageous, particularly given concerns about keeping costs to a minimum and maximising the benefit for creditors, even in a situation, as here, where the creditor would not be receiving the full outstanding amount.[54]

20 As such, the art 49 authority for the court to exercise any powers it or the requesting court had would entitle the court to regard the receiver as having whatever authority he would have had under English law in relation to the property, notwithstanding that it was sited in Jersey. On the basis of comity, the Jersey court was prepared to accede to the Letter of Request and authorise the receiver to manage the property with view to selling it in due course.[55] One caveat alone applied in that the receiver was to be regarded, for the purposes of local law, not as principal in his own right, but as agent for the company which owned the property.[56]

Summary

21 In addition to the novelty the case represents for the Jersey court, being the first application of its type, this case presents other features of interest. Of particular note is the use of the art 49 facility to grant the foreign creditor access to local assets on terms that the local creditor simply would not be able to enjoy. The point may be made that this could be an argument for local procedures to be reviewed to speed up the processes of execution and recovery and/or, it being the case, to confer similar rights on local creditors. Furthermore, although Jersey law does not permit the creation of floating charges or the appointment of receivers or indeed the appointment of office-holders

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[53] *Ibid*, at para 26.
[54] *Ibid*, at para 27.
[55] *Ibid*, at para 28.
[56] *Ibid*, at para 29(i).

other than by a court,[57] it is nonetheless able to assimilate the position of a receiver appointed by a charge-holder under a contract outside the purview of a court. It also accepts that the insolvency context within which art 49 is intended to operate is satisfied, the companies in question being insolvent according to the evidence.[58] It is also able to analyse whether the terms on which recognition might be forthcoming have been met in the instant case by referring to the foreign law (to determine issues of status and capacity) as well as compare the effect recognition of the foreign appointment will have when compared with local methods for execution and enforcement. In the context of an adjudication involving a private international law analysis, the appeal to the principle of comity is also interesting for its use as a justification for extending recognition and assistance even in a situation where local creditors would not be similarly treated.

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[57] That said, a company liquidation normally sees the liquidator appointed by the directors or members.

[58] *Sed quaere* whether recognition of a receivership over a chargor, not otherwise insolvent, or property generally would be forthcoming on similar terms.