

UPDATE

Security in security - court dismisses challenge to Guernsey Saisie procedure in landmark judgment

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The Royal Court recently considered the legality of the method by which a judgment creditor enforces its judgment against a judgment debtor's real property in Guernsey. That procedure is known as 'Saisie' and is unique to Guernsey. The debtor claimed that the Saisie procedure breached his human rights. Mourant Ozannes successfully defended this challenge on behalf of the judgment creditor.

Enforcement against real property

In Guernsey, a creditor who has taken security over a debtor's real property (known as a bond), or a creditor who has registered a judgment debt against such real property, can use the Saisie procedure to seek recovery of the sums due to it against all of the debtor's real property in the island. One singular aspect of the procedure is that on buying out any priority creditors, the judgment creditor may take the whole of the real property in satisfaction of the debt. When the judgment creditor then goes on to sell the property, if there is any surplus after its debts and costs are deducted, it is not legally required to pay that surplus over to the judgment debtor.

The Human Rights challenge

In *HSBC Bank plc v Doyle*, the judgment debtor argued that the creditor's entitlement to take title to the whole of his real property, with no obligation to pay over any surplus once the property is sold, was contrary to his right to the peaceful enjoyment of his property, as asserted by the European Convention on Human Rights.

The Court rejected this argument for a number of reasons:

- There are various procedural stages in the Saisie process, and it is only after a number of these have been completed that the Court permits the judgment creditor to take title to the real property (known as an Interim Vesting Order or IVO). Until such time as an IVO is granted, the debtor remains the sole owner of the property. It is thus open to the debtor to seek to sell the property on the debtor's own terms, apply the proceeds of sale to pay off the judgment creditor and retain any surplus. If the debtor can do this, there is of course no deprivation of property.
- When the creditor is ready to seek an Interim Vesting Order, the debtor may apply for a postponement of that order. The court will consider whether to grant this in order to give the judgment debtor more time to sell the property. This provides further protection to the debtor before being deprived of their property.
- Any deprivation of property resulting from a secured lender's ability to take the real property which had been offered as security is justified by and proportionate to the public interest in ensuring the availability of credit on affordable terms, made possible by security.
- If there was a need for change (which in any event the court did not accept), it would be for the legislature to make this change. That way it could consider the backdrop of enforcement and insolvency law more generally, not to seek to amend aspects of the law "on the hoof" on a case-by-case basis.

- As a further safeguard to the debtor's interest in any surplus, the Bank, as judgment creditor, stated in open Court that if there were any surplus and no impediment to the Bank doing so, the Bank would pay such surplus to the debtor. In the court's judgment, that statement of intention amounted to a complete answer to the debtor's challenge on this point.

Implications

Lenders should be aware of what is expected by the courts so they can make sure the lending arrangements cannot be impugned. The case reaffirms a creditor's ability to enforce a debt against real property in Guernsey. It offers an insight of the parameters within which it is safe for institutional lenders to act where they take security against a residential property, eg the level of warning to debtors about the possibility of losing the secured property if they fail to keep up with the agreed repayments. Those parameters also apply to entities or individuals who hold a Guernsey or foreign judgments which might be enforced against real property in Guernsey.

The Saisie procedure might be over two centuries old but that does not mean it offends more modern developments such as the human right to property. This being said and although the Court declined to find that the judgment creditor's entitlement to the surplus is per se contrary to Convention Rights, the judgment does not close the door to any future human rights challenge in other cases. We expect that a judgment debtor would need to point to particularly special circumstances to justify Court intervention in the future. It remains to be seen whether the States of Guernsey will consider legislative reform.

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