GUIDE

The enforcement of Jersey security

Last reviewed: January 2017

This guide sets out the procedure for enforcing Jersey security interests taken under the Security Interests (Jersey) Law 1983 (the **1983 Law**) and some of the main legal factors that should be considered when dealing with enforcement. This guide does not consider the Security Interests (Jersey) Law 2012 (the **2012 Law**). For information on the 2012 Law please see our guide on the 2012 Law here. This guide focuses on the enforcement of Jersey security interests over units in a Jersey Property Unit Trust (**JPUT**) and shares in a Jersey company, though the principles discussed are generally equally applicable to other types of Jersey security interest.

Why would a lender enforce the Jersey security interest?

In most structures the relevant borrowings are generally secured not only by a charge over the underlying property, but also by a security interest over the units in the JPUT and/or shares in the Jersey company that owns the property.

Enforcing a Jersey security interest may enable the bank, lender, security trustee or other equivalent party (the **secured party**) to sell the property free of Stamp Duty Land Tax and thereby utilise the tax advantages for which the structure may have been originally designed. This may enable the secured party to obtain a higher price for the asset.

How is Jersey security enforced?

Security is enforced by means of a statutory power of sale. The 1983 Law regulates when such power becomes exercisable, its means of exercise and the order in which the proceeds of sale must be applied.

The power of sale arises after an event of default (as defined in the relevant security agreement) occurs, but when the power of sale becomes exercisable depends on whether the event of default is capable of remedy. If the event of default is incapable of remedy, the power of sale becomes exercisable following service of notice of the event of default by the secured party on the entity that granted the security (the **debtor**). If the event of default is capable of remedy, the notice must require the debtor to remedy it, and the power of sale is only exercisable if the debtor fails to remedy it within 14 days of receipt of such notice. There is no statutory guidance or case law as to the meaning of 'capable of remedy'.

In addition to the above, the authority of a court order will be needed to exercise the power of sale, unless the security agreement provides otherwise. It is usual for a security agreement to exclude the need for a court order.

Upon exercising a power of sale, the secured party must take reasonable steps to ensure the sale is made within a reasonable time and for a price corresponding to the open market value of the units or shares at the time of sale.

In order to assist the secured party in enforcing its power of sale, it is common for the secured party to be provided with a power of attorney under the terms of the security agreement, and also for blank unit or share transfer forms to be provided on grant of the security which the secured party can complete on enforcement.

The proceeds of the sale must be applied in the following order:

1. in payment of the costs and expenses of the sale;
2. in discharge of any prior security interest;
3. in discharge of the security interest of the secured party who exercised the power of sale (the secured party may then apply such monies in accordance with a payment waterfall contained in an intercreditor deed or similar);
4. in payment, in due order of priority, of security interests which rank after 3. above; and, finally
5. in payment to the debtor or Viscount (the public official in Jersey who conducts the bankruptcy) or other insolvency officer (if applicable).

Does the secured party need to appoint a receiver or other officer?

No, the sale is conducted by the secured party.

Does the secured party owe any duties to the debtor in relation to a power of sale?

Upon exercising a power of sale, the secured party must take reasonable steps to ensure the sale is made within a reasonable time and for a price corresponding to the open market value of the units or shares at the time of sale. No further guidance is given in the 1983 Law.

Jersey case law suggests that if the secured party fails to sell the collateral for an open market value, the debtor may have an action against the secured party in relation to the shortfall. In addition, if a power of sale in relation to a principal debtor's security is exercised in a manner that is prejudicial to a guarantor debtor (eg the secured party selling the collateral at less than market value and thereby potentially increasing the liability of the guarantor), the guarantor debtor may similarly be able to bring an action against the secured party.

Can a secured party sell the collateral to itself, a nominee or subsidiary?

The 1983 Law is silent on this point. The 1983 Law does not confer upon a secured party a power of appropriation or foreclosure (save where the collateral is cash, negotiable instruments or cash in a bank account). However, this does not necessarily preclude the possibility of a sale to self, a nominee or a subsidiary. There has been one judgment of the Royal Court that involved the exercise of the power of sale by the secured party to itself and other syndicate banks and, in this case, no objection was taken on the ground of self-dealing either by the debtor or by the court. However, the issue of self-dealing was never raised, so no authorities on it were put before the court and, accordingly, the judgment cannot be regarded as sound authority on this point. Given the uncertainty and until the matter is definitively judicially determined, a secured party wishing to exercise a power of sale in favour of itself, a nominee or a subsidiary without any proper attempt to sell the collateral in the open market, should only do so having obtained an independent valuation and an order from the court to that effect.

Are there any practical restrictions on the enforcement of security?

The constitutional documents and Control of Borrowing Order consent of the JPUT or company should be checked to ensure there are no restrictions on enforcing the security, eg restrictions on transfer of units or shares. In addition, if the JPUT or company conducts any regulated activities or has a presence in Jersey for the purposes of the Control of Housing and Work (Jersey) Law 2012 (**CHW Law**) (for more information on the CHW Law, please see our guide Control of Housing and Work (Jersey) Law 2012) there may be regulatory change of control restrictions. Consideration should also be given as to whether the enforcement of security over shares will trigger a requirement to make a mandatory offer under Rule 9 of the Takeover Code (which will arise upon the exercise of a power of sale over 30 per cent or more of the voting shares in a company to which the Takeover Code applies).

Where security has been given over the shares in a Jersey company under the Law and that company has subsequently been declared *en désastre* (a form of Jersey bankruptcy), the shares in such company can only be transferred with the consent of the Viscount.

What happens if the debtor becomes insolvent?

The effect on security of a debtor being declared bankrupt or subject to another insolvency procedure (whether in Jersey or elsewhere) depends on the method by which security was created.

If the security was granted by means of the secured party taking possession of the unit or share certificates (similar to a pledge, and the most common method of creating security over units and shares), the 1983 Law provides that the amount due to the secured party must be paid in priority to all other claims. If, however, the property of the debtor is declared *en désastre*, the units or shares will vest in the Viscount but the proceeds of sale must be applied in the same order as if the sale had been conducted by the secured party.

If the security was granted by means of the secured party taking title to the units or shares, the debtor being declared bankrupt or subject to another insolvency procedure (whether in Jersey or elsewhere) does not affect the power of the secured party to deal with the units or shares. If, however, the property of the debtor is declared *en désastre*, the Viscount may apply to the Jersey Royal Court for an order vesting the units or shares in him and directing that they be sold. The proceeds of such sale must be applied in the same order as if the sale had been conducted by the secured party.

Security agreements will sometimes enable a secured party to 'convert' security by possession referred to above into security by title in order to give them potentially greater protection in a default scenario.

Is there a register of security interests in Jersey?

No, there is no register of security interests created under the 1983 Law in Jersey. There is a register of security interests created under the 2012 Law. Security interests created under the 1983 Law do not need to be registered under the 2012 Law in order to preserve their priority.

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