

**Judgment 26/2007      Governor and Company of the Bank of Scotland v  
(i) Henderson and (ii) Shales – Royal Court –  
17 August 2007**

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**Saisie Procedure (Simplification) (Bailiwick) Order, 1952 – bond consented to by joint purchasers – debtors unable to service the loan – no equity in the property – one debtor consented to judgment in favour of the lender – the other debtor could not be traced – held that the lender could not rely upon the standard clause in the bond as to service – related to service of notices and demands on customers of the lender and not to legal process – held also that the standard clause in the bond appointing an officer of the lender as Attorney for the debtors could not be relied upon as the debtors had appeared by an Attorney to consent to the bond – delegatus non potest delegare – order for substituted service under Rule 6 of the Royal Court Civil Rules, 1989**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 17<sup>th</sup> day of August, 2007 before Richard John Collas, Esquire, Deputy Bailiff, sitting alone.

In the action of THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND (“the Plaintiff”) against SIMON JAMES HENDERSON (“the First Defendant”) and KELLY SAMANTHA SHALES (“the Second Defendant”) in the terms attached hereto;

THE COURT having heard Advocate M.G.A. Dunster for the Plaintiff and the Second Defendant in person AWARDED Judgment by consent against the Second Defendant in the sum of ONE HUNDRED AND EIGHTY ONE THOUSAND SIX HUNDRED AND NINETEEN POUNDS AND FIFTY TWO PENCE (£181,619.52) with costs and interest, and power to levy execution on the real property of the said Second Defendant;

AND THE COURT having again heard Advocate M.G.A. Dunster for the Plaintiff AWARDED Judgment in default of appearance against the First Defendant in the said sum with costs and interest, and

power to levy execution on the real property of the said First Defendant, THE COURT having been satisfied that there had been good service upon him;

AND THE COURT FURTHER ORDERED under Section 6 of the Royal Court Civil Rules 1989 that substituted service may be effected upon the First Defendant at his last-known address of 11 Cour du Bordier, Le Bordage in the parish of Saint Peter Port, Guernsey, and that this Order should remain in force for the duration of the saisi proceedings herein;

The whole in accordance with the Note of Decision handed down by the Court in the attached terms.

S M SIMMONDS  
Her Majesty's Deputy Greffier

**CO (MGAD)**

17.08.07

**THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND** whose address for service is at 7 New Street in the parish of Saint Peter Port in the Island of Guernsey (“the Plaintiff”)

**A C T I O N**

**SIMON JAMES HENDERSON** of 11 Cour du Bordier, Le Bordage in the said parish of Saint Peter Port in the said Island of Guernsey and **KELLY SAMANTHA SHALES** also of 11 Cour du Bordier, Le Bordage in the said parish of Saint Peter Port in the said Island of Guernsey or alternatively of Kelandale, 5 Gas Lane, Le Bouet in the said parish of Saint Peter Port in the said Island of Guernsey (“the Defendants”) **TO SEE** the Court order the Defendants, or either one of them, **TO PAY** to the Plaintiff the sum of **ONE HUNDRED AND EIGHTY ONE THOUSAND SIX HUNDRED AND NINETEEN POUNDS AND FIFTY TWO PENCE** (£181,619.52) being the sum due under loan account numbers 80983210 and 81030303 secured under a bond given by the Defendants in favour of the Plaintiff and registered on the 16th day of December 2003, including interest and expenses due under the said bond as at the 17th day of August 2007, the Plaintiff having demanded repayment of all monies due under the said bond by letters dated the 8th day of June 2007 and the 1st day of August 2007, the whole without prejudice to interest accrued and to accrue after the said 17th day of August 2007.

**AND** the Plaintiff claims the costs hereof on the contractual, and therefore indemnity, basis; as provided by the written agreement between the parties that any costs and

expenses incurred by the Plaintiff in enforcing the Plaintiff's rights under the agreement or in protecting and enforcing the Plaintiff's security may be charged to the Defendants; and that those costs shall include, inter alia:-

1. Advocate's costs at the indemnity rate;
2. The Plaintiff's costs and disbursements.

**M G A Dunster**  
**Advocate**



6. The Bank seeks recovery of £181,619.52 plus interest from today and costs. The Property had been valued at £180,000; the valuation was later reduced to £175,000. When it was on the market, the only offer received was for £167,000. I can take judicial notice that the market for such flats at present is such that prices are not increasing or, if they are doing so, they are not increasing at such a rate as to achieve a sale at a price sufficient to clear the loan. I estimate that at least £185,000 would be needed in order to pay Estate Agent's commission and other incidental costs, including the Bank's legal costs. So, I conclude there is no equity in the Property.
7. I also note that as Mr Henderson cannot be contacted, he would not be available to consent to a sale in the Conveyancing Court, even if a private sale could be negotiated. The Bond contains a clause purporting to appoint the Manager or Assistant Manager of the main branch of the Plaintiff in Jersey to be the Attorney of the Defendants with power to sell the Property. Advocate Dunster does not rely on the appointment. Rightly so, in my view, as the Defendants appeared by an Attorney in order to consent to the Bond. Under the well established maxim of *delegatus non potest delegare*, the appointment of a further Attorney in the Bond cannot be valid.
8. It is clear that the Defendants have abandoned the Property and wish the Bank to foreclose. They do not oppose Saisie Proceedings which the Plaintiff wishes to progress as quickly as possible. The difficulty for the Plaintiff is in effecting service on Mr Henderson.
9. The Plaintiff has obtained service on Miss Shales who attended in Court this morning to consent to judgment and to give an address for service of future proceedings in Guernsey.
10. The Bank only has "C" Service on Mr Henderson, having effected service by leaving a copy of the Summons at the Property. Advocate Dunster relies upon Clause 8 of the Bond which is in standard terms:

*"That a demand or notice hereunder shall be made in writing and served on the [Defendants] personally, or by post at the address or place of business last known to the [Plaintiff] and shall be effective, notwithstanding that it be returned undelivered and notwithstanding the death of the [Defendants]"*.
11. He argues that clause can be interpreted as a nomination by the Defendants of an address for service for the purposes of Rule 1(d) The Royal Court Civil Rules 1989. Without hearing full argument, I am not persuaded that it can be so interpreted and I have not been referred to any decision of the Royal Court in which the Court has previously interpreted a similar provision in a Bond in such a way. If there was substantial equity in a property, I wish to reserve the position as to whether it would be just to allow a creditor to pursue Saisie proceedings to an FVO by serving all summonses at an abandoned address where they may never come to the attention of the debtor until it is too late for the debtor to intervene to protect his interest in the property. In my view,

Clause 8 of the Bond probably relates only to service of notices and demands by the Bank on its customers and not to the service of legal process.

12. However, in the present circumstances where the Defendants have abandoned the Property; they have no equity in it; and in taking account of the letter signed by them both to which I have referred, I am prepared to make an Order for Substituted Service Within the Jurisdiction under Rule 6 of the Royal Court Civil Rules 1989.
13. There is no other practical alternative. Nothing would be gained by, for example, ordering Miss Shales to accept service on Mr Henderson's behalf as she cannot contact him. His sister may also have lost contact with him. The former procedure of requiring HM Sergeant to accept service on behalf of absentees is unsatisfactory if HM Sergeant has no knowledge of the absentee's whereabouts. Publication in a newspaper is impractical as it is not known where Mr Henderson is living.
14. Under Rule 6 I have wide powers and in the unusual circumstances of this case I make an Order that, for all the purposes of the Saisie Proceedings, good service may be effected on Mr Henderson by leaving any process at the Property notwithstanding that such summonses and notices may never come to his attention. Such process includes the originating summons, notices relating to the Commissioner's hearings and the IVO hearing as well as any other steps that may need to be taken in the Saisie.