

Civil appeal from the Court of Alderney – order for eviction and interim vesting order – review of law on saisie – duties and obligations of the saisi hérédital – ‘aids to navigation’ for judicial law-making – leave granted to appeal out of time – appeal granted to extent that eviction order stayed to 30 September, 2004 and the making of the IVO postponed to 30 November, 2004, with leave to both parties to apply. [See also Judgment 23/2003]

IN THE ROYAL COURT OF GUERNSEY

The 24th day of August, 2004 before Andrew Christopher King Day, Esquire, C.B.E.,
Lieutenant Bailiff, sitting alone: -

In the matter of

GIUSEPPE CATALDO PIRITO (Appellant)

V

HILDA CURTH (Respondent)

WHEREAS on 19th, 20th, 21st and 29th July the Lieutenant Bailiff considered an application by the Appellant for an enlargement of time in which to enter appeals against the Eviction Order and Interim Vesting Order granted by the COURT OF ALDERNEY in favour of the Respondent on the 12th February 2004 and the substantive appeals thereon and heard thereon Advocates L. Le R. Strappini and P. J. G. Atkinson counsel for the Appellant and Respondent respectively the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and ORDERED: -

- 1) that leave to appeal out of time is GRANTED;

- 2) that the eviction appeal is ALLOWED, to the extent that the order is stayed until the 30th September, 2004, with leave to apply;

- 3) that the IVO appeal is ALLOWED, to the extent that the making of the IVO is postponed until the 30th November, 2004, and therefore will not be effective until the 1st December, 2004, with leave to apply. The claims registered by the Income Tax Authority to remain unaffected;

- 4) that unless application to the contrary is made by 4.00 pm on the 18th August, 2004 (as extended to 10th September 2004) the Respondent's costs of this appeal will be paid by the Appellant on the standard recoverable basis, which costs, together with the outstanding debt in relation to earlier costs, will come out of the Appellant's half-share of the net proceeds of the sale, which share will also bear the amounts payable to the Income Tax Authority.

S. M. D. ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
(Ordinary Division)
On appeal from
THE COURT OF ALDERNEY

Between:

GIUSEPPE CATALDO PIRITO

Appellant

- v -

HILDA CURTH

Respondent

Judgment of Day L.B. on the Appellant’s application for an enlargement of time in which to enter appeals against the Eviction Order and Interim Vesting Order granted by the Court of Alderney in favour of the Respondent on the 12th February, 2004, and the substantive appeals thereon.

Advocate L. Le R. Strappini appeared for the Appellant.

Advocate P.J.G. Atkinson appeared for the Respondent.

Hearing Dates: 19th, 20th 21st and 29th July, 2004
Judgment handed down: 24th August, 2004

Legislation and Texts referred to:

Saisie Procedure (Simplification) (Bailiwick) Order 1952 (“the 1952 Order”)

The Court of Alderney (Appeals) Law, 1969 (“the 1969 Law”)

The Court of Alderney (Civil Appeals) Rules 1969 (“the 1969 Rules”)

Supreme Court Practice 1999 (“the White Book”)

The Convention for the Protection of Human Rights and Fundamental Freedoms
 (“ECHR”)

The Human Rights (Bailiwick of Guernsey) Law, 2000 (“the Human Rights Law”)

Ordinances of the Royal Court – 1628, 1636, 1736, 1812, 1827, 1830, 1833

Loi ayant rapport aux Débiteurs et à la renonciation 1929 (“the 1929 Law”)

Cases and Authors referred to:-

Gallienne - Traité de la Renonciation par loi outrée (1845)
Gaudion v. Weardale Ltd. – Court of Appeal 23.7.1997
Guille v. Mackay – Court of Appeal 14.6.1967
Martel v. Wilkinson – Court of Appeal 4.4.1991
Courtney v. Alderney Building Co. Ltd. – Royal Court 20.5.2004
Luordo v. Italy – ECHR 17.7.2003
Bottardo v. Italy – ECHR 17.7.2003
Stockholm, etc. v. Sweden – ECHR 16.9.2003
S.C. and others v. Italy – ECHR 16.11.2003
Connors v. U.K. – ECHR 27.5.2004
Gordon and Ward – Judicial Review and the Human Rights Act, (2001 Ed.)
Gillow v. U.K. – ECHR (1987) A. 109
Warburton – Traité sur l’histoire, les lois et coutumes (1831 Ed.)
Report of H.M. Commissioners (1819)
Jeremie – Traité sur la saisie mobilière (1815)
Morton v. Paint – Court of Appeal 9.2.1996
C (a minor) v DPP (1996) 1 AC 1 HL (E)
McCormack v. Waterman – Court of Appeal 20.5.2002

I preface this judgment by paying deserved tribute to Counsel. Not only were their submissions helpful and thorough, their professionalism was exemplary. Mr. Strappini, appearing by virtue of a legal aid certificate, left no stone unturned in seeking to assist the Appellant (not the easiest of clients in my assessment, as might be inferred, *inter alia*, from the number of advocates who have represented him during the whole course of this litigation), whilst Mr. Atkinson displayed admirable patience, presenting the Respondent’s case with restraint, and succinctly.

1. These appeals are the latest stage in the litigation between the parties which first started over 5½ years ago. The appeal against the Interim Vesting Order (“IVO”) is unquestionably the more important, and at the heart of that appeal is the nature, form and effect of *saisie* proceedings as they impact upon the particular facts of this case. Thus I

turn immediately to summarising the central features of such proceedings, as the necessary context of the instant issues.

A. Saisie proceedings in outline

2. Whilst in recent decades *saisie* proceedings - by which I mean *renonciation par loi outrée* in contrast to *renonciation volontaire* - have been governed by the 1952 Order, it must not be forgotten that that Order was very much, as its title implies, a simplification of the previous proceedings. Save, perhaps, for those paragraphs enacted “for the removal of doubts”, the Order did not change the substantive law, and to understand that one still must refer to the definitive work of Gallienne, and similar authorities (including legislation).
3. In essence, a judgment creditor may seek, by order of the Court, to execute that judgment against the real property of the debtor (a Preliminary Vesting Order - “PVO”), which is deemed to be an irrevocable election on the part of the creditor not to seek thereafter to levy execution against the personal property of the debtor (other than in the limited circumstances specified in paragraph 1 (4)(b)(i) and (ii)) of the 1952 Order). That judgment creditor in whose favour a PVO has been granted is most succinctly described, as in the past, as the *saisi mobilier* (or *saisi mobilièrement*). He has the authority to take action regarding the letting or repairing of the property or the eviction of those in occupation of it, by virtue, as appropriate, of an Act of Court. The *saisi mobilier*, having had the amount of his claim certified by a Commissioner of the Court, is then entitled to institute further proceedings against the debtor seeking payment of that certified sum, and, in default, to have the whole of the debtor’s real property vested in him as trustee for claimants against the real property (as *saisi hérédital* or *saisi héréditalement*).
4. This Interim Vesting Order (“IVO”) is the crux of the proceedings. It is the stage of *renonciation*. Prior to the making of this Order, the realty is still vested in the debtor. After such Order, the debtor, being deemed to have renounced, has no further interest in any realty previously vested in him. The effect of an IVO is therefore final and irrevocable in that regard. Thus the law specifically provides (as confirmed in the 1952 Order) that a debtor may apply to the Court for a postponement of the making of the IVO. In the terms of paragraph 2(5):-

“(5) *The Court, on an application for the making of an interim vesting order, is hereby empowered to make an order accordingly or, if the circumstances advanced by the debtor appear to render it just so to do, from time to time to*

postpone the making, or the operation, of such order on such conditions, if any, as the Court shall think just.”

5. The *saisi hérédital* has effectively the same authority as the *saisi mobilier* in respect of repairing, letting, evicting, etc. Further, he must proceed to open a register so that those with claims against the real property may, if they so wish, enter such claims therein. Thereafter, the *saisi hérédital* must summons all those who have so registered a claim to appear before the Court and, in inverse order of the priority of their claims (what is described as the “retrograde offer or sale”) either elect to have the real property vested in them subject to assuming liability for the payment of all claims ranking in priority to his own, or to renounce any claim to the realty. In that way the realty or real interest of the debtor (generally “the realty”) becomes finally vested in a creditor, be he the original judgment creditor or other registered claimant. Additionally, and alternatively, the *saisi hérédital* may at that stage apply to have the realty vested in him on paying off all the registered claimants, regardless of priority, thus exercising his right “*d’arrêter les plaids et de se faire tenant*”. As Gallienne states (at p. 209):-

“La saisie est propriétaire, quand quelqu’un des affieffeurs s’est fait tenant de l’héritage en saisie, ou que le saisii hérédital a fait acte de propriété; dans l’un ou l’autre cas, le saisii propriétaire est à la place du débiteur d’origine, hors les obligations que la saisie a purgées.”

That final stage is, unsurprisingly, entitled the Final Vesting Order (“FVO”), and the person in whom the realty becomes vested, the *saisi propriétaire*.

6. This is not the occasion to explore in greater depth than is necessary for the purpose of these proceedings, all the intricacies and main features of *saisie* proceedings other than those identified in the brief outline I have given. However, it is vital to emphasise, again, and at this stage, the crucial importance of the obtaining of the IVO and its effect. Not only has the debtor been divested of his realty, irrevocably, there is no duty whatsoever to account to him on the part of the *saisi propriétaire*, for any surplus that may arise from the sale of the property after the payment of all the registered debts. Indeed, there is no obligation on the *saisi propriétaire* to sell the property at all. His only obligation is to pay off prior registered claims. It is only prior to the IVO that the debtor, being still the owner, can benefit from any surplus on a sale; hence the safeguard provided by the facility to postpone the making or operation of such order.

7. Moreover, the essential thrust and spirit of *saisie* proceedings is that the *saisi mobilier*, and thereafter the *saisi hérédital*, has an overriding duty to conserve the debtor's realty, and maximise any income therefrom, for the eventual benefit of all claimants who may register, but not for the debtor. The IVO does not create any form of trust for sale. The debtor cannot be a claimant against his own realty. At the beginning of the 21st century, these are features of *saisie* proceedings which may be considered unsatisfactory. However, they are long-standing and deeply rooted in our customary law, as confirmed in 1952.
8. I turn to the background, factual and litigious, to these appeals.

B. Background

9. The parties started to live together in about 1973 and at the end of 1981 purchased a plot of land in Alderney (jointly and for the survivor of them) upon which a house was subsequently built. Though they have never married there are three children aged (about) 22, 18, and 16. In 1998 the Respondent left the home and on the 10th December that year instituted proceedings in which she sought orders severing the joint interest in the premises (i.e. removing the rights of survivorship) and for the *licitation* of the property, with the net proceeds of sale being divided in equal shares between them.
10. For a variety of reasons, that application was not finally determined by the Court of Alderney until the 7th June, 2001, when the Respondent's application was granted in full. That judgment was appealed, but the appeal was dismissed by the Royal Court on the 27th September, 2002, and thereafter by the Guernsey Court of Appeal on the 10th April, 2003. Thus the *licitation* was to proceed, and by order of the Court of Appeal (repeating the time given by of the Court of Alderney in 2001) the Appellant was to participate in the judicial auction of the premises within a period of 3 months. No progress was made in that regard, and the Respondent made application to the Court of Alderney on the 10th July, 2003, *inter alia*, that the Appellant permit the Respondent's valuer access to the premises within 14 days to carry out a valuation for the purposes of the *licitation*, and that failure to comply with such order would give rise to a penalty of £1,000 per week being payable. The Appellant did not attend those proceedings and the order was made as requested. Notice of appeal was lodged within the statutory time limit against that order but has not to date been pursued.
11. In addition, and importantly for present purposes, the Respondent had been awarded the costs of all the *licitation* proceedings. As they remained unpaid the Respondent issued

proceedings before the Alderney Court for the payment of them, in a sum slightly under £10,000.00, which action was first returnable before the Court in Alderney on the 17th July, 2003. On that occasion the Appellant was present but unrepresented and on his request, in that he was no longer represented by an advocate and was seeking further legal assistance, the claim was adjourned until the 11th September, 2003, it being made clear by the Court that the matter would proceed on that date. Moreover, by letter dated the 8th September, 2003, Mr. Atkinson also made it clear to the Appellant that his client would be proceeding with her claim on the 11th September. On that date, the Appellant again being present but not represented, and notwithstanding his application for a further adjournment, the Court granted judgment in the amount claimed with permission to levy execution on the real property of the Appellant. Subsequently (on the 6th November, 2003), a Commissioner of the Court certified that the amount of £10,225.29 was due by the Appellant to the Respondent under the judgment claim.

12. The Respondent made further applications to the Court of Alderney on the 11th December, 2003, seeking, firstly, an order evicting the Appellant, as an occupier, from the former matrimonial home, and, secondly, applying for an IVO. The Appellant was represented by Advocate Dunster, on that occasion, and the matter was adjourned for two months, specifically to the 12th February, 2004. On the 9th January, 2004, Mr. Atkinson wrote to Mr. Dunster, reminding him of the proceedings pending on the 12th February and observing that his client had still not co-operated in any way, to date, in the proposed auction or sale of the property.
13. On the 12th February, 2004, the Court adjudicated on both applications. With regard to the IVO, which was taken first, Advocate Kelly (of the same law firm as Mr. Dunster), appeared for the Appellant and sought a two months adjournment to enable the Appellant to try and arrange for three valuations of the property and make arrangements to either re-finance or buy Miss Curth's share, or sell the property and pay the debt owed to Miss Curth. She accepted the history of the proceedings as had been outlined by Mr. Atkinson, in my view comprehensively and fairly. The Court had been specifically reminded that it had power to postpone the making of an Interim Vesting Order, as had the Appellant in the relevant Summons. The Chairman of the Court, in giving judgment stated: "*the Jurats see no purpose is served in staying this application and are unanimous in granting an Interim Vesting Order vesting the real property... in the name of ... Miss Curth. That is the decision of this Court. You now have to consider.*". (With all due respect the transcriber of the proceedings in the Court of Alderney I think that those last two sentences should be joined in one to give their proper sense).

14. The Court also proceeded to deal with the application for an eviction order. Mr. Atkinson agreed to a one-months stay of the execution of any order made by the Court; in contrast Advocate Kelly sought a two-month stay. The Court ordered a one-month stay. (The transcript of the proceedings in the Court of Alderney on the 12th February and the Act of Court which ensued therefrom are attached as Appendices A and B).
15. Following the granting of the IVO on the 12th February, 2004, the Respondent proceeded, quite rightly, to open the Register of Claims against the real property of the Appellant which Register closed on the 30th April, the significance of which is that the Income Tax Authority registered two claims against the Appellant in the total sum of just under £27,000.

C. The statutory provisions relating to civil appeals from Alderney

16. The time limit imposed by the 1969 Rules, (made in pursuance of the 1969 Law) for the entering of an appeal is fifteen days. It is accepted by Mr. Atkinson that within that period the Appellant clearly showed that he wished to appeal both orders. However, and for whatever reason, it was not until the 10th March that the Appellant in person handed in a form of appeal (which in fact was irregular in form) to the Clerk of Alderney Court which related solely to the eviction order, including a request for leave to appeal out of time. Having been duly notified of the filing of the appeal Mr. Atkinson very properly on the 14th April served formal notice on the Appellant that the Respondent would be applying to the Royal Court on the 23rd April for directions as to the future conduct of the appeal. At my direction, that application was adjourned until the 30th April, and thereafter to the 28th May so as to enable Mr. Strappini, who had by now made a tentative appearance, to clarify his position and instructions. Thus by the 28th May the Court had a proper application from the Appellant seeking leave to appeal out of time against both the eviction order and IVO, with draft notices of appeal and grounds therefore. At the same time Mr. Atkinson made a separate application that any consideration of the application for leave to appeal out of time should be conditional upon certain undertakings being given by the Appellant (to comply with the previous court orders in the *licitation* proceedings, giving access to valuers, and vacating the property within a stated time) and upon the lodging of a sum equal to the amount of the judgment debt. That application I rejected on the 25th June, partly because of the relative imminence of the full leave and appeal hearing fixed for the 19th July.

17. The 1969 Law, creates a right of appeal, with certain exceptions, from the Court of Alderney to the Ordinary Division of the Royal Court, and empowers the Royal Court to make necessary Rules in relation to such appeals. The 1969 Rules, in addition to providing for time limits and other matters, provides specifically under Rule 6:-

“6. (1) The Royal Court may by order confirm, reverse or vary the determination of the Court or make such other order in the matter as it thinks fit.

..... (Relates to costs)

And under Rule 9:-

“9. The Royal Court shall have power to enlarge the time fixed by any provision of these Rules for doing any act or taking any proceeding, on such conditions, if any, as the justice of the case may require, and to order any such enlargement although the application for the same be not made until after the expiration of the time allowed.”.

D. Legal principles

18. The Guernsey Court of Appeal in Gaudion identified the matters which the Court has to consider in deciding whether or not to exercise its discretion to extend time for lodging notice of appeal. Gloster JA in giving the judgment of the Court stated:-

“In deciding whether to exercise its discretion to extend time for lodging notice of appeal, the Court has to consider the following matters:

- 1. Whether Mr. and Mrs. Gaudion have a sufficiently arguable appeal against the eviction order.*
- 2. Whether as a matter of discretion an extension of time should be granted. This in turn involves the consideration of –*
 - (i) the explanation given by the Gaudions for their failure to lodge notice of appeal in due time and their subsequent delay in doing so;*
 - (ii) any prejudice to the plaintiff, Weardale Ltd, as a result of the late service of the notice of appeal and the consequent delay in the hearing of the appeal;*
 - (iii) any other relevant factors.”.*

19. The guidance to be obtained from the White Book (at 59/4/17) is to like effect:-

“Extension of time for appealing

(2) It is entirely in the discretion of the Court to grant or refuse an extension of time. The factors which are normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if time for appealing is extended; and (4) the degree of prejudice to the potential respondent if the application is granted;

and as thereafter more fully explained.

20. As is to be expected, appeals to this Court from the Court of Alderney may involve matters of law, of procedure, or more widely the findings of the Jurats. There is no challenge in this case that the Alderney Court wrongly applied the relevant law; rather the contention is that the decision of the Court was made in ignorance of the full terms and effect of the relevant law with the result, on the facts in this case, that its decision was perverse. This involved a mixture of procedure and findings. As far as any findings of fact are concerned, the test to be applied by this Court is the same as that to be applied by the Court of Appeal to appeals from the Royal Court, namely perversity (see Le Quesne JA in Guille (at p. 5) and Kentridge JA in Martel (at p. 112 F) and Courtney). Whether or not the decisions of the Alderney Jurats involved findings of fact (over which Counsel might be in dispute), is therefore immaterial, in view of the nature of the Appellant’s case.

E. Issues relating to the enlargement of time

21. With regard to the relevant factors in relation to the enlargement of time, Mr. Atkinson rightly concedes that in this case the length of delay (even though the notice of appeal originally filed by the Appellant was wrong in form) was minor; the reasons for such delay were understandable; and that there would be no degree of prejudice to the Respondent if the enlargement of time application was granted, because the crucial factor in this case was the likely chance of success of the substantive appeal, which, for that very reason, I had directed was to be dealt with at the same time as the application for leave.

F. Merits of the substantive appeals: issues and submissions

22. I therefore turn to the merits of the appeals, the crux of which, as already stated (para. 1), is about the granting of the IVO, the “cuckoo in the nest” as Mr. Strappini describes it.

That was the significant decision of the Alderney Court, rather than the eviction order. I therefore concentrate on the former appeal.

23. I take firstly Mr. Strappini's submission that the IVO granted by the Court of Alderney was based on an incorrect understanding of the facts, as illustrated by the remarks of the Chairman when pronouncing judgment (transcript p. 5 para. 5 – already cited at paragraph 13 above).
24. The criticism that Mr. Strappini has of his statement by the Chairman is that in referring to non-compliance with a court order, that of the 10th July, 2003, in respect of the Appellant being ordered to permit the Applicant's valuer access to the premises within fourteen days and the penalty imposed in failing to comply, - which was not only made in the absence of the Appellant, but never formally served on him – the Chairman fell into error. The decision was appealed in time, and therefore was still pending. Hence, to rely upon a non-existent breach of a court order as being a reason for granting the IVO must make the order fundamentally flawed.
25. I reject that argument without hesitation. That statement of the Chairman has to be read against the full background of all previous proceedings, the lack of action on the part of the Appellant in the *licitation* after the decision of the Court of Appeal in April, 2003, and the proceedings before the Court that day itself and in particular the request by the Appellant's advocate for a stay of an IVO for two or three months to allow the Appellant to obtain valuations to help him to make an offer for the property, etc. In the circumstances, that particular submission clearly and understandably got short shrift from the Alderney Jurats.
26. In reality, the very heart of Mr. Strappini's submission is that a serious injustice has been done in this case, the essence of which is this. By virtue of the IVO, the Respondent has, albeit as trustee for other claimants, become the owner of the Appellant's one-half interest in the property. That interest has been so vested to satisfy a debt of some £10,000 whilst the gross value of that interest Mr. Strappini assesses at some £150,000 to £160,000. I must say immediately that I have had no evidence whatsoever put before me as to the possible gross value of the Appellant's former one-half share in this property. Nevertheless, I think I am entitled to proceed on the basis that that one-half share is certainly worth more than the combined total of the debt owed to the Respondent and the monies owing to the Income Tax Authority (as now revealed in the Register).

27. Whether the net value of that interest exceeds the debts due by £10,000 or £100,000 is immaterial; it is the principle which is important, namely that the Respondent may stand to make a profit (a “windfall” as Mr. Strappini repeatedly described it) undeservedly and unjustifiably from the sale of the property (she of course being the owner in her own right of the other one-half share). Mr. Strappini naturally accepted that that windfall might accrue to the benefit of the Income Tax Authority. The point, however, was that whoever might be the beneficiary of the windfall, whether arising from the proceeds of sale, or indeed the value of the asset acquired in relation to the debt to be met, there is no accounting to the debtor for any surplus. Hence the real injustice not only felt by the Appellant but in fact suffered by him as a result of the IVO.
28. In view of the particular and unusual circumstances of this case, it was especially important, in Mr. Strappini’s submission, that the Court was fully and adequately aware of the nature and effect of the order it was being asked to make. That was even more important when the Court was composed entirely of lay members, and thus wholly dependent, on matters of law, upon the help and submissions it received from Counsel and advice from its Clerk.
29. Mr. Strappini accepted that Mr. Atkinson (see p. 2 E of the transcript) had in his review of the proceedings reminded the Court that at the PVO stage the Appellant had been told that if he failed to pay the debt the progress of the proceedings would lead to him losing his half interest in the house; that had been made clear to the Alderney Court on the 11th September, 2003, and again on the 12th February, 2004. Apart from that comment, however, Mr. Strappini argued that there is no evidence from the transcript of any other assistance being given to the Court, or that it was aware of the draconian effect of an IVO. In those unadvised and uninformed circumstances, the Court could not have reached a rational decision with regard to the grant of an IVO. Hence it was a material defect in the proceedings, such as to make the Court’s decision unsafe, unsatisfactory and/or a miscarriage of justice. To put the matter another way; in the particular circumstances of this case, the granting of an IVO was disproportionate, punitive, oppressive and unconscionable. No reasonable body of persons could have granted an Order in those circumstances and to do so was, effectively, perverse.
30. In respect of his submission that the effect of the IVO was disproportionate to the debt owed, Mr. Strappini also sought support from the Strasbourg jurisprudence under the ECHR (“the Convention”), and particularly under Article 1 of Protocol 1 (protection of property). Accordingly he referred me to Luordo and Bottardo, Stockholm, etc, S.C. and others, and Connors, as well as relevant passages from Gordon and Ward. Gillow might

also have been invoked in support of the submission. In the Italian cases, the Court found in favour of the complainants because the necessary balancing exercise had fallen unfairly against the complainants, in that whilst the objective of the statutory bankruptcy proceedings were justified the inordinate delay in bringing proceedings had been disproportionate to that objective. The same element of disproportionality was at the heart of the judgment in the Swedish case (a right had been infringed however small the amount of money involved), and the English case (the disproportionality of the statutory scheme of summary eviction in the case of gypsy parks). The decisions in those recent cases all depend necessarily on their own facts, but it is unquestionably the case that the issue of proportionality has always been and is a central and recurring theme in the Strasbourg jurisprudence.

31. I do not consider it necessary or desirable to consider to what extent the Strasbourg jurisprudence directly impacts upon the present case, in view of the fact that the Human Rights Law has not yet come into operation, though this Court must always be mindful of the international obligations of the Bailiwick. Be that as it may, the Strasbourg jurisprudence is often helpful in concentrating attention as to whether or not in a particular case an injustice has occurred, regardless as to whether the Strasbourg jurisprudence under the Convention has direct effect or not, or whether what it may have to say is relevant. In this case, I would have thought that any injustice, if any there be, clearly manifests itself without outside assistance.
32. Mr. Strappini submitted that there were four options open to the Alderney Court. It could have – a) granted an IVO without conditions; b) granted an IVO subject to conditions; c) postponed the granting of an IVO, or d) ordered that no IVO should be granted.
33. The remedy which this Court should give to the Appellant was to set aside the IVO, and remit the matter to the Alderney Court for it to give proper and reasonable consideration to the facts of the case with the benefit of adequate knowledge of the law. For example, and in effect self-evidently, the Alderney Court should give informed consideration to the question of postponing the making or operation of an IVO (under 2(5) of the 1952 Order), and thus give the opportunity to the Appellant to realise his undoubted asset; and thus do justice. That was Mr. Strappini's primary submission.
34. The secondary submission, Mr. Strappini honestly stated, was only reluctantly advanced because what his client wanted was the restoration of the "*status quo ante*" the 12th February, 2004, (although at the end of argument he stressed the important implications in

my accepting this secondary submission). This argument involved a detailed and careful examination of many of the customary authorities on *saisie*, both compulsory and voluntary, and the relevant legislation, including Ordinances of 1628, 1636, 1736, 1812, 1827, 1830, 1833 (in addition to the 1952 Order), and Warburton, the Report of His Majesty's Commissioners (1819), Jeremie, and Gallienne.

35. On the basis of substantial authority, the customary law could and should be developed (what he described as a “minor tweak”) in such a way as to enable the Court, on granting an IVO, to attach such conditions to the operation of the Order as would require the property to be sold, for the benefit not only of creditors but also for the debtor if any equity remained. In appropriate cases such as this, where there is in effect only a limited insolvency, namely an immediate inability to pay an outstanding debt but not overall an insufficiency of assets, the Court can and should order that the *saisi hérédital* account to the Court for the net proceeds of sale of the property. To put it in another way – in appropriate circumstances an IVO should create a trust for sale. Those are stark and uncompromising statements as to the law of Guernsey/ Alderney. I would indeed describe them as novel, at least within my limited experience. Novel, Mr. Strappini would accept, only in the sense that they may not have been made before, or certainly not to the knowledge of existing practitioners, but they are concepts which would have been readily recognisable by the *Coutumiers* of earlier centuries and fall clearly within *l'esprit de la coutume*.
36. It is a thoughtful and well-researched submission which needs, and deserves, to be carefully examined. In limiting my examination to what I understand to be the main planks in the argument, I intend no disrespect to Mr. Strappini or to the strength of his submissions.
37. I proceed to the various stages identified in those submissions. The starting point is to identify the powers available to the Alderney Court on hearing the application for an IVO. That necessarily leads to 2(5) of the 1952 Ordinance which I have already cited in full. The relevant power of the Court is, if the circumstances advanced by the debtor appear to render it just so to do, from time to time to postpone the making, or the operation, of such Order on such conditions, if any as the Court shall think just. Clearly such conditions might allow time in which something has to be done, for example the making of binding offers for the purchase of the property, to give the debtor sufficient time in which to sell it. But the conditions which the Court may impose, Mr. Strappini submitted, extend far beyond that kind of scenario.

38. It is open to the Court, under the terms of the Order, to require, in granting an IVO, that the *saisi hérédital* is to proceed in a certain way; for example, that after the closing of the Register the matter is to be remitted to the Court for a directions hearing, so that the Court itself can assess the extent of the debtor's insolvency (i.e. either partial or total), which in turn, if evidence is forthcoming that the value of the realty or of the debtor's former real interest exceeds the value of claims, might lead the Court to exercise its power to order a sale to proceed, with the Court retaining the control of the distribution of the proceeds of sale.
39. Such scenarios are not mere flights of legal imagination (my words), submits Mr. Strappini. The power of the Court to intervene in this kind of manner is revealed by the authorities. So (at p. 135) Gallienne states (at the end of the passages relating to the duties and obligations of the *saisi hérédital* prior to the author examining the procedures he has to institute against creditors):-

“Avant de terminer nos remarques sur le devoir du saisi, de faire valoir les propriétés de la saisie, nous devons faire observer qu'il pourrait quelquefois se présenter des cas où il serait essentiellement de l'intérêt de la saisie de bailler à rente soit l'entier ou partie de ces propriétés ; il faudrait alors que le saisi prît permission de la cour de ce faire, de l'avis et conseil des créanciers. Cette mesure ne devrait, cependant, jamais être prise que dans des cas extraordinaires, et lorsqu'il ne pourrait y avoir le moindre doute quant à la nécessité d'en user, ou lorsque la preuve serait constante, qu'il en résulterait un avantage certain aux parties intéressées, car, si des affieffeurs non-inscrits, et peut-être encore inconnus dans cet état de la saisie, vinsent à démontrer, lorsqu'appelés, qu'un pareil bail à rente lésait leurs intérêts, il se pourrait très-bien que la cour ne les obligât pas de parler.”

40. Thus the Court, albeit on the application of the *saisi hérédital*, can order the sale of the debtor's property or part thereof, at least in exceptional and justified circumstances. Order 1(4)(b)(ii) is in addition a clear statutory statement as to the ability of the Court to authorise the sale of the realty (but, I would comment, is wholly silent as to the circumstances in which such authority might be requested or given). Mr. Strappini fairly acknowledged that he was not aware of any other authority indicating any intervention by the Court (by request or otherwise) in respect of the sale of the property, that is to say any authority specifically and solely relating to compulsory renunciation (i.e. *renonciation par loi outrée*).

41. Which leads to the core of Mr. Strappini’s argument, which requires analysis of the procedure relating to voluntary renunciation (*renonciation volontaire*) under the customary law prior to the enactment of the 1929 Law (*ayant rapport aux débiteurs et à la renonciation*), which is still, he submits, the law in Alderney. That procedure in brief outline (again with no disrespect to Mr. Strappini) was that a judgment debtor could in effect seek the assistance of the Court (as explained by Warburton and Jeremie), to determine whether he was bankrupt, and if so, to enable the debtor to renounce before the Court to all his assets, both real (my emphasis) and personal, subject to him appearing in the next, or next convenient, sitting of the Court *en Plaids d’Héritage* to corroborate his renunciation, which is only effective in respect of real property if it is so corroborated. Thereafter, under the authority of the Court, all the assets, including the realty, of the debtor may be sold, in an attempt to satisfy all creditors with any possible balance being available for the debtor.
42. It was emphasised by Mr. Strappini that the effect of both varieties of “*renonciation*”, whether “*volontaire*” or “*par loi outrée*” was, and is still in Alderney, identical with regard to the debtor’s realty, that is to say in both it is vested in the creditor as “*saisi hérédital*”, after proceedings *en Plaids d’Héritage*. It is clear, not least from the Ordinances of 1628, 1636 and 1833, that the principal object of a *renonciation volontaire* under customary law was to realise the debtor’s real estate if possible by public auction. It was only if realisation by sale proved impractical that different means were resorted to, so that for example under the 1628 and 1636 Ordinances creditors were constrained to accept parts of the debtor’s realty in settlement of their debts, whereas under the 1833 Ordinance recourse was to be had to the retrograde offer. Those Ordinances, certainly that of 1833, were not, Mr. Strappini’s submitted, ever extended to Alderney so that the customary law remains unadulterated in that jurisdiction.
43. Whether or not that is a correct submission does not, in my view, alter the force of his argument, that clearly under *renonciation volontaire* the objective was to realise the debtor’s real estate by auction, or indeed by other means, and account to the Court for any surplus of funds following the sale after discharge of registered debts. Thus the concept that a *saisi hérédital* held the property of the debtor on trust for sale is not in any sense a new one; it is steeped in antiquity. Thus to adopt and incorporate that procedure within a *renonciation par loi outrée* is not a fundamental change at all, as there can be no inherent inconsistency between the role of a *saisi hérédital* under compulsory renunciation and that of a person similarly described and empowered in a voluntary renunciation. Both can only be appointed by the Court *en Plaids d’Héritage* and their roles are essentially the same

regardless of the route by which they came to be so appointed. The only substantial point of distinction is that under *renonciation volontaire* the realty has to be offered for sale by auction before recourse is had to any other form of realisation (and this whether with or without the assistance of persons variously described in former times as *commis*, *abienneur*, or *adjoint*), whereas in the case of *renonciation par loi outrée* the real property has been subjected automatically to the procedure of the retrograde offer.

44. Thus judicial law-making (a subject to which I will return), on true analysis, does not arise, for the reason that the sale of the renouncing debtor's realty had long since been part of the customary law. Alternatively, if it is acknowledged that judicial law-making is involved, it is only so to the extent of incorporating a well-established concept into a different form of bankruptcy proceedings.
45. Thus Mr. Strappini invited me to "tweak" and develop the customary law in this case by confirming the IVO but, under Rule 6 of the 1969 Law (*to vary or make such other order*), to make it conditional upon the realty being sold and the proceeds being held under the Court's control.
46. With regard to the appeal against the eviction order, there was some discussion as to whether under the law of Alderney the Court had any power in the case of an occupier, which the Appellant undoubtedly is, for the Court to order any stay of execution of an order at all. The view which I expressed and repeat is that notwithstanding the lack of statute law in Alderney, comparable to the 1954 law in Guernsey relating to occupiers, I am satisfied that as it is a matter for the Court's discretion, it must be open to it in appropriate circumstances to stay the operation of an eviction order. I accept that that leaves open the maximum time for which a stay might be granted as is the case under statute in Guernsey.
47. The criticism which Mr. Strappini had of the making by the Alderney Court of the eviction order related to the lack of information with which it was provided to the Court, as would be expected before the Royal Court; for example, reports from any relevant housing department or otherwise, the efforts of the Appellant to find alternative accommodation, clarification as to the Appellant's housing needs and those of his family who live with him, and not least the length of time in which the Appellant had lived in the property. Mr. Strappini accepted that if the proceedings had been conducted properly an eviction order could not be resisted. As I have already said, the eviction order played a very secondary role in importance to the IVO.

48. I turn to Mr. Atkinson's submissions, and concentrate on those relating to the merits of the IVO appeal.
49. Firstly I turn to that which Mr. Strappini described as his secondary submission, namely his submissions leading to his invitation to me to create a trust for sale. The first point on which Mr. Atkinson took serious issue was Mr. Strappini's interpretation of 2(5) of the 1952 Order (already cited). Those provisions, Mr. Atkinson submitted, only empower the Court to impose conditions which relate to the postponement of an IVO. The Court cannot impose conditions (outwith the established law) as to the duties to be discharged by the *saisi hérédital* or *saisi propriétaire*. If, he pertinently asked, conditions were imposed on the grant of the IVO, how would they be enforced? Merely as examples, would they be binding on he who elects at FVO stage if he is not the *saisi hérédital*, or on those who acquired from the *saisi hérédital* by inheritance or on assignment, or in the insolvency/*saisie* of the creditor?
50. He courteously described Mr. Strappini's review of the authorities as being of considerable historical interest but they were exactly that. They did not reflect the modern well-established procedures. The 1952 Order (which in any event did not change the substantive law) had been in force for over 50 years, and there was no room for doubt as to its operation amongst practitioners, lenders and all those with a legitimate interest therein. All that would be achieved by Mr. Strappini's submissions would be to create uncertainty in total contrast to the present position. To provide one example only. It is not unusual for secured lenders to give priority to subsequent lenders. The ramifications of doing that are clearly understood and can be properly analysed by any lender in coming to an informed decision.
51. All present certainty would go by the board if Mr. Strappini's submissions found favour. He reminded me, unsurprisingly, of the comments made by His Majesty's Commissioners (1819) (at pp. 6-7) in the context of the perceived undesirable features of the retrograde offer aspect of *saisie* proceedings :-

“But as the Royal Court conceived that any alteration in this system, by substituting a mode of sale analogous to the practice of this county (i.e. England and Wales), would endanger the security of the produce of such sale and change the nature and dislocate the whole system of real property, their Lordships are unwilling to run the risk of putting such serious interest to hazard by any innovation till they have laid

before them more in detail the grounds upon which the apprehensions of the Royal Court are founded...”.

52. As a matter of public policy, very large sums of money have been lent on the security of real property within the Bailiwick and lenders (and all other creditors) are entitled, in the absence of amendment by legislation, to have recourse to proceedings in *saisie* as that remedy is presently (his emphasis) exercised. Do not meddle with the established system of real property unless the proposed way ahead is clear. That has a striking resonance with the Lord Lowry’s fifth navigational aid (see para 58). This was not an area suitable for judicial law-making.
53. With regard to Mr. Strappini’s primary contention, that the decision of the Alderney Jurats was uninformed and therefore flawed, Mr. Atkinson submitted that the Court of Alderney was fully aware, as the transcript reveals, of the only three practical options open to it, namely to grant an IVO without conditions, to defer the granting of an IVO, or to order that no IVO should be made. The full background had been adequately explained to the Jurats. They were aware of the power to postpone the making or operation of an IVO in accordance with 2(5) of the 1952 Order. They were fully aware that the granting of the Order would deprive the Appellant of any further interest in the real property. They were fully aware of the amount of the debt the payment of which the Respondent was seeking to recover.
54. It is true that the Alderney Court was not specifically told that the *saisi propriétaire* was entitled to all the net proceeds of sale of the Appellant’s former interests and might benefit from any “windfall”, but it was not necessarily the Appellant who would be in that position. When the Alderney Court had to reach its decision, the position was uncertain, as opposed to that now more clearly viewed with hindsight (i.e. the intervention of the Income Tax Authority alone). Nor must it be forgotten that the Appellant was represented by Counsel at these proceedings. Her submissions (as has already been indicated) were limited solely to the question of adjourning the making of the IVO for just a few months to see if the Appellant could effect a sale or at least make constructive progress towards doing so, which to date he demonstrably had not. It was for his Counsel to make any further submissions deemed appropriate or desirable in the circumstances. (I cannot but comment myself that the thrust of his Advocate’s submissions may well have been in itself sufficient indication to the Jurats as to the draconian effect of the granting of an IVO).

55. Whilst a great deal had been said about the perceived injustice to the Appellant in this case, the position of the Respondent tended to be overlooked. She had so far been denied justice in that she had been denied “the fruits of her orders”, to adopt Mr. Atkinson’s description, namely the various *licitation* orders which had been made. She was entitled to those orders being executed as part of her remedy with regard to the former matrimonial home. She was equally entitled, as a judgment creditor, to a remedy to satisfy her debt. If she was denied the granting of an IVO, then, having been granted a PVO and thereby having elected to proceed only against the realty, she would be deprived of any remedy. Justice must be even handed.

G. Conclusions

I continue to concentrate on the IVO appeal

56. With regard to Order 2(5), I agree with Mr. Atkinson. On the proper construction of these provisions, the conditions which the Court is empowered to impose must relate, and can only relate, to the postponement of the making or operation of the IVO. In addition the 1952 Order simplifies procedures; no more. The provisions cannot be read so as to empower the Court, in some unspecified way, to create a new variety of IVO, as Mr. Strappini would argue. Moreover, there is nothing in any other provision of the 1952 Order, or anything within its overall framework or purpose, to assist Mr. Strappini.
57. If I am wrong on that matter, Mr. Strappini’s secondary submission must still be rejected. He is inviting me to indulge in judicial law-making to an extent which in my view is totally inappropriate.
58. In considering the circumstances in which judicial law-making may be appropriate, I must be (willingly) guided by the binding authority of Morton. For present purposes, I merely refer to the judgment of Southwell JA, in which (at p. 20) he specifically stated that the five "aids to navigation", which had been provided by Lord Lowry in C (a minor) (at p. 28E) could and should be applied by the Courts of Guernsey just as much as by the English Courts. Lord Lowry’s five "aids to navigation" are as follows:-

“(1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention

than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty.”

59. The most obviously relevant of those aids in this case may be the last, but the first, third (perhaps deleting the word “social”) and fourth also impact significantly. I particularly bear in mind that the essence of this case relates to the law of real property, where certainty is of especial importance (see, for example, McCormack).
60. At the very heart of any reform in this area of our law lie matters of policy and legal doctrine, requiring comprehensive analysis and deliberation. For example, the establishment of a satisfactory legal scheme of trusts for sale, which might produce an acceptable level of finality and certainty, is not achieved overnight in an *ad hoc*, unadvised judicial pronouncement. Any judicial intervention in matters such as this would unquestionably be a recipe for chaos.
61. Mr. Strappini’s primary submission is very much a different matter. I accept, at least superficially, that a considerable injustice appears to have been done to the Appellant by depriving him of the value of his interest in the former matrimonial home, albeit that I have no evidence as to the gross value of such interest. Adequate time, therefore, on the face of it, should have been granted to effect a sale or to make progress with the *licitation*. The failure by the Alderney Court to do so might therefore appear perverse and unsustainable. That, of course, only serves to highlight the very real problem in this case, the conflicting interests of justice between the parties.
62. There is much merit in Mr. Atkinson’s submissions as to the injustice which has been and continues to be caused to his client, and I specifically take into account all the areas in which that may have arisen, including the stress to litigants of what will appear to them to be unending and unproductive litigation (though the decision to seek an IVO was hers alone).
63. I cannot attach blame to the Appellant for the judicial delays in these proceedings since their inception in December, 1998, or for appealing the decisions of the Court of Alderney of 2001 and of this Court in 2002 with regard to the “*licitation*”; it was a right which he properly exercised. His conduct, or his lack of action after the decision of the Court of Appeal in April, 2003, is another matter. Despite the injustice which I know he feels with regard to the decisions relating to the ownership of the house (and his contributions to it), he has to face up to reality. Prior to the granting of the IVO, he and the Respondent each

owned an undivided one-half share in the property. That is the law; as is the right of the Respondent to effect the sale of the property and therefore to realise her equity in it. I would be more sympathetic to the Appellant if he had shown any sign of accepting these realities in the last 15 months.

64. In all honesty, I find it difficult to criticise the Alderney Jurats for reaching the decision which they did, or the manner in which the proceedings were conducted. I am satisfied that they were aware of all the material facts, such as the effect of granting an IVO, and that the Appellant would lose the equity which he obviously had (though the amount might be uncertain), in the interest of which he was to be deprived irrevocably. I consider that they were also entitled, as I have already indicated, to reject the basis for his Counsel's submission for an adjournment. The Court had been more than tolerant in granting delays prior to both the PVO and IVO hearings, with no constructive movement of any sort in that time on the part of the Appellant.
65. I am not persuaded that the appeal should be allowed by way of overruling the granting of the IVO. That would be unjust, and serve no useful purpose, for as Mr. Atkinson pointed out his client could make a renewed application. The only result would be yet further delay.
66. Nevertheless, I have sufficient doubts as to the justice of the case. I am driven to conclude, with reluctance, that the Appellant should be given one last chance to realise the residual value of his former interest in the property, which will require taking immediate and constructive action on his part. The objective of both parties must be a speedy and mutually just resolution of the present *impasse*. This saga has continued for more than long enough, to echo the view expressed by the Court of Appeal back in April, 2003.
67. As a matter of principle I generally take the view, as Mr. Atkinson submitted I should, that if I have reached a conclusion that the lower Court erred in its decision, then the matter should be remitted to that Court for proper reconsideration. In the circumstances of this case, however, I consider that this Court itself should make any necessary orders, and thereafter to supervise them; and that such delays as justice requires be granted must be kept to a minimum.
68. I therefore order:-
 1. Leave to appeal out of time is granted.

2. The eviction appeal is allowed, to the extent that the order is stayed until the 30th September, 2004, with leave to apply.
3. The IVO appeal is allowed, to the extent that the making of the IVO is postponed until the 30th November, 2004, and therefore will not be effective until the 1st December, 2004, with leave to apply. The claims registered by the Income Tax Authority remain unaffected.

These orders, in my view, reflect the timescale of 3 months granted originally by the Court of Alderney and confirmed by the Court of Appeal in which the Appellant was required to participate in the *licitation*. It is appropriate that the eviction order should be stayed for a shorter period so that the property is vacant at the time of any public auction or so as not to deter a sale. No purchaser will commit himself if he has any doubts as to vacant possession being granted on completion of the purchase of the property.

4. Unless application to the contrary is made by 4.00 p.m. on the 18th August, 2004, the Respondent's costs of this appeal will be paid by the Appellant on the standard recoverable basis, which costs, together with the outstanding debt in relation to earlier costs, will come out of the Appellant's half-share of the net proceeds of sale, which share will also bear, of course, the amounts payable to the Income Tax Authority.

I should make it clear to the Appellant that it is now entirely a matter for him whether he realises the value of his interest in the former home (as has been determined by law), or he loses out completely. On the 1st December, 2004, the IVO will have full force and effect unless in the meantime the property has been disposed of. I have specifically granted both parties leave to apply in respect of both orders to allow for a bare modicum of flexibility. So, for example, if the Appellant is only able to move into other premises on the 10th October, he is free to apply for extra time; on the other hand if by the 1st October the Appellant has made no effort to vacate the premises then the Respondent is free to apply to this Court for it to reconsider the length of stay in the coming into effect of the IVO. Equally, if effective progress is being made towards the sale of the property but it cannot finally take place prior to the 30th November, then clearly the Appellant must be free to apply for such further limited extension as the case requires. These examples are in no way definitive; and freedom to apply is no guarantee of success.