



HSBC Bank PLC v Doyle
Royal Court
2nd October 2018

JUDGMENT
39/2018

Application by Defendant in saisie proceedings to the Royal Court for determination as to whether his rights under Article 1 of Protocol 1 to the Convention and under Article 6 of the Convention were engaged.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between

HSBC BANK PLC

Plaintiff

-and-

MICHAEL JOSEPH DOYLE

Defendant

Date of hearing: 28th February 2018

Judgment delivered: 28th February 2018

Reasons handed down: 2nd October 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiff: Advocate J E Roland
The Defendant was not represented and appeared in person

Cases, Texts & Legislation referred to:

The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985
The Judgments (Interest) Rules, 1996
The Saisie Procedure (Simplification) (Bailiwick) Order, 1952
The European Convention on Human Rights
The Human Rights (Bailiwick of Guernsey) Law, 2000
Practice Direction No. 1 of 2006
Gaudion v Weardale (1998) 25.GLJ.61
Wood v United Kingdom (1997) 24 EHRR CD69
Horsham Properties Group Ltd v Clark [2009] 1 WLR 1255
Barclays Bank plc v Alcorn [2002] EWHC 492 (Ch)

The Administration of Justice Act 1970
The Reform (Guernsey) Law, 1948
The Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950
Gallienne, *Traité de la Renonciation par Loi Outrée*

Introduction

1. The Defendant, Michael Doyle, consented to two judgments being entered against him in favour of the Plaintiff, HSBC Bank plc. The first Act of Court, dated 21 April 2017, records that the judgment was for £1,890,504.77, with interest pursuant to the Judgments (Interest) (Bailiwick of Guernsey) Law, 1985, “*and with power to levy execution on the real property of the Defendant*”. The balance of the Plaintiff’s claim was to be defended and I reserved the costs of the proceedings. I then made a Consent Order on 16 June 2017, which had been signed by Advocate Clare Tee on behalf of the Defendant, entering judgment for £10,175.32, which would also carry interest pursuant to the 1985 Law, permitting the balance of the Plaintiff’s claim to be withdrawn, and I ordered that the Defendant pay the Plaintiff’s costs of the proceedings on the contractual, and so indemnity, basis, save that both parties would bear their own costs for the balance of the claim that was to have been defended, namely those incurred from 22 April to 16 June 2017 inclusive. The rate of post-judgment interest has remained at 8% per annum since 1 October 1996 by virtue of the Judgments (Interest) Rules, 1996.
2. Prior to putting the matter before a Commissioner of the Court on 10 November 2017, the parties were apparently able to agree the costs payable pursuant to this order and the Advocates for the Plaintiff intimated the costs that would be sought in respect of that hearing. This was set out in the Plaintiff’s account for that hearing and the Plaintiff, as the Judgment Creditor, proceeded to cause the Defendant, as Judgment Debtor, to appear before the Commissioner on the date in question in accordance with para. 2(1) of the Saisie Procedure (Simplification) (Bailiwick) Order, 1952. At that hearing before the Commissioner, the Defendant raised questions as to the legality of the saisie procedure, in particular questioning whether it contravenes any of the rights he enjoys under the European Convention on Human Rights, as incorporated into domestic law by the Human Rights (Bailiwick of Guernsey) Law, 2000. The Commissioner quite properly recognised that these were issues he could not resolve and so referred the matter for determination by the Court if the Defendant so requested.
3. The Defendant made this request in writing, explaining that “*there now remains a number of key legal matters that only a hearing at Ordinary Court can advise upon*”. The basis for the application was elaborated upon in a further letter from the Defendant dated 12 December 2017, in which he identified the discrepancy between the amount awarded as the judgment sum and the potential value of his real property, as well as the appropriateness of the legislation being applied by the Plaintiff for the collection of that amount, because “*it grossly and unfairly over-reaches the terms of the contracts to which the Judgement sum relates*”. He submitted that the saisie legislation “*appears wholly inadequate*” and that, if it applied, it “*would result ... in a direct contravention of my right to the full enjoyment of the property that belongs to me*”. He also sought procedural guidance because he was a litigant in person and the Legal Aid Administrator would no longer assist him.
4. At a hearing on 22 December 2017, I gave directions leading to the hearing that took place at the end of February 2018. In particular, I drew to the Defendant’s attention Practice Direction No. 1 of 2006 and highlighted the need for the Defendant to “*specify the nature of the point raised and include a skeleton argument in support, plus copies of any authorities*” (para. 3(b)). Although I had reservations about the timing of the Defendant’s application in respect of the alleged contraventions of his Convention rights, I concluded that it would

probably be better to have those arguments made at this early stage in the ongoing saisie process rather than leaving him to take them at any later stage. I did so in the belief that the overall process might then operate more quickly than would be the case if, for example, a discrete issue relating to the marshalling of the claims or in respect of an application seeking the Defendant's eviction were to lead to further human rights points arising.

5. As a consequence of the directions given, the Defendant provided his Skeleton Argument under cover of a letter dated 12 January 2018. It was handwritten on Prison paper because, at that time, the Defendant was in custody in respect of criminal offences for which he had been convicted. The Skeleton Argument very clearly explains that the Defendant suggests that his rights under Article 1 of Protocol 1 to the Convention and under Article 6 of the Convention were engaged. The Plaintiff's Skeleton Argument, prepared by Advocate Roland, who appeared on behalf of the Bank (ie, the Plaintiff and so Judgment Creditor), dated 9 February 2018 was filed in response.
6. At the conclusion of the hearing on 28 February 2018, I announced that I was unable to make the rulings sought by the Defendant. I explained my reasons for reaching that decision. I said that I would set out those reasons in writing as soon as I could, particularly bearing in mind that the Defendant was not represented by an Advocate (although he could have requested that a transcript of the outline of my reasons be prepared so as to have them in a form that he could read and re-read, as necessary). Unfortunately, it has taken me much longer than I would have liked before I have had the opportunity to give the reasons in written form and I apologise to the parties for any inconvenience caused by this delay. This judgment sets out my reasons for rejecting the submissions made by the Defendant and concluding that there had not been, and was unlikely to be, any violation of the Convention rights he had advanced in the ongoing saisie proceedings in which the parties are involved.

Background

7. In the course of his submissions, the Defendant explained why he feels particularly aggrieved at what has happened. Although it was not given as sworn testimony, he explained that Oakwood Manor had been purchased in 2003 and that this was the culmination of the efforts of him and his wife in moving up the property ladder. They had initially bought small and managed to afford larger and better properties from time to time. They have six children. Oakwood Manor had been purchased with the assistance of a mortgage from Skipton International and, within a few years, the balance on that loan had been reduced. In 2006, they took the decision to renovate Oakwood Manor. His family enjoyed significant income from the financial services business in which they engaged. The Plaintiff was approached and agreed to lend monies to enable the property to be renovated. There was a series of loans made. The Plaintiff's Cause referred to three loans. Two loans were made in October 2008, with a bond given by the Defendant in favour of the Plaintiff dated 14 October 2008 securing £1.2 million. The second and third bonds were dated 16 April and 19 December 2009 and secured £782,000 and £248,000 respectively. The third loan was agreed in July 2012 as a consolidation of the Defendant's other indebtedness, in the sense of leaving the lending from October 2008 unaffected as secured by the initial bond and relating to subsequent borrowings as secured by the second and third bonds. As the Defendant readily acknowledged, the combined amount borrowed and so secured was £2.3 million. However, he explained that the loan to value was always in the region of 50%; the last valuation in 2008 or 2009 of Oakwood Manor being for £4 million. The Defendant accepted that the value of the property had inevitably reduced since those heady days for property owners but was quite adamant that there remains some equity in the property.
8. There were no problems in the Defendant servicing the payments due on these loans until there was a raid on his business premises in England in 2012 and steps were taken in the Bailiwick to prosecute him and his wife. The Defendant had been remanded in custody for

some months and then was released on bail. Following a trial, he was convicted and sentenced to 7½ years' imprisonment. Whilst he had been on bail, he had managed to cover the amounts needing to be repaid through selling off a portion of the land at Oakwood Manor. Once he was sentenced and became a serving prisoner, he found it difficult to deal with matters, which was part of his complaint, resulting in the arrears escalating, and culminating in the Bank's Advocates implementing the saisie procedure. The Defendant suggested that it was beyond the terms of his loan agreements with the Plaintiff Bank for the Bank to be able to take the entirety of his real property in Guernsey under this procedure. In his submission, it should be limited to what was needed to pay off his debts. He submitted that it infringed his Convention rights to the equity remaining in Oakwood Manor if the entirety of his real property would be vested in the Plaintiff. He described Oakwood Manor as the family home, the place where he and his wife got married and they have put significant investment into it.

9. In response, Advocate Roland made a number of submissions on the law to which I will return, and highlighted the factual matrix against which action had been taken, drawing attention to the Bank's terms and conditions, which include details about the enforceability of the security given and noting that this reflects what was stated in each offer letter about the potential for a borrower's home to be repossessed if the repayments were not kept up. She also noted that steps had been taken by the Defendant previously to raise funds to avoid facing this type of proceeding and that, until a later stage in the process, it remained open for the Defendant to be master of his own destiny by raising the funds to settle the judgment debt, in which case none of the issues being ventilated by the Defendant about the equity in Oakwood Manor would arise. However, as matters stood, the Bank had to seek satisfaction of the judgments in its favour through the saisie process as the means of enforcing the significant judgment debts due by the Defendant. She stated openly that it was not the Plaintiff Bank's policy to retain any equity once the saisie process completed, but that the Bank could not give any formal undertaking in that regard because it did not yet know whether there were other creditors of the Defendant whose stance might be different. I understand the Plaintiff's position to be that it remained open to the Defendant to sell Oakwood Manor at a price he was prepared to accept, pay off the full amount due under the judgments and retain whatever was left, ie, the equity to which he had referred, or, if that route could not be achieved by him, to wait and see whether another creditor would elect to take Oakwood Manor, in which case any grievance the Defendant had would not involve the Plaintiff Bank, which would simply have had its debt settled by this third party creditor, but that, in the event that the Bank proceeded to a final vesting order, the Bank would remit any balance to the Defendant after it had sold Oakwood Manor and paid itself, including the costs it incurred.

Right to a fair hearing

10. Against this factual background, the first of the Convention rights on which the Defendant focused was Article 6(1), which provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

More particularly, the Defendant submitted that the alleged infringement related to equality within the justice system. He referred to his “*caste*”, and suggested he was put at a disadvantage purely due to the nature of the position in which he found himself in society. He sought to distinguish between his position as a litigant without the benefit of legal representation and the Plaintiff’s position of being able to instruct one of the larger firms of Advocates in the Channel Islands. In describing these respective positions as “*David and Goliath*”, I understood the Defendant to be arguing that there was an inequality of arms that needed to be addressed.

11. The Defendant pointed out that he had been granted legal aid when the debt claim of the Plaintiff was extant, but that his legal aid had ceased when he agreed to the final judgment being entered against him. The Defendant further stated that, as a serving prisoner, he had no access to law books and no access to the internet tools that would be available to him otherwise. The extent of the unequal position in which he found himself was summarised in his Skeleton Argument as being that he “*must respond to the ‘Saisie’ procedures of [his] house and home with the singular use of a biro pen and some prison paper.*”
12. Because I understood the difficulties the Defendant faced, I carefully asked the Defendant at the outset of the hearing whether he was ready to proceed with his submissions. He confirmed that he was. He also confirmed that he had not made any application to the Legal Aid Administrator for legal representation in relation to his challenge based on alleged violations of his Convention rights. I was satisfied, therefore, that he had, although perhaps reluctantly, chosen to proceed knowing that he was having to develop these issues for himself and with the impediments associated with being a serving prisoner. I had first reviewed his Skeleton Argument prior to the hearing, from which I could see that he had complied with the requirements of the Practice Direction, at least as best he could. I am well aware that the Defendant has the ability to formulate legal arguments without the assistance of an Advocate and that he is then able to develop those arguments orally. In short, the Defendant is reasonably well-versed in the procedures of this Court and is not the type of litigant in person who genuinely struggles to articulate the case he wishes to present. As the hearing proceeded, I was quite satisfied that the Defendant was not prejudiced to an extent that there was a violation of Article 6 of the Convention and I was not troubled that he might not be getting a fair hearing. Had I been, I would have stopped the hearing and taken appropriate steps.
13. I regarded the Defendant’s decision not to apply for legal aid as being a significant factor. Had the Defendant genuinely wanted to have the assistance of an Advocate, I am convinced that he would have made the application and, had it been rejected, he would then have known that he could seek to challenge that decision before this Court. In other words, he did not pursue that route through choice, where his initial remedy would have been in separate proceedings not involving the Plaintiff, so I treated him being a litigant in person as not amounting to a breach of his Article 6 rights on the basis that the absence of legal aid was not through any act of a public authority but rather of the Defendant’s own volition.
14. Further, I did not understand the Defendant to be complaining about anything that he had been denied by the Prison. For example, his complaint was not that the Prison had refused to allow him any materials to which he could have had access. Similarly, I did not understand the Defendant to direct his complaint against the Court. I endeavoured to give the Defendant as much assistance as I felt I could and explored with him the bases on which he was challenging whether the saisie procedure is Convention-compliant as thoroughly as I felt they merited, doing my best to interpret his arguments in the way most favourable to him. Of course, had the Defendant been raising any complaint about how he had been treated by the Legal Aid Administrator or the Prison, it would have been necessary to have invited representations by, or on behalf of, whichever of those authorities the Defendant complained about, but this was not the way the Defendant put his case. Ultimately, I could

not identify any Convention right violation arising from the fact that the Defendant was not legally represented and had embarked on this particular element of challenge whilst a serving prisoner. Perhaps of most significance for me was the confirmation that the Defendant gave at the outset that he was ready to proceed and that he was then able to make full submissions on his own behalf and also in reply after Advocate Roland had concluded her submissions, including offering his analysis of how he felt the cases to which she had referred did not assist the Bank.

15. For these reasons, I remained satisfied throughout that the Defendant was being afforded a fair hearing and that there was no merit in his suggestion that Article 6 of the Convention should result in any outcome other than the one I indicated would follow.

Peaceful enjoyment of property

16. The second Convention right on which the Defendant relied is found in Article 1 of Protocol 1, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The Defendant concentrated on the equity he asserts he has in Oakwood Manor as the possession in respect of which he is entitled to the peaceful possession. In other words, that equity cannot be taken from him pursuant to the saisie procedure and still be Convention-compliant. In his Skeleton Argument, he suggested that:

“If the matter is not redressed, the Plaintiff may seize upon all of the Defendant’s realty. It is not obliged to return any remaining equity over and above the Judgment Sum back to the Defendant. The Plaintiff takes full repossession rights over all the Defendant’s realty, may serve eviction notice at the interim vesting order stage and can sell off the realty covering only its debts in any manner it wishes.”

17. The Defendant first referred to the contractual position, arguing that it went beyond the terms of his relationship with the Bank that, in the event of non-payment, the entirety of the security given for the loans could pass to the Bank. I have reviewed the loan offers made by the Bank. For example, in letters dated 3 October 2008, which the Defendant counter-signed on 14 October 2008 accepting the offer on the terms contained in those letters and in the HSBC Mortgage Loan Conditions, immediately above the place where the Defendant signed there appears in larger typeface and bold the warning: *“Your home may be repossessed if you do not keep up repayments on your mortgage”*. Although the Loan Conditions applicable in 2008 were not produced, I have been shown a copy of the March 2012 edition of the HSBC Mortgage Loan Terms and Conditions and I was told by Advocate Roland that these were not materially different from what was incorporated into the loan agreements with the Defendant. Clause 4.2 provides:

“The Security must be a first charge over the Property and, unless we agree otherwise in writing, must be the only charge over the Property.”

Clause 11.1 provides:

“The Mortgage Debt will become immediately due and payable on written demand by us and no sum (or further sum) may be drawn by you under the Agreement if any of the events set out in this clause 11.1 occur. ...

11.1.3 You fail to pay (i) any Monthly Payment when due resulting in a shortfall equivalent to two or more Monthly Payments or (ii) any other sum payable under the Agreement when due.”

By virtue of clause 11.2.3, the Defendant agreed that he would pay to the Bank *“on demand any costs and expenses reasonably and properly incurred and [the Bank’s] reasonable charges in enforcing compliance with or remedying any breach of the Agreement or the Security or recovering the Mortgage Debt”*. (The wording pleaded in respect of the three loans in the Plaintiff’s Cause was slightly different, but to the same effect, being a promise to pay *“the full amount of all fees, expenses, liabilities and legal or other costs incurred or charged by [the Bank] in or incidental to (i) enforcing compliance with or remedying any breach of the Agreement or the Security or recovering the Mortgage Debt and (ii) the protection and enforcement (including the costs of any proceedings) of the Security”* and with the addition in respect of the third loan of *“and any insurance required under clause 6.4”* at the end of the parentheses.)

18. The Bonds registered at the Greffe after the Defendant appeared before the Court and consented to them are all in similar terms. By clause 2, the Defendant promised to pay the Bank on demand *“all present and future indebtedness ... on any current or other account with interest and bank charges and all other liabilities whatsoever ... present future actual or contingent arising from transactions between [him] and the Bank both within Guernsey and elsewhere together with all costs charges and expenses howsoever incurred by the Bank”*. Clause 3 provides that the Bond is a *“continuing security”*. The Defendant’s appearance before the Court entailed confirming and ratifying the Bond *“on the security and obligation of all the real and personal property of the Debtor present and future”*.
19. Although there may not be anything explicit in the contractual arrangements between the Bank and the Defendant that spells out how non-payment could result in the loss of the whole of the property given as security for the loan, it seems to me that it is quite apparent from the overall terms of the loan that the property offered by the Defendant to the Bank as security for the loans was known from the outset to be at risk in the event of non-performance by him of his obligations under any of these agreements. I take the view that this is shown to have been clearly understood by reason of the Defendant acknowledging that he was in breach of the loan agreements, with the consequence that there were two judgments entered against him by consent. I regard the fact that there was also consent for the Bank to levy execution on the real property of the Defendant as a significant factor. Because he was at that time represented by Counsel, I think I can properly infer that the Defendant must have been (and so was) advised that a judgment creditor can choose first to seek to execute a judgment against personal property before moving to execute against real property but that, as is usually the case where the judgment creditor has security over real property, that step can be skipped and the judgment creditor (as former lender) will move directly towards enforcing against the judgment debtor’s real property. Accordingly, by consenting to the first stage in the saisie process, it could be said that the Defendant knew what would follow thereafter and his current complaint, particularly in respect of the loss of any equity in the property, becomes less capable of being advanced strenuously as a result.
20. The Court of Appeal has commented upon the saisie procedure in *Gaudion v Weardale* (1998) 25.GLJ.61. On page 51, Southwell JA summarises the process up to the summoning of the judgment debtor to the Court to pay the debt in the amount that the Commissioner has found to be owed and adds the following comments:

“The effect of an interim vesting order is to vest the debtor’s realty in the creditor as trustee for all the claimants against the debtor’s realty. If the creditor sells the property at a price which exceeds the amount of the debt, the surplus belongs to the creditor, not to the debtor.

This is a relic of ancient Guernsey customary law, which in my judgment would well bear reconsideration by the relevant authorities. They may consider that at the end of this 20th century it would be appropriate for any surplus to go to the impoverished debtor, rather than as a windfall to the relevant creditor.

However, to reduce the risk of this potential injustice to the debtor, under section 2(5) of the Saisie Order 1952 the Royal Court may, if the circumstances relied on by the debtor appear to render it just to do so, postpone the making or the operation of an interim vesting order on such conditions, if any, as the Court sees fit. By this delay (which the Court may grant more than once) the debtor may be enabled to sell his realty at a value higher than the amount of his debt, because until an interim vesting order is made the debtor remains in control of his realty so as to be able to sell it at the best price obtainable.”

21. The plea from Southwell JA, however, appears to have fallen on deaf ears. There have been no changes made to the customary law procedure, as modified by the 1952 Order, or to the substantive legal principles, particularly those relating to who takes the benefit of any surplus once the property is sold. Indeed, in a document setting out the response of the then Commerce and Employment Department to options for reforming Guernsey’s insolvency regime, published on 11 February 2016, it was stated that:

“The Department’s view that substantial reform of Saisie is not necessary has not changed post consultation. Respondents commented that it was little used and that any review would require a wider consultation, to include consideration of security interests legislation. However, in the few instances the process has been used in recent years, it has operated to realise a debtors [sic] real property in satisfaction of debts. Again, it is essentially an enforcement process with origins in customary law, and the Department does not intend to put forward any changes to it as a result of this reform.”

This appears to be the most recent policy position put forward on behalf of the States of Guernsey. It makes no mention of the particular issue alluded to by Southwell JA and on which the Defendant has concentrated his submissions, namely whether it is a violation of his Convention right in Article 1 of Protocol 1 to the European Convention that the process leaves any surplus following a sale of the real property in question, ie, the debtor’s equity, in the hands of the judgment creditor. I do not, though, find that there is anything of particular assistance to help me to resolve this question in either *Gaudion v Weardale* itself or the unwillingness of the government to progress any changes to the regime.

22. When considering the admissibility of a claim in circumstances where repossession of a home took place following non-payment of a loan, the European Commission of Human Rights in *Wood v United Kingdom* (1997) 24 EHRR CD69 stated:

“In so far as the repossession constituted an interference with the applicant’s home, the Commission finds that this was in accordance with the terms of the loan and the domestic law and was necessary for the protection of the rights and freedoms of others, namely the lender. To the extent that the applicant is deprived of her possessions by the repossession, the Commission considers that this deprivation is in

the public interest, that is the public interest in ensuring payment of contractual debts, and is also in accordance with the rules provided for by law.”

This is, in my opinion, a powerful summary of the reasons why the Defendant was always likely to face an uphill battle in mounting this challenge to the saisie procedure because he has entirely overlooked that the Court has to be engaged in a balancing exercise of the rights of both sides. I can also understand why Advocate Roland placed so much weight on this decision. The Defendant has, quite understandably, concentrated on what he regards as his right to his possession, whether that is Oakwood Manor itself or what he strongly suspects will be a surplus in the net proceeds of sale in due course, without perhaps paying as much attention as he could have to the fact that the Bank is being kept out of the money the Defendant has openly conceded is owed to it and where the Bank is unable to recover what it lent to the Defendant on the security of the house.

23. A further case to which Advocate Roland referred was *Horsham Properties Group Ltd v Clark* [2009] 1 WLR 1255. This case also involves default on mortgage repayments and an argument from the borrower in possession as to violation of the Convention right in Article 1 of Protocol 1. However, the decision turns on the way in which the statutory regime in England and Wales operates, so it is not quite the same as in the present case. There are, though, passages in the judgment of Briggs J (as he then was) that help me to reach my conclusions on the approach to be taken to the Defendant’s challenge.
24. At para. 25, Briggs J said that he had “*no difficulty in concluding that Miss Beech’s share in the equity of redemption in relation to the property was a “possession”, a widely defined expression*”. Although the Defendant did not adduce any evidence that there is some equity in Oakwood Manor, for the purposes of determining his challenge I was prepared to accept that there must be some equity in his favour in the property. Even if the judgment debt is rounded up generously to £2 million, in all likelihood Oakwood Manor could be sold for more than that figure, even if it would no longer achieve anything approaching £4 million. Ultimately, this parcel of land will be worth what a buyer is prepared to pay, whether the vendor is the Defendant or the Bank. However, if the sale were to be at no more than the amount to cover the judgment debt, it follows that there would be no equity and, in the absence of any “possession”, Article 1 of Protocol 1 would not be engaged in any event. Accordingly, for the purposes of this case, I accepted that there was a possession and so Article 1 of Protocol 1 was potentially engaged.
25. Returning to the *Horsham Properties* case, Briggs J held that the borrower with some equity “*lost her equity of redemption without any state intervention at all*” (para. 33) because it was lost “*by virtue of the contract for sale which ensued from the receivers’ placing of the property in the auction*”, which arose from the exercise of powers conferred purely by contract, ie, at a private level, rather than involving a public authority. As matters stood at the time of the hearing in the present case, the Defendant had not been deprived of his ownership of Oakwood Manor. It was clearly open to him to sell his real property on terms that suited him and use the funds derived from such a sale to settle his debt to the Bank. This was one of the reasons why I had questioned initially whether the challenges the Defendant wished to mount were being taken prematurely. As I have already indicated, I considered that attempting to resolve the matters involved, possibly on the basis of some assumed (although quite likely) facts, would assist. Eventually, I did not consider that the exercise to be conducted amounted to answering a theoretical (or academic only) question, which is the type of issue that this Court declines to entertain.
26. Accordingly, when considering whether there would be a deprivation of the Defendant’s possession through state intervention, it became necessary to take into account that the process under the 1952 Order involves various stages of decision by the Court. In my judgment, the deprivation of property cannot be regarded as taking place until an interim

vesting order is granted and, even then, it may not always involve the loss of equity if the value of the property is below the amount owed. As is clear from the 1952 Order (and as explained by Southwell JA in *Gaudion v Weardale*), it will always be open to a judgment debtor to seek an indulgence from the Court to enable him to secure a sale of the real property on terms acceptable to him. Whilst that situation pertains, it cannot be said that Article 1 of Protocol 1 is yet applicable. On this analysis, it would only be when an interim vesting order is made by the Court (being the act of a public authority, and so amounting to state intervention), that the former borrower judgment debtor might be regarded as a victim of a Convention violation.

27. Briggs J then moved on to consider the question of “*whether any supposed deprivation of possessions constituted by a mortgagee’s sale out of court without first obtaining a court order for possession is justified in the public interest*”. This question is not, of course, of direct relevance to the saisie process because, as I have just noted, there cannot be a forced sale through the judgment debtor taking ownership of the judgment debtor’s real property without there first being a Court order. However, given the explanation provided by Briggs J, it strikes me as even clearer in the context of the saisie process that there are protections in place for a judgment debtor that demonstrate the balancing of the competing interests being undertaken without any Convention right violation. The first stage of the explanation was to quote Hart J in *Barclays Bank plc v Alcorn* [2002] EWHC 492 (Ch):

“It seems to me, however, that her general submission on the effect of the Human Rights Act in relationship to a mortgagee’s action for possession is correct, namely, that the matter is regulated by section 36 of the Administration of Justice Act 1970 in a way which draws a balance which Parliament was entitled to draw between the interests of occupants of dwelling houses and the interests of mortgagees, and does so in a manner which is proportionate and reasonable, and allows the court, in the exercise of its discretion, to apply criteria of reasonableness and proportionality in either granting or denying the mortgagee its remedy.”

The terms of section 36 of the Administration of Justice Act 1970 empower a court dealing with an action for possession by a lender (as mortgagee) to adjourn the proceedings or to stay or suspend the execution of any order for possession for such period as it considers reasonable. To an extent, therefore, this passage could be read in a manner that reflects the way the Royal Court can deal with the judgment creditor’s application for an interim vesting order to be made in default of the judgment debtor settling the judgment debt. It is a stage that reflects that proportionate balancing of the property interests of both parties, all in the public interest.

28. It is para. 44 *et seq.* of the judgment of Briggs J, though, that further explains why he did not find any violation of Article 1 of Protocol 1:

“44 In my judgment, any deprivation of possession constituted by the exercise by a mortgagee of its powers under section 101 of the LPA after a relevant default by the mortgagor is justified in the public interest, and requires no case-by-case exercise of a proportionality discretion by the court, for the following reasons. First, it reflects the bargain habitually drawn between mortgagors and mortgagees for nearly 200 years, in which the ability of a mortgagee to sell the property offered as a security without having to go to court has been identified as a central and essential aspect of the security necessarily to be provided if substantial property based secured lending is to be available at affordable rates of interest. That it is in the public interest that property buyers and owners should be able to obtain lending for that purpose can

hardly be open to doubt, even if the loan-to-value ratios at which it has recently become possible have now become a matter of controversy.

45 Secondly, I am bound by the decision of the Court of Appeal in Ropaigealach v Barclays Bank plc [2000] QB 263 to conclude that there was no wider policy behind section 36 of the Administration of Justice Act 1970 than to put back what the courts had shortly before taken away, namely a discretion to stay or adjourn proceedings for possession, triggered only where the mortgagee considered it necessary or appropriate to go to court in the first place. The question whether any wider policy ought to be implemented wherever steps taken by a mortgagee to realise its security are likely to lead to the obtaining of possession is a matter for Parliament, and upon which Parliament has yet, so far as I can ascertain, to form any view. It would be quite wrong for the courts in a vigorous and imaginative interpretation of the Human Rights Convention to make that policy, as it were, on the hoof. In that respect, the following observations of Lord Scott in Harrow Borough Council v Qazi [2004] 1 AC 983, 1024-1025, para 125 are, albeit expressed in relation to article 8 rather than article 1, applicable by analogy:

“social housing legislation of this character is well justifiable on the public interest grounds provided for by the article: James v United Kingdom (1986) 8 EHRR 123. If, on the other hand, the tenant has no right to remain in possession as against the landlord he cannot claim such right under article 8. To hold otherwise, to hold that article 8 can vest property rights in the tenant and diminish the landlord’s contractual and property rights, would be to attribute to article 8 an effect that it was never intended to have. Article 8 was intended to deal with arbitrary intrusion by state or public authorities into a citizen’s home life. It was not intended to operate as an amendment or improvement of whatever social housing legislation the signatory state had chosen to enact. There is nothing in Strasbourg case law to suggest the contrary.”

29. Extracting that last point and applying it to the situation of the saisie process (albeit that this stage has not yet been reached in the Defendant’s case, so what follows is not strictly necessary to determine his challenge), if there were a step taken to evict the judgment debtor from his or her home, the combination of article 8 and article 1 of Protocol 1 would, in my view, play no greater role than those articles do in respect of any other eviction action. The Court would need to be satisfied that the judgment creditor had been placed in a position akin to a landlord or other property owner where the continued occupation of that person’s property could be terminated (or was from its inception unlawful) and, in default of the person vacating the premises voluntarily, a Court order to use the services of HM Sheriff to effect the person’s removal could be sought. The balancing of the respective Convention rights then operates through consideration by the Court as to whether to grant any stay of the eviction order to which the plaintiff is entitled and, if so, on what terms. Accordingly, had I needed to address what happens when a judgment creditor seeks to evict a judgment debtor during the course of the saisie procedure, I would not have been minded to find that there was any systemic Convention breach particular to the saisie process. The conclusion would depend in each case on how the balancing of the rights had been undertaken by the Court and would, of course, be fact-specific to the individual circumstances advanced by the parties rather than of general application.

30. I also regard the comments of Briggs J about the respective roles of the Court and the legislature to be sound guidance in the context of the Defendant’s challenge. A committee of the States has comparatively recently been reviewing the insolvency regime in Guernsey. Although in some cases the judgment debtor may not be insolvent, the saisie procedure has

quite understandably been treated an aspect of this overall regime. The government has chosen not to propose changes to the saisie procedure. In my opinion, it would not be appropriate for this Court to attempt to re-interpret the various principles that apply so as to create any different approach of general application “*on the hoof*”.

31. The 1952 Order was made pursuant to powers contained in article 64 of the Reform (Guernsey) Law, 1948 and section 12 of the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950. Reference to these enabling provisions clarifies that the 1952 Order deals with the making of rules of procedure, including where such a rule varies, modifies or revokes any rule of procedure operative in pursuance of customary law. For the purposes of the Human Rights Law, this means that the 1952 Order constitutes “*subordinate legislation*” (as defined in section 17(1) of the 2000 Law). As a result, this was not a case in which a declaration of incompatibility under section 4 of the Human Rights Law could be made, but involved first the obligation, if relevant, to interpret the 1952 Order in a way which is compatible with the Convention rights engaged (section 3 of the Law) and, if not, consideration would need to be given to setting aside any offending provision. To the extent that the substantive legal principles are not codified at all, but remain purely customary law, the Court would theoretically have the opportunity to rule that the customary law has developed so as to meet the needs of the 21st century. However, for the reasons given in Briggs J, which I adopt, if it is desirable to make changes, this really is an area for legislative intervention rather than the Court sweeping aside the basis on which this customary law regime has operated since time immemorial.
32. On the question of how to deal with statute, I did not, however, reach the position of having to take either course of action because I was not persuaded by the Defendant that the position as between him and the Bank led to any Convention right violation. In this regard, it is important to consider carefully the relationship between the parties. Unlike the position in England and Wales, as explained in cases such as the *Horsham Properties* case, where statute appears to play a more prominent role, these matters are not covered in quite the same way in Guernsey. Looking at what happens in respect of secured lending in the Island, it is an important factor to bear in mind that, before the security of the person’s real property is perfected between them and operates as a form of charge over the borrower’s property, there will be an appearance before this Court at which the borrower consents to the Bond. In this manner, there is arguably greater formality, involving an appearance before a public authority (for the purposes of the Human Rights Law) and I think this places into clearer focus the agreement being given by the borrower to the consequences of non-performance of the borrower’s obligations under the terms of any such secured loan. As I have stated, I further regard the acknowledgement by the Defendant of his having breached the terms of the loan agreements as a significant factor because it affects his ability now to refer to relying on the contractual terms between the parties. In his challenge, he was effectively attempting to rely on the terms of agreements he has broken, whereas the Bank was relying upon the customary law way in which a judgment creditor can proceed to enforce that judgment debt against the property of the judgment debtor. This is different from, and independent of, the Bank trying to rely upon the terms of the agreements it had with the Defendant.
33. Although it was not articulated by the parties in quite this fashion, I was further satisfied that the saisie legal regime is sufficiently well-known and so imbued with legal certainty, that there can be no suggestion that these are principles that are not readily accessible to members of the public. I appreciate that the level of certainty is not going to be as easily demonstrated as with a case involving statute, but the steps have been expressed in the 1952 Order, building on and developing the ancient customary law principles, which themselves are accessible by reference to the commentators on the customary law, such as Gallienne’s *Traité de la Renonciation par Loi Outrée*, to which the Defendant referred in his Skeleton Argument, but also, for example, the works of Peter Jeremie and Thomas Le

Marchant. Accordingly, on the issue of whether the legal and procedural regime can be said to be capable of being understood by those affected by it, including the Defendant, I concluded, without the point being taken by him, that it was. In these circumstances, the principle issue for me was whether I would find a potential Convention violation and, if so, whether that could be accommodated through a Convention-compliant interpretation of the terms of the 1952 Order.

34. In the light of what was said in *Wood v United Kingdom* (to which I am obliged to have regard by section 2 of the Human Rights Law to its relevance) and the *Horsham Properties* case, I did not find that there was any Convention violation arising from the approach being taken by the Bank as judgment creditor in respect of enforcing the judgment debts in its favour. My primary reason for so concluding was to have regard to the actual position that had been reached between the parties (and to bear in mind what might happen in future). The Defendant argued his case concentrating on the equity in Oakwood Manor being the possession concerned, which he said would be lost were an interim vesting order to be made. However, the Bank, as judgment creditor, stated in open Court that if there were any surplus following a sale, that surplus would be returned to the Defendant. In my judgment, that factual position amounted to a complete answer to the Defendant's challenge on this point.
35. Moreover, in the meantime, as is clear from the terms of the 1952 Order and as explained in *Gaudion v Weardale*, it remained open to the Defendant to sell Oakwood Manor (or any other assets he has) in order to settle the judgment debts he now owes to the Bank. In the event that the process moved towards the summoning of the Defendant to pay his debts or face an interim vesting order, procedurally he has the opportunity to seek an adjournment of that application (or a stay of any order) to enable him to sell the property (or raise funds). In my view, this amounts to a proportionate level of protection of the possession the Defendant asserted he wished to have protected from arbitrary interference by a public authority. Further, in the event that there were to be an interim vesting order and so the loss of his ownership of the real property, the Defendant was unable to persuade me that this amounted to an unlawful interference with his Convention right under Article 1 of Protocol 1. Instead, to the extent that this issue becomes relevant, I regard it as being an acceptable balancing of the competing property rights of the two parties, and so in the public interest.
36. There may be a different outcome when this subsequent stage is reached because of the potential for third parties to register their claims. In the event that this were to happen, the Defendant's remedy would be to raise the issues he has about what happens to any surplus funds upon sale representing the equity he currently enjoys, but that is not an issue that engages the position of the judgment creditor Bank so I cannot deal with it in the context of these proceedings as they currently stand. To do so would be speculative, theoretical and so academic and I will not, therefore, offer any view on such issues.

Conclusion

37. For all these reasons, I decided that I could not grant any of the relief sought by the Defendant. I was satisfied that the *saisie* procedure being conducted by the Bank did not involve any breach of the Defendant's Convention rights and that his other claim in relation to being afforded a fair trial was without merit because it did not involve any action by a public authority. Indeed, I felt the Defendant had managed to advance the submissions he wished to make as fully as would have been the case had he chosen to be represented.
38. Advocate Roland sought the Bank's costs of dealing with the Defendant's challenges to the process and the Defendant conceded that he could not resist that application. Accordingly,

as a further aspect of the costs of enforcing the judgment debts, those costs are to be paid by the Defendant to the Bank on the same contractual, and so indemnity, basis as the other costs orders.