

Separate declarations sought by the Creditors with respect to the treatment of the Debtors jointly or severally within the Saisie proceedings and declarations as to the maximum amount each Creditor may claim in the Saisie proceedings

[2020]GRC047

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

**IN THE MATTER OF the Saisie Proceedings (“the Saisie Proceedings”) against
RICHARD THOMAS GALLIENNE (“Mr Gallienne”) and
MARTINE JILL GALLIENNE (“Mrs Gallienne”)(“together the Galliennes”)
 (“the Saisie Proceedings”)**

**AND IN THE MATTER OF the application by
ORACLE LOANS AND MORTGAGE BROKERS LIMITED (“Oracle”)
dated 13 May 2020 and as amended on 19 May 2020 (the Amendment)
 (“the Application”)**

**AND IN THE MATTER OF the application by CHERRY GODFREY FINANCE LIMITED
 (“Cherry Godfrey”) dated 22 May 2020**

Hearing date: 27 July 2020

Judgment handed down: 10th September 2020

Before: Jessica E Roland, Deputy Bailiff

**Counsel for Oracle: Advocate M P Priaulx and Advocate A J Ayres
Counsel for Cherry Godfrey: Advocate Robert Fullman**

Cases, texts & legislation referred to:

Gallienne Renonciation par Loi Outrée

Saisie Procedure (Simplification) (Bailiwick) Order 1952

Carpenter and Carpenter v Field Aviation Limited 11 January 1982

Re Faulkner 7 Jun 1991

Barclays Bank v Curry and Curry 18th September, 1996

In the matters of Selwood v Madeley and Waterman v McCormack 19th December 2001

Waterman v McCormack Court of Appeal 3/2002

Pirito v Curth, 24 August 2004

Jubilee Scheme 3 Limited v Capita Symonds Limited GLR 2011-12 GLR 25

Credit Suisse Trustees Limited v Haggiag et al Guernsey Judgment 25/2015

Background

1. Mr and Mrs Gallienne were the owners of Le Mieille, Rue des Blanches Terrès (“the Property”). The Property was vested in Mr and Mrs Gallienne jointly and for the survivor.
2. On the 4th February 2016 Mr and Mrs Gallienne agreed to guarantee, on a joint and several basis, a loan by Oracle to a company Domestic Sprinklers Guernsey Limited. In order to secure this guarantee, Mr and Mrs Gallienne consented to a bond against their real property on a joint and several basis registered with the maximum indebtedness of £70,000 (plus interest and costs).
3. Also secured against the Galliennes’ property was a bond for the benefit of Hansard Trust Company Limited (“Hansard”) as Trustees of The Ramblers Retirement Annuity Trust Scheme as security for a sum owed by Mr and Mrs Gallienne (jointly and severally). This bond was secured on the 5th June 2018 with the maximum indebtedness secured being £385,000 plus interest and costs. Oracle agreed to Hansard taking priority over their Bond and thus Hansard was the first secured creditor against the Galliennes’ real property with Oracle being the second.
4. The Domestic Sprinklers Guernsey Limited defaulted on the payments on the loan to Oracle and Mr and Mrs Gallienne failed to pay the amounts due pursuant to the guarantee. On the 30th August 2019, Oracle was awarded judgment by the Royal Court against Mr and Mrs Gallienne in the sum £115,432.24, together with contractual interest from the 16th November 2017 in the sum of £61,956.64 and judicial interest and indemnity costs, with permission to levy execution of the real property of Mr and Mrs Gallienne.
5. On the 12th November 2019, the Royal Court, sitting on *En Plaids d’Heritage*, granted the application of Oracle for an Interim Vesting Order (“IVO”) vesting in Oracle the whole of the real property of Mr and Mrs Gallienne as trustee for the claimants against the real property of the Galliennes.
6. Complicating matters in relation to these particular proceedings was an unsecured loan made by Cherry Godfrey to a company known as Genesis Properties Limited, which in turn was guaranteed by Mr Gallienne and his brother Malcolm Gallienne, but not Mrs Gallienne. After Genesis Properties defaulted on that loan, Cherry Godfrey obtained judgment against Genesis Properties Limited, Mr Gallienne and Malcolm Gallienne on the 7th June 2019 for the sum of £239,937.77 with interest and costs (on an indemnity basis in accordance with the contract). Cherry Godfrey had previously registered the action in the Livre des Hypothèques Acts des Cour et Obligations against the real property of Mr Gallienne, Malcolm Gallienne and Genesis Properties Limited.
7. Oracle, as the holder of the IVO and in accordance with the Saisie Procedure (Simplification) (Bailiwick) Order 1952, caused the opening of a register of claims against the real property of Mr and Mrs Gallienne. When they took this action, rather than open one single register for Mr and Mrs Gallienne, they opened a register in the name of Mr Gallienne and opened a separate one in the name of Mrs Gallienne.

8. To a large extent, the inscriptions on the registers are very similar save in relation to Cherry Godfrey. As is typical, in both registers the first claim (dated 10th December 2019) is by the Law Officers of the Crown who registered in respect of all fines and also in respect of all rentes and cheffrentes. The second registration in both registers is by Advocates Trinity Chambers LLP acting on behalf of their client Oracle declaring that there is *“owing to the judgment creditor the sum of £187,391.97 the whole without prejudice (i) to interest accrued and to accrue and (ii) further costs incurred by the judgment creditor.”* The third entry is dated 14th January 2020 and again appears on both registers. That entry is as follows: *“Advocates Collas Crill acting on behalf of their client Hansard Trust Company Limited in its capacity as Trustee of the Ramblers Retirement Annuity Trust Scheme that there is owing to their client the sum of £431,128.32 inclusive of interest and costs, calculated to the 31st January 2020, together with interest to accrue thereon from 31st January 2020.”* The entry in Mr Gallienne’s register then refers to *“The principal sum is secured by a Bond registered against the real property of Richard Thomas Gallienne on the 5th June 2018.* Mrs Gallienne’s entry is the same, save it refers to her real property.
9. However although those are all the entries on Mrs Gallienne’s register, on Mr Gallienne’s register there is a further entry dated the 21st January 2020 which states as follows: *“Advocates Babbé acting on behalf of their client Cherry Godfrey Finance Limited, whose address for service is PO Box 69 La Vieille Cour, La Plaiderie, St Peter Port declare that there is owing to their client the sum of £268,239.62 inclusive of the interest and costs up to the date hereof together with interest accrued thereon from the 31st January 2020. Their clients claim was registered in the Livre des Hypothèques Actes de Cour et obligations dated 30th November 2018, securing the claim.”*
10. The final entry on Mr Gallienne’s register is not on Mrs Gallienne’s register because the Cherry Godfrey judgment (and underlying guarantee) was only against Mr Gallienne (and others) and not Mrs Gallienne.
11. The next stage in the saisie process is the marshalling of the claims, however Oracle and Cherry Godfrey disagree about how this should be done. The facts in this case are not in dispute. The question instead is one of law. As a consequence of this disagreement, the hearing before the Commissioner was adjourned sine die. Before the Royal Court Oracle and Cherry Godfrey by their applications each seek a series of declarations as to how the marshalling should be undertaken. Hansard have declared themselves neutral as to the outcome and have not put forward any position on the process. Neither party disputed the power of the court to grant declaratory relief in principle.
12. The declarations by Oracle are:
 - i. That the saisie proceed against Richard Thomas Gallienne and Martine Jill Gallienne jointly; and
 - ii. As to the maximum amount each creditor may claim in the saisie proceedings.
13. The declarations sought by Cherry Godfrey are :
 - i. That the saisie proceedings as against the Galliennes are henceforth severed and treated as separate saisie proceedings against each of Mr Gallienne and Mrs Gallienne
 - ii. If the declaration in accordance with (i) above is to the effect that the saisie proceedings are henceforth severed and treated as separate saisie proceedings,

a declaration as to the maximum amount which each of the registered creditors Hansard and Oracle to whom both Mr and Mrs Gallienne are jointly and severally indebted may claim in each separate saisie proceedings, and in particular, whether each of the registered creditors Hansard and Oracle may claim the full amount of the jointly and severally due indebtedness of both Mr Gallienne and Mrs Gallienne in both separate saisie proceedings or if each of the said Hansard and Oracle may only claim an amount in one set of saisie proceedings which when added to the claim of that registered creditor made in the other saisie proceedings does not exceed the full amount of the debt jointly and severally due; and

- iii. For the avoidance of doubt and to prevent this question being remitted back to the Court by the commissioner once the issues referred to in paragraphs (i) and (ii) above have been concluded, an order that, in the marshalling of the claims of the creditors, Oracle may only claim priority (except as against Hansard whose claim in any event ranks in priority to that of Oracle by virtue of Oracle whose bond was registered first having agreed that Hansard's bond would rank in priority to Oracle's bond) by virtue of the bond consented to in its favour by the Galliennes and registered on 4 February 2016 in respect of the sum of £70,000 together with interest on that sum (with the amount of such interest accrued prior to the making of the interim vesting order in this matter being limited to 730 days' interest) and costs with the balance of Oracle's claim being unsecured and ranking below the claims of all other creditors.

Discussion

14. When the register closes, the saisi hérédital must summon those creditors who have registered a claim to appear before a Commissioner. It is a principle of the Guernsey saisie procedure that once a creditor nominates to proceed against the realty, they are committed to executing only against the realty and forego their rights to pursue the debt owed to them against personalty.
15. The registered claims will then be "marshalled" by the Commissioner, i.e. verified and placed in order of priority. The priority of the claims is established by first looking at whether a creditor holds security against the debtor's property. Secured creditors (i.e. bondholders and any creditor having registered a judgment debt) have priority over unsecured creditors. Between secured creditors it is first in time (subject to any agreement between the creditors) who has priority. At a hearing before a Commissioner the real property is then offered to each of the registered creditors in turn. The Saisie procedure (Simplification) (Bailiwick) Order 1952 at section 3(3) confirms the customary process of offering the property in reverse order to:

".....each of the said claimants requiring him to declare whether or not he elects to have the real property of the debtor vested in him for an estate of inheritance, subject to the condition that he assume liability for all claims ranking in priority to his own....."

16. The creditor who chooses to take the property must do so on the basis that it will be liable to pay the claims which rank above it in their entirety.
17. As Lieutenant Bailiff Day set out in the appeal from the Alderney Court in the matter of Pirito v Curth, Royal Court 24 August 2004 paragraph 5:

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 saisi hérédital a fait acte de propriété; dans l’un ou l’autre cas, le saisi 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.

18. It is not claims against the person which are caused to be registered but rather claims against the real property of that person which is now by virtue of the IVO in the hands of the saisi hérédital. It is only the marshalling of the claims against the real property not any claims against the person. A creditor who doesn’t embroil itself in the saisie proceedings is capable of making claims at any time (subject to limitation) against the person of the debtor. The creditor who pursues the saisie process makes that election when, having obtained judgment, they obtain a Preliminary Vesting Order. The creditor who chooses not to take the property renounces any claims against realty and having elected to pursue its claim against the debtor’s realty, the creditor can no longer claim against the debtor’s personalty.
19. The parties agreed that the making of an Interim Vesting Order severed the joint ownership of Mr and Mrs Gallienne in their property. This was made clear in the judgment of Deputy Bailiff Day as he was then in In the matters of Selwood v Madeley and Waterman v McCormack Royal Court 19th December 2001 at page 28 paragraph B following Barclays Bank v Curry and Curry 18 September 1996 (and which was confirmed in the Court of Appeal) where he said as follows:

“However once the Interim Vesting Order has been obtained the saisi hérédital holds the Real Property or interests of the debtor (the renonciateur) as Trustee for all claimants against that Realty. That must inevitably and irrevocably sever the joint ownership.”
20. Thus in this case where both joint owners are the judgment debtors, after the IVO the real property vests in equal undivided shares in Oracle as Trustee for the claimants against the real property of Mr and Mrs Gallienne.
21. Although two registers were opened by Oracle, there is one IVO in relation to the whole of the real property of Mr and Mrs Gallienne.
22. Oracle argue that matters should remain as one saisie process and the creditors marshalled as a list against both Mr and Mrs Gallienne real property, with Cherry Godfrey ranking third on that list being required to settle all debts above it in full in order to claim Mr Gallienne’s severed share of the Realty if it elects to do so. If they decline to elect, they fall out of the process having renounced.
23. As the second ranking creditor Oracle would be asked the same question, but in relation to both Mr and Mrs Gallienne as their judgment debt is joint and several.

24. Cherry Godfrey have a direct financial interest in how the debts of Hansard and Oracle are treated under the saisie proceedings. Cherry Godfrey who is a creditor only of Mr Gallienne submits that as the interests of all of the creditors are not the same, the proceedings against Mr and Mrs Gallienne's realty should proceed separately and that there should be two saisie proceedings, one for Mr Gallienne and one for Mrs Gallienne. Having severed the proceedings, the second declaration seeks to specify the amount each of the prior creditors can claim in each of the separate saisie proceedings.
25. I agree with the submission of Cherry Godfrey that whatever the former position in law of a husband and wife in relation to their debts, the law treats them now as it would any other two individuals who have decided to deal with their debt and their real property ownership in the way that the Galliennes have. There is no suggestion in this case that this a matter where the Court is or is likely to be involved under the Matrimonial Causes (Guernsey) Law 1939 (as amended).
26. Neither party contests the principle confirmed in Carpenter and Carpenter v Field Aviation 11 January 1982 that it is possible to create an hypothéque in respect of one of the joint owners of real property and thus Cherry Godfrey was able to register a claim just against Mr Gallienne.
27. Nor do either party seek to distinguish Barclays Bank v Curry and Curry Guernsey Royal Court (18th September, 1996). In that case, judgment had been taken by the bank against only one of the owners of real property in Guernsey which was owned jointly and for the survivor. The then Bailiff, Sir Graham Dorey, held at paragraph (f):
- “Equally someone holding an interim vesting order in a joint tenancy interest can safely proceed to recover one half of the land in which his debtor had such an interest.”*
28. The judgment debts owed by the Galliennes to Oracle and Hansard are joint and several. Where a debt is joint and several, the creditor may pursue either debtor or both. Further the satisfaction in part by one of the debtors of the debt does not prevent the creditor from recovering the remainder of the debt from the other debtor.
29. Whilst Advocate Fullman submitted dire consequences of agreeing with the submissions of Oracle, the typical method of preventing the sort of issue which Cherry Godfrey has is to ensure where there is jointly owned property that credit is extended and/or guaranteed on a joint and several basis (as was identified in In the matters of Selwood v Madeley and Waterman v McCormack (*ibid*) (Royal Court) at page 58 paragraph H) and taking into account the warning of Day LB at page 60 paragraph H.
- “..in the rare cases where lenders see fit to obtain security for their loans to the owner of a joint interest in a property, by charging that interest, that particular prudence must be exercised. As far as judgment creditors are concerned, it is a matter for them why and how they have seen fit to extend credit without adequate security being satisfactorily provided.”*
30. It is not uncommon for (usually) a husband's business to be supported by loans and/or guarantees over the jointly owned matrimonial home. The Cherry Godfrey claim was not the consequence of secured lending but unsecured lending which by virtue of the registration of the claim by Cherry Godfrey in the Livre des Hypothèques has been charged against the Property. In another set of circumstances this may have led to Cherry Godfrey having the only charge against the Property. On the facts of this case, however, at the time Cherry Godfrey and Mr Gallienne agreed the guarantee on an unsecured basis in December 2017, the

Property was already subject to the Oracle bond. By the time Cherry Godfrey registered the charge against the Property on 30 November 2018, the Property was subject to a further joint and several charge by virtue of the Hansard bond. This information was all readily available to Cherry Godfrey due to what Dorey B described in Barclays Bank v Curry and Curry (*ibid*) as the “*strong tradition of keeping a full and open register of title and charges against owners of land.*”

31. It is worthwhile considering what happens where there is an IVO against the real property of two joint owners and only a joint and several debtor; possibly the most common scenario of a saisie where the saisie has been pursued by the holder of the mortgage over a home. The judgment creditor with joint and several debt effectively takes half of the debt from each judgment debtor. Although the IVO has severed the way the original owners held their respective interests in the property so that rather than there being two interests held jointly and for the survivor, there are two equal interests in common, there is only one interim vesting order. Whilst the debt is joint and several, this does not lead to the judgment creditor pursuing the real interest of one of the former owners rather than the other. There will be obvious commercial reasons for this even handed approach particularly from commercial lenders. This also means, in modern times where commercial lenders have tended (without obligation) to return any excess amount of the debt to the former owners, it is given to the former owners equally without one being preferred over the other. However neither of these decisions by the holder of the IVO and the FVO are required by the saisie procedure.
32. I agree with the submission of Oracle that to require the Court to prescribe the amount of recovery that a joint and several creditor takes from each interest would erode the value of the security of that creditor and the bargain that the creditors agreed with the debtors and which the creditors secured by a bond against the property. This would mean the Court's interference with the joint and several debt arrangements secured by the prior creditors.
33. If Cherry Godfrey do elect to have the interest in the property of Mr Gallienne vested in it, it will be on the basis it accepts liability for all claims ranking in priority to its claim. The joint and several claims in relation to Oracle and Hansard rank in priority to its claim so it must be on the basis that these are paid off. The assertion that this will lead to double recovery by the prior creditors is without foundation particularly given the marshalling is conducted by a Commissioner of the Court.
34. This is the case even if one possible scenario is that Cherry Godfrey and Oracle end up in joint ownership of the Property. These are sophisticated commercial lenders neither of whom I suspect want to retain ownership of the Property and no doubt a deal would be done but absent agreement, then licitation (assuming partage is not a realistic option), will be the route.
35. I do not consider the hypothetical scenarios set by Cherry Godfrey are helpful in resolving the issue before the Court in relation to Mr and Mrs Gallienne. Echoing what was said by the Court of Appeal in Waterman v McCormack Court of Appeal 3/2002 in relation to the hypothetical examples considered by Day DB (as he was then) at first instance.

“if parties had entered any of these hypothetical arrangements in ignorance of the true legal position one might accept that the application of the law could lead to injustice, but this is not a hypothesis upon which court will generally act. People are presumed to know the law and to order their affairs against the background of that knowledge.”

36. I have reminded myself that the scenario before the Court involves three sophisticated lenders. They will assess the commercial viability and risk in relation to their lending both

secured and unsecured before entering into the agreement to lend. This is their bread and butter. They will also as Oracle submits take a decision based on the commercial viability of enforcing against realty prior to making an entry on the register.

37. Whether Mr and/or Mrs Gallienne benefit from a return of any equity will be a matter for the holders of the FVO in relation to their severed interests. In my view it would not be for the Court to discharge the IVO in relation to the real interest of Mrs Gallienne. Mrs Gallienne's interest has now come to an end. If the debts of Hansard and Oracle had been entirely satisfied from the interest attributable to Mr Gallienne, Oracle as the *saisi heridital* would be entitled to obtain the Final Vesting Order in relation to Mrs Gallienne's former interest (as long as all registered claimants against Mrs Gallienne's former interest had been paid off).
38. It is feature of *saisie* that a creditor who obtains the FVO can retain the property or can sell the property at a price which exceeds the amount of the debt and any surplus belongs to the creditor, not to the debtor. Southwell JA referred to this in Gaudion v Weardale Ltd Guernsey Court of Appeal, 4 February 1998, at 51 over 20 years ago as

“ a relic of ancient Guernsey customary law, which in [his] 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.”

39. However as set out above, most commercial lenders who obtain an FVO will not want to retain the real property, and after monies due to them have been satisfied, will pay any excess to the former owners of the property.
40. It is also the case that if there is not enough equity to satisfy all the prior claims that the holder the FVO may be out of pocket without any alternative source of satisfaction having made their election to claim against the real property of the debtor.
41. The two registers in relation to the interest of the real property perhaps initially created a false dynamic of which register the Commissioner should marshal first. However as I have set out above, the IVO is in relation to the real property of Mr and Mrs Gallienne, thus the marshalling is in relation to the claims against the real property of both Mr and Mrs Gallienne. The Cherry Godfrey claim is third in priority. The fact that it is only against Mr Galliennes' property but ranks behind joint and several claims against Mr Gallienne's property means that necessarily Cherry Godfrey will be the first creditor to be offered the real property of Mr Gallienne but will be obliged if it takes it to pay off the entirety of the debts as they are on a joint and several basis owed to Oracle and Hansard. This is unless, of course the other parties agree to an alternative arrangement but this would be a commercial decision not one required by the *saisie* process.

Conclusion

42. Having considered the applications by Oracle and Cherry Godfrey I dismiss the application for declarations (i) and (ii) by Cherry Godfrey for the reasons set out above. In relation to declaration (iii) sought by Cherry Godfrey, during the hearing Advocate Priaux on behalf of Oracle confirmed that it was not disputing that Oracle's position is limited in priority to their position under the Bond which is approximately £142,532.76. It is not necessary for the Court to make a declaration to that effect.
43. In relation to the application made by Oracle I will make the declaration sought by Oracle that the *saisie* proceed against Richard Thomas Gallienne and Martine Jill Gallienne jointly. In relation to the second declaration sought by Oracle, as the maximum amount each creditor

may claim in the saisie proceedings will have changed due to accrual of interest and costs, I will not make this declaration. However the decisions I have set out above should make it clear to the parties and Hansard how the priorities should be dealt with and thus make clear the principle of the maximum which can be claimed by each creditor. Oracle as holder of the IVO will now be obliged to reconvene the hearing before the Commissioner to certify the order of priority and thereafter the saisie proceedings in relation to Mr and Mrs Gallienne's former real property will continue to the final vesting order stage.