

JERSEY / JUDGMENT

Burby v Thompson and Bertram

[2008] JCA 204 (27 November 2008)

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COURT OF APPEAL 27 November 2008 Before : Dame Heather Steel, Q. C., President; James W. McNeill, Esq., Q. C.; and Miss Clare Montgomery, Q. C. Between Mark Burby and Selina Burby Applicants And Matthew John Thompson (in his capacity as Attourné) First Respondent And Peter Andrew Bertram (in his capacity as Attourné) Second Respondent In the matter of an application for the adjudication of renunciation of the immovable and movable property of Mark Burby and Selina Emma Burby (nee Wroe-Johnson) (the "adjudication") And in the matter of an application concerning the Attournés appointed by the court being Advocates Matthew John Thompson and Peter Andrew Bertram (the "Attournés") Appeal against the decision of M. C. St. J. Birt, Esq., Deputy Bailiff (sitting alone) dated 14 August 2008. Advocate M. L. A. Pallot for the Appellants Advocate M. J. Thompson for the Respondents

JUDGMENT

MONTGOMERY JA:

Introduction

1. On 14 August 2008 the Royal Court of Jersey, M. C. St. J. Birt, Esq., Deputy Bailiff (sitting alone), refused an application made on behalf of the Appellants that he should declare void the dégrèvement procedure brought on behalf of Ansbacher Bank (Channel Islands) Limited ("Ansbacher"). The dégrèvement procedure was brought to enforce a judgment that had been entered against the Appellants. 2. Ansbacher had obtained the judgment in proceedings brought against the Appellants in the sum of £706,762 on 4 October 2006. On 15 December 2006, on the application of Ansbacher, the Court granted an Acte Vicomte Chargé d'Ecrire. The judgment debt remained unpaid and on 13 March 2007 the Court ordered the adjudication of the renunciation of the movable and immovable property of the Appellants, ordered the dégrèvement of the immovable property and appointed the Respondents, Advocate Thompson and Advocate Bertram as Attournés, to conduct the dégrèvement. 3. The Attournés attended upon the Greffier and the dégrèvement was fixed for hearing on 10 April 2007 at 10.00 a.m. This day was a date within a two week window, not earlier than four weeks and not later than six weeks, after the adjudication of renunciation made by the Court ("the two week window"). 4. The dégrèvement was not in the event heard on 10 April 2007 or

on any day during the two week window. The hearing was variously adjourned, stayed or simply not listed until 7 July 2008 when the dégrèvement was granted. It is common ground that for a significant part of the period leading up to 7 July 2008 there was no formal order of the court mandating the delay or specifying that time would not run. 5. An application to the Court for confirmation of the dégrèvement has been stayed pending this appeal against the order of the Deputy Bailiff. 6. The Appellants contend that the failure by the Attournés to secure that the dégrèvement was heard within the two week window violated the time limitation imposed by Article 91 of the Loi (1880) sur la Propriété Foncière ("the 1880 Law") and rendered the dégrèvement and the attendant procedural stages prior to its grant void. It is submitted that in the circumstances of this case the dégrèvement proceedings must be discharged and that the Acte Vicomte Chargé d'Ecrire and the adjudication of renunciation also fall away. 7. This contention raises two issues; (i) the nature of the time limitation imposed by Article 91 the 1880 Law; and (ii) the effect on the validity of the dégrèvement of any violation of any Article 91 time limit. 8. The contention also raises the issue of bias. However it is apparent that the issue is raised more by way of "forensic emphasis" than as a freestanding ground of appeal. I do not consider that the failure by the Learned Deputy Bailiff to deal with particular arguments of the Appellants provides, in the context of this case, a proper basis for alleging that he acted with actual or apparent bias. 9. Nor do I accept that the conclusion by the Learned Deputy Bailiff that the Appellants were not prejudiced by the delay in the dégrèvement can be seriously faulted. Whilst it is clear that the Appellants have a natural interest in knowing the outcome of the dégrèvement and may wish to attempt to mitigate the effect of their failure to pay their debts, it is not clear to me that they have suffered any significant financial or other prejudice as the result of any delay. In particular the complaint that they have been deprived of their opportunity to apply for an injunction to prevent the application for the dégrèvement being publicised can only be sustained if they are right in the submissions that they make as to the meaning of Article 91 and the effect of any violation of that Article. I consider therefore that no proper basis has been established for any appeal on the grounds of bias and that no free standing point arises as a result of the Learned Deputy Bailiff's analysis of the prejudice that might have been caused by the delays in this case. The nature of the time limitation imposed by Article 91 10. It is common ground that dégrèvement is a process by which a judgment creditor can enforce against immovable property. Dégrèvement involves the disencumbrance (that is the removal of encumbrances from property) of immovable property. It enables a judgment creditor to take and dispose of immovable property without pre-existing charges continuing to attach to the property. The judgment creditor who takes the property, called the "tenant après dégrèvement" has no obligation to account to the debtor for any equity of redemption in the property. The procedure was the subject of a Law Commission Consultation Paper CP2 published in November 1998 which proposed its abolition. The procedure has not, however, been abolished. 11. The procedure requires the "tenant après dégrèvement" to pay in full any secured creditors who have charges registered against the property that are earlier in time to any held by the tenant. 12. The procedure to obtain a dégrèvement is that the creditor must:- (i) obtain judgment; (ii) if the judgment is not satisfied within one month, obtain an Acte

Vicomte Chargé d'Ecrire stating that if the creditor remains unsatisfied after a further two months then the property of the debtor may be adjudged renounced ("sous peine que ses biensmeubles et heritages seront adjuges renonces"): (iii) assuming that the creditor remains unsatisfied after two months, the adjudication of renunciation may then be sought and once granted, this permits a 'demande' to be submitted for the dégrèvement to occur (see Article 2 Loi (1904) (Amendement No.

- 2) sur la Propriété Foncière) (the 1904 Law). 13. The relevant part of Article 91 of the 1880 Law provides as follows:- "Aussitôt qu'il aura obtenu la permission de procéder au dégrèvement d'un héritage . . . l'Attourné s'adressera au Greffier, afin que celui-ci fixe un jour pour ledit dégrèvement; lequel jour ne pourra être moins de 4 ni plus de 6 semaines après la date de l'acte accordant ladite permission . . ." 14. Mr Thompson for the Attournés observed that the verb pouvoir is used. However, given that it is the negative " ne pourra être " that is employed, I do not consider that the verb used assists in determining the precise nature and scope of the procedure stipulated in Article 91. 15. The Appellants accept as accurate the translation set out in the opinion of the Judicial Committee in *Eves & Eves v Hambros Bank*

[1995] JLR 344 :- "As soon as he shall have received permission to proceed with the discurberment the Attorney shall apply to the Greffier for the appointment by the latter of a day for the said discurberment, which shall not be earlier than four weeks and not later than six weeks after the date of the act granting the said permission." 16. Article 92 of the 1880 Law provides that after permission to proceed has been given, the Attourné must give notice through the Viscount to all persons who have hypothecs over the property and must insert an advertisement on two consecutive Saturdays giving notice of the day and time fixed for the dégrèvement describing the property in question. 17. The purpose of Article 92 is clear. It is to ensure that any persons interested in the property including the debtor's secured and unsecured creditors are informed of the existence of the dégrèvement process. Article 93 requires the Attourné to deliver to the Greffier a list of the names of the persons summoned to the hearing and their interest in the property. The Greffier is then required to prepare a register, listing the claims, for use in the dégrèvement proceedings 18. Article 102 requires those who have privileged claims on the property to deliver a declaration or protest stating the amount of the claim before the day of the dégrèvement hearing in order to retain the privilege. 19. It is clear from the decision in *Eves & Eves v Hambros Bank*

[1995] JLR 344 that the debtor has no right to appear or to be represented at the hearing of the dégrèvement. The persons entitled to appear and be heard are the interested persons to whom notice has been given as well as any unsecured creditors who have asked to be placed upon the register prepared by the Greffier. 20. The procedure at the hearing of the dégrèvement is governed by Articles 94 and 95 of the 1880 Law:- "Article

94. Le jour fixe pour le dégrèvement, le greffier, après s'être assuré que les divers intéressés ont été dûment assignés à paraître devant lui, fera l'appel des dits intéressés. Ceux qui . . . étant présents, refuseront de se porter tenants aux biens en dégrèvement, seront évincés de toute réclamation ou hypothèque sur le dits biens, et leurs contrats et autres pièces seront absolument nuls et comme non-avenus, sans préjudice toutefois aux dispositions des articles 50 et 51. Article
95. Lorsqu'un intéressé ou ayant-cause se déclarera tenant, le greffier fera un record de teneur annonçant la date que porte le contrat ou autre pièce sur lequel le tenant aura accepté cette qualité, et déclarent tous contrats et hypothèques postérieurs en date, renonces et de nul effet ni valeur, et assujettissant la personne qui se sera portée tenante, à tenir pour valables tous contrats et payer toutes rentes et hypothèques d'une date antérieure qui concernent l'héritage en dégrèvement. " 21. Thus, at the hearing of the dégrèvement, the Greffier must be satisfied that the concerned parties have been duly summoned and must also ensure that the register ranks the interested parties in the correct order so that they may be called to accept the tenancy of the property in the appropriate order of priority. It will be observed that the list is called in reverse order of priority starting with any unsecured creditors who are called upon each in turn to elect whether to accept the tenancy of the property on condition of paying all prior claims or else to forfeit their interest. 22. The argument advanced on behalf of the Appellants asserts that, in this case, the appointment of the date of 10 April 2007 within the two week window specified in Article 91 was not sufficient to secure compliance with the Article. It is contended that Article 91 required the substantive dégrèvement hearing to be completed on that day or on a day within the relevant two week window. I do not agree. The language used in Article 91 is clear. It requires no more than that a day be fixed within the stipulated time period. It does not appear to me that there is anything in the language of the Article or the procedures that are identified in the 1880 Law that requires the hearing in fact to commence on that day or to be completed within the two week window. 23. The Appellants complain that the learned Deputy Bailiff employed the term "date" rather than "day" in analysing the language of Article 91 however, in my judgment this does not make any material difference to the linguistic analysis of the Article. It is impossible to read into the Article a requirement, not merely that a day should be fixed, but also that the day fixed should be the effective hearing date. Were that to be required under the 1880 Law then one would expect the requirement to be clearly and unambiguously stated. 24. There is nothing in the language of Article 91 or the 1880 Law generally to suggest that the powers of the court to adjourn or postpone the day fixed for the dégrèvement are limited so as to preclude the adjournment of the substantive hearing to a day outside the stipulated time period. Indeed Advocate Pallot accepted before us that the language does not require the hearing of the dégrèvement in the 2 week calendar window immediately after the four calendar weeks following the adjudication of renunciation. Advocate Pallot accepted that Article 91 must be read as impliedly acknowledging the possibility of a hearing taking place outside that period, provided that the court had made an order to prevent time from running. In my view this concession is of significance. It

recognises that the language of Article 91 must be read having regard to the customary law powers of the court and now the powers of the court under the Rules. 25. Given the concession, I consider that it is unsustainable for Advocate Pallot to contend that the language of Article 91 permits a hearing outside the immediate calendar period but only where time is ordered not to run. In my judgment Article 91 must be read as being subject to the full range of the customary law powers of the court to defer, postpone or adjourn a hearing, whether or not an order has been made in relation to the tolling of time. 26. My view as to the ordinary meaning to be ascribed to the language of Article 91 is confirmed by reference to the scope and object of the statutory scheme under the 1880 Law. This is the approach that is mandated in the speech of Lord Steyn in *R v Soneji*

- [2006] 1 AC 340 at paragraphs 23 -24, a speech upon which reliance is placed by the Appellants. 27. The procedures mandated by Articles 91 to 95 of the 1880 Law were clearly designed to ensure that the rights of any secured and unsecured creditors were protected by the Court. It cannot have been thought that, if there were significant difficulties in securing the service of notice on or the attendance by interested parties within the two week window, it would be impossible to recognise those difficulties or to vindicate the rights of those creditors by allowing an adjournment of the *dégrèvement* proceedings so as to permit the person to be served or represented. Equally it cannot have been contemplated that, where an issue arose as to the order of priority as between creditors so as raise doubt as to the order in which they might be called on to accept the tenancy, there was no power in the Court to postpone the hearing to a day outside the two week period. 28. The facts of this case vividly illustrate the difficulties that may arise in connection with the determination of the order of priority in the *dégrèvement*. Much of the delay that has occurred since the Appellants first secured the postponement of the hearing of 10 April 2007 has been occupied by proceedings between Ansbacher and HSBC
- [2007] JCA 228 . 29. It would be inconsistent with the purpose of the *dégrèvement* hearing to identify the creditors and to permit them the opportunity to take a tenancy in reverse order of priority if Article 91 is to be construed as preventing the court from adjourning the *dégrèvement* to permit the order of priority to be determined or only permitting this course where a formal stay has been granted. 30. It is also clear that part of the purpose of the 1880 Law was to leave intact the right of a debtor, even after a day is fixed for the *dégrèvement*, to apply to make *remise de biens* pursuant to the *Loi (1839) sur les remise de biens* ("the 1839 Law"). The right to seek to make *remise de biens* was confirmed by this Court in *In re Barker* [1985-86] JLR 186. The Court rejected an argument that "once an order for the *dégrèvement* had been made the body of creditors as a whole acquired a vested right to such a *dégrèvement* being conducted in accordance with the provisions of the law ..." The Court in *Barker* held that an application to seek to make *remise de biens* could lead to the *dégrèvement* hearing being stayed for up to a year (and thus *ex hypothesi* to a the *dégrèvement* being heard on a date outside the two week window). The Court must therefore have been satisfied that Article 91 of the 1880 Law did not set a timetable that prevented any adjournment or postponement of the fixed date to a day outside the

two week window. 31. The parties in this Appeal both agree that, when an application to make remise de biens is made, this will stay the dégrèvement proceedings as a matter of customary law despite the fact that no statutory power to stay is spelled out in the 1839 or the 1880 Law. This is confirmed in *Le Gros; Traité du droit coutumier de L'île de Jersey*, page 371. 32. The Appellants seek to argue that a stay for the purpose of a remise de biens is an exception to a general rule otherwise forbidding postponement. However, in my judgment those who drafted the 1880 Law must have done so intending that Article 91 would be subject to the general customary law powers of the court to control the progress of proceedings before it not merely for the benefit of the debtor but also for the benefit of creditors. 33. The acceptance in *In re Barker* of a power to delay the dégrèvement can only be explained on the basis that the court accepted that Article 91 does not oust the general power of the court to postpone or adjourn any fixed day or date and to extend time where necessary for the hearing of any application. It is clear that the Privy Council in *Eves & Eves v Hambros Bank*

[1995] JLR 344 at 351 were similarly prepared to accept that the ostensibly strict procedure of the 1880 Law did not preclude the application of Rule 6/7(1) of the Royal Court Rules 1992. 34. The Appellants rely on the fact that M. C. Birt, Esq., Deputy Bailiff, refused to adjourn the proceedings on 13 March 2007 as supporting their contention that there is no power to adjourn. However, it is not clear to me the basis on which the application for an adjournment was refused. The reasons given have not been transcribed or made available to this court. It is at least possible that an adjournment was refused on the basis that the application by the Appellants was to be regarded as an abuse of the process of the court, see *Eves & Eves v Hambros Bank*

[1995] JLR 344 at 351 or that the Appellants lacked locus given the precarious nature of their interest in the property. In any event the existence of a previous inconsistent decision by the Deputy Bailiff does not in my judgment make any difference to the correct analysis of the law. 35. The contentions advanced on behalf of the Appellants as to the running of time were the subject of comment by the Learned Deputy Bailiff. He observed that the detailed method proposed by the Appellants for calculating the running of time undermined the Appellants' main argument that a dégrèvement had to be heard within a two week window calculated by reference to the act of renunciation and permission. The Appellants are critical of the observation. However I share the view that the Appellants arguments on the running of time tell against them. 36. It is not merely the absence of any reference in the 1880 Law to any method by which time may be calculated, nor is it the complexity (or otherwise) of the scheme proposed. It is quite simply the fact that, if as the Appellants contend, their method of calculating time is to be implied into the 1880 Law, it is impossible to reconcile the particular methods proposed with the clear purpose of the 1880 Law. For example the Appellants contend (Contentions paragraph 19 (v)-(vii)) that a debtor's consent may be effective to suspend time from running. This appears to me to be contrary to the scheme of the 1880 Law, which is to exclude the debtor from the dégrèvement process. 37. It cannot sensibly be inferred that the debtor nevertheless has

the right to consent to the procedure being delayed. Similarly the argument that a limited number of creditors can, by their consent, prevent time from tolling for the purpose of calculating the elapse of time is not in my judgment consistent with the scheme of the 1880 Law, which, at least until the hearing of the *dégrèvement*, appears to recognise the importance of considering the interests of all the creditors not merely the creditor who has appointed the *Attourné*. The effect on validity of any violation of any Article 38. This is an issue that does not arise given the conclusion that I have reached in relation to the true meaning of Article 91. However since the issue has been fully argued it is right that I should express my conclusions on the point. The effect of the failure to comply with a statutory time limit was considered by the House of Lords in *R v Soneji*

[2006] 1 AC 340 . Lord Steyn approved (at [21]) the conclusion of the Australian High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*

(1998) 153 ALR 490: " A better test for determining the issue of validity is to ask whether it was the purpose of the legislation that an act done in breach of the provision should be invalid." Lord Steyn affirmed that regard must be had to the language and purpose of the relevant provision in making this assessment. The Appellants accept that the decision in *R v Soneji* is to be regarded as highly persuasive in considering the effect of any violation of Article 91. 39. The Appellants maintain that a *dégrèvement* pronounced in breach of Article 91 will be void and that the adjudication of renunciation and the *Acte Vicomte Chargé d'Ecrire* must fall. The Appellants argue it is then permissible for the procedure to restart and for a fresh *Acte Vicomte Chargé d'Ecrire* and adjudication of renunciation to be pronounced. In this way, it is said, the appropriate time frame contemplated by the 1880 Law is secured for the benefit of both the creditors and the debtor. 40. This approach however places a significant and unnecessary burden on the court. It requires duplicative procedures to be facilitated to the detriment of the speedy and efficient administration of justice. Far from securing an appropriate time frame for the benefit of all, the effect of the Appellant's argument would produce delays far beyond the delays contemplated in the ordinary course in the *dégrèvement* scheme under the 1880 Law. 41. Further if, as contended, the adjudication of renunciation were to fall, the rights of creditors that may have accrued in connection with the *réalisation* of the debtor's moveable property (which may have already been determined under Article 2(1) (c) of the 1904 law) would be disturbed. In my view the framers of the 1880 Law cannot have intended these consequences to flow from a breach of any time limits imposed by Article 91. 42. It cannot have been intended that a breach of any time limit in Article 91 would deprive the court of its jurisdiction in an appropriate case to hear a *dégrèvement*. The application of a strict approach, in which a hearing even one day outside the two week window is not permitted, cannot have been contemplated. Having regard to the purpose of the 1880 Law, which I have summarised as being to secure the representation and rights of creditors whilst preserving the right of debtors to seek a *remise de biens*, it cannot have been the purpose of the 1880 Law to regard a *dégrèvement* pronounced outside the two week window as invalid even if that was a pronouncement in violation of the time limit stipulated in Article

91. The absence of flexibility that would be produced by a strict time limit would threaten the rights of creditors and debtors alike to secure the recognition and consideration of their interests by the Court before a dégrèvement is granted.

Conclusion

43. Given the decision I have reached in relation to the issues in the case, no arguable criticism can be advanced as to the conduct of the Attournés or the views expressed by the Deputy Bailiff as to where the balance of prejudice lay. Although Advocate Pallot argued that there were breaches of the principles of fairness in the course of the hearing before the Deputy Bailiff and of the requirements of Article 6 and Article 1 Protocol 1 of the European Convention on Human Rights, those arguments were premised on the proposition that his construction of Article 91 was correct. For the reasons I have explained, this premise was wrong. 44. For all these reasons I would refuse the appeal. Authorities *Loi (1880) sur la Propriété Foncière*. *Loi (1904) (Amendement No. 2) sur la Propriété Foncière*. *Eves & Eves v Hambros Bank*

[1995] JLR 344 . *R v Soneji*

[2006] 1 AC 340 . *Ansbacher and HSBC*

[2007] JCA 228 . *In re Barker* [1985-86] JLR 186. *Le Gros*; *Traité du droit coutumier de L'île de Jersey*. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 153 ALR 490. Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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