

JERSEY / JUDGMENT

Burby v Thompson and Bertram

[2008] JRC 133 (14 August 2008)

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judgment

the deputy bailiff: 1. The property of the applicants has been adjudged renounced. A dégrèvement of their immovable property was due to take place before the Deputy Judicial Greffier on 7th July 2008. On 2nd July I heard an urgent application on behalf of the applicants to the effect that the Attournés had failed to comply with the time limits laid down in Article 91 of the Loi

(1880) sur la Propriété Foncière ("the Law") and that, as a result, the dégrèvement would be void. 2. Having heard argument on 2nd July, I announced my decision on 3rd July. I found against the applicants and concluded that the dégrèvement to be held on 7th July would not be void. I said that I would give my reasons later. Advocate Pallot indicated that the applicants would wish to appeal against my decision. Upon the Attournés undertaking that they would take no point concerning the locus standi of the applicants to pursue any appeal following the dégrèvement, I refused to stay the hearing of the dégrèvement itself but stayed the right of the Attournés to apply to this Court for confirmation of the dégrèvement under Article 96 of the Law pending delivery of the reasons for my decision. This judgment constitutes those reasons. The background 3. The relevant part of Article 91 of the 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". 4. Article 92 provides that the Attourné must insert an advertisement on two consecutive Saturdays giving notice of the day and time fixed for the dégrèvement and describing the property in question. This is in order to give notice to unsecured creditors. The Article also provides that the Attourné must give notice through the Viscount to all persons who have hypothecs over the property or have passed a contract with the debtor in relation to the property. 5. In order to consider Mr Pallot's submissions it is necessary to set out the somewhat protracted history of these particular dégrèvement proceedings. 6. On 4th October 2006 Ansbacher (Channel Islands) Limited ("Ansbacher") obtained judgment against the applicants for the sum of £706,762 in respect of an outstanding loan which had been secured on the

applicants' immovable property by judicial hypothec when originally granted. The judgment itself was also registered in the Public Registry. 7. On 15 th December 2006, on the application of Ansbacher, the Court granted an 'Acte Vicomte chargé d'écrire.' 8. The debt remained unpaid and accordingly on 13 th March 2007, on the ex parte application of Ansbacher, the Court ordered the adjudication of the renunciation of the movable and immovable property of the applicants, ordered the dégrèvement of the immovable property and appointed Advocate Thompson and Advocate Bertram as Attournés to conduct the dégrèvement. 9. In accordance with their obligation under Article 91 the Attournés liaised with the Deputy Greffier and the dégrèvement was fixed for hearing on 10 th April at 10.00 a.m. This was of course within the 4-6 week period stipulated by the Article. 10. On 29 th March the applicants applied for a stay of the dégrèvement proceedings on the grounds that they were considering applying for a Remise de Biens. The Court stayed the dégrèvement proceedings until 7 th May or such longer period as might be agreed by consent between the parties. The Act specifically stated that, for the avoidance of doubt, the Attournés were relieved of their responsibility to progress the dégrèvement during the course of the stay. 11. No further stay was agreed on or before 7 th May (as envisaged in the Act of 29 th March) and accordingly the stay was automatically lifted as from 8 th May. As a consequence, on 22 nd May Advocate Thompson re-fixed the date of the dégrèvement for 5 th June at 10.00 a.m. and gave notice of this to Advocate Pallot by e-mail. 12. On Friday 25 th May the applicants applied for a Remise de Biens. The Court appointed two Jurats to report on the application by 8 th June and stayed the dégrèvement proceedings once again pending receipt of their report. 13. On 6 th June, the applicants withdrew their application for a Remise de Biens and the Judicial Greffier accordingly lifted the stay on the dégrèvement proceedings. 14. Friday 8 th June was the return date for a representation which had been tabled the previous Friday by HSBC Bank plc. HSBC was the holder of a judicial hypothec over the applicants' property in the sum of £360,000. It had originally been second in line behind Ansbacher who held a judicial hypothec dating from November 2002 when its (Ansbacher's) loan to the applicants was originally entered into. On 26 th May 2006 a third judicial hypothec over the property had been obtained by a Mrs Lesslie. The representation of HSBC contended that, because it had registered its judgment of 4 th October 2006 in the Public Registry, Ansbacher had thereby lost the benefit of its original judicial hypothec of November 2002 and therefore now ranked behind HSBC and Mrs Lesslie respectively. That was clearly a matter which had to be the subject of a decision before the dégrèvement could take place and accordingly the Court stayed the dégrèvement proceedings once again. 15. This Court delivered its decision in respect of HSBC's representation on 5 th September. The Court held that HSBC was correct and that Ansbacher had lost the benefit of its first judicial hypothec of November 2002 by registering its judgment of October 2006 in the Public Registry. Ansbacher appealed and the stay on the dégrèvement proceedings was continued pending appeal. The appeal was dismissed by the Court of Appeal on 5 th December 2007. There does not appear to be an Act of the Court of Appeal specifically dealing with the matter but the parties are agreed that the stay on the dégrèvement proceedings must be

taken as having been lifted on 5th December once the Court of Appeal had dismissed Ansbacher's appeal. 16. One might have thought that that would be the end of the matter and the dégrèvement could now have been proceeded with. However, on 25 th January 2008, Ansbacher tabled a representation challenging the validity of the debt allegedly owed by the applicants to HSBC and which gave rise to the judicial hypothec held by HSBC. Clearly this was also a matter which had to be resolved before the dégrèvement could proceed. Although the prayer of the representation of Ansbacher sought an order that the dégrèvement be stayed pending a decision on the representation, no order for a stay appears actually to have been made although, no doubt with the agreement of Ansbacher and HSBC, it seems to have been implicitly agreed with the Attournés that the dégrèvement could not proceed until this latest dispute had been resolved. In due course HSBC filed an answer and subsequently took out a summons seeking to strike out Ansbacher's representation as disclosing no reasonable cause of action. On 20 th May 2008 the matter was resolved by Ansbacher withdrawing its representation with the consent of HSBC. 17. On 30 th May, on behalf of the Attournés, Advocate Thompson wrote to the Court enclosing a draft order that the Attournés should proceed to fix a date for the dégrèvement to be heard with the 4-6 weeks of the date of the order. He described it as a consent order although went on to point out that the advocate for HSBC was aware of the terms of the draft order and, whilst that advocate did not see the need for HSBC to consent to it, they did not oppose it. The Court made an order in response to that letter on 2 nd June directing the Attournés to fix a date for the dégrèvement within 4-6 weeks. Subsequently the Attournés liaised with the Greffier and fixed a new date for the dégrèvement for 7 th July 2008. This gave time for the necessary advertisements on two consecutive Saturdays to be published, as required by Article 92. 18. I should add that Mr Pallot took strong exception to the letter dated 30th May from Advocate Thompson, which described the draft order as a consent order. Advocate Thompson accepted that this had been an error and it was in fact a unilateral application on the part of the Attournés. Mr Pallot also protested that he had not been notified of the letter or of the issuing of the Act or of the new date of the dégrèvement despite having asked Advocate Thompson on 18 th January 2008 for confirmation that the Attournés would give him at least 48 hours notice of any substantive action in connection with the dégrèvement . Mr Thompson replied that he had not given any such confirmation in response to that request and in any event the Law did not require notice of the date fixed for the dégrèvement to be given to the debtor. He did however acknowledge that such notice might have been given as a matter of courtesy. Contentions 19. Advocate Pallot pointed to the strong language in Article 91. It uses the expression "ne pourra être plus de six semaines..." He translated this as meaning "shall not be able to be more than six weeks..." He accepted that once the date had been fixed in accordance with Article 91, the Court had jurisdiction to stay the proceedings. This might occur whilst the debtor applied for a Remise de Biens or it could occur, as in the present case, whilst a dispute between creditors was resolved. However any stay could only be granted before the expiry of the six-week period; thereafter jurisdiction to stay the proceedings was lost. Furthermore, the total period during which the proceedings were

not stayed could not exceed six weeks from the date of the Act authorising the *dégrèvement*. That was the effect of Article 91. In the present case the *dégrèvement* proceedings were not stayed from 13th

- 29th March (15 days) and were similarly not stayed between 7th and 25th May (17 days). They were also not stayed for the period between 6th and 8th June (1 day). Thus a total of 33 days out of the permitted six-week period had expired by the time the stay eventually came to be lifted following the Court of Appeal's decision on 5th December 2007. It followed, said Mr Pallot that the *dégrèvement* had to be heard within 9 days of the decision of the Court of Appeal unless a further stay was granted. No further stay had been granted with the result that the proposed *dégrèvement* on 7th July would be several months outside the permitted time limit. 20. He accepted that the principles laid down by the House of Lords in *R v Soneji*

[2006] 1 AC 340 were applicable in Jersey and that the Court should ask whether it was a purpose of the legislature that an act done in breach of the relevant time provision in a statute should be invalid. He pointed out that *Soneji* involved the making of confiscation orders in respect of benefits derived from criminal activities; there was therefore a clear public interest in not invalidating such orders merely because of a failure to comply with the requisite time limit. There was no equivalent public interest in this case. On the contrary, the time limit in Article 91 was inserted to protect the debtor so that he would know where he stood and would not be kept in a state of uncertainty for a prolonged period. The debtor was therefore prejudiced if the time limit in Article 91 was not complied with. 21. As to the consequences of invalidity, he contended that not only the Act adjudging the debtor's property renounced and authorising the *dégrèvement* but also the 'Acte Vicomte chargé d'écrire' must fall as a result of non-compliance with the time limit in Article 91. The remedy for the creditor was that he could commence again. He could obtain a new 'Acte Vicomte chargé d'écrire' followed after the requisite period by an Act adjudging the debtor's property renounced, following which he could proceed to *dégrèvement* within the time limits specified in Article 91. Discussion 22. I must first decide whether the Attournés have in fact acted outside the provisions of Article 91. If they have, I must then consider the consequences of such non-compliance. It is often the case that a legislature imposes time limits for certain actions to be done without spelling out the consequences of a failure to comply. In the past the courts resolved the problem by deciding whether the requirement was mandatory (in which case invalidity followed from a failure to comply) or directory (in which case it did not). In *Soneji* the House of Lords jettisoned these distinctions and substituted a new test of posing the question whether Parliament could fairly be taken to have intended total invalidity as a consequence of non-compliance with the statutory requirement. This Court has already held that the principles established in *Soneji* are equally applicable in this island (see *AG v Da Silva*

[2008] JRC 033) and neither counsel sought to argue otherwise in this case. 23. I have carefully considered Mr Pallot's submissions but have concluded that the Attournés have not breached the requirements of Article 91. If I am wrong, I have no hesitation in concluding

that the States cannot fairly be taken to have intended total invalidity as a consequence. I would summarise my reasons as follows:- (i) One must consider exactly what Article 91 actually requires. It does not say that the *dégrèvement* must in fact take place not less than 4 nor more than 6 weeks after the Act authorising a *dégrèvement* (which is usually also the date of the adjudication of renunciation). It says that the *Attournés* must appear before the *Greffier* as soon as possible after obtaining the Act and that the *Greffier* must fix a date for the hearing of the *dégrèvement* which is not less than 4 or more than 6 weeks after the Act. Although in the ordinary case the expectation no doubt was that the *dégrèvement* would take place on the date fixed by the *Greffier*, Mr Pallot was surely correct to concede that the provision does not require that the hearing of the *dégrèvement* itself must actually take place within that timescale. As *Re Barker* [1985-6] JLR 186 made clear, the debtor retains the right to apply for a *Remise de Biens* up until the hearing of the *dégrèvement*. Inevitably, such an application, even if refused, is likely to result in the *dégrèvement* taking place outside the six-week period. Furthermore, the States must be taken to have envisaged the possibility of, for example, a dispute between secured creditors, as happened in this case. Such matters are highly unlikely to be capable of being resolved within a timescale which allows the *dégrèvement* to take place within the six-week period. Thus, although Article 91 requires the *Attournés* initially to fix the hearing date to take place within the 4-6 week period, the Article does not require the *dégrèvement* actually to take place within that timescale and there is clearly jurisdiction in the Court to adjourn the hearing of the *dégrèvement* to a later date if there are valid grounds for doing so. (ii) Mr Thompson argues that that is enough to dispose of this application. The *Attournés* and the *Greffier* complied with Article 91 in initially fixing the *dégrèvement* for 20 th April 2007, which was within the six-week period. The Court adjourned that hearing and finally fixed the *dégrèvement* for 7 th July 2008; but that was for valid reasons given the initial application by the debtors for a stay and then for a *Remise de Biens*, the dispute between HSBC and Ansbacher (which was eventually resolved by the decision of the Court of Appeal on 5 th December 2007), and finally the further dispute between Ansbacher and HSBC which commenced on 25 th January 2008 but was not resolved until 20 th May 2008. The Court then made an order on 2 nd June authorising the *Attournés* once again to move forward to a *dégrèvement* and the *dégrèvement* was fixed for 7 th July. (iii) However Mr Pallot argues that time continues to run save when the Court has expressly stayed the *dégrèvement* proceedings and that the hearing must take place within the six-week maximum period after allowance for any periods during which there has been a stay. Thus, as mentioned at para 19 above, he argues that the *dégrèvement* had to take place within 9 days or so of the lifting of the stay at the conclusion of the proceedings before the Court of Appeal on 5 th December 2007. The Court put to him a scenario where a *dégrèvement* is duly fixed for the last day of the permitted six-week period and the debtor applies for a *Remise de Biens* on the day immediately preceding the date fixed for the *dégrèvement*. Assuming that the Court stays the *dégrèvement* whilst the Jurats investigate whether to recommend a *Remise*, the Court pressed him on what would happen if the Court then refused a *Remise*. There would only

be one day for the *dégrèvement* to take place on his argument. That would clearly be insufficient time to re-fix a date, give notice through the Viscount to the secured creditors of the new date and advertise on two consecutive Saturdays as required so that the unsecured creditors were aware of the new date for the *dégrèvement*. Mr Pallot's response was that the Court, on refusing the Remise, should at that time make such consequential orders as might be necessary to preserve the position. But it seems to me that this exposes the weakness in his argument. If the Court, on refusing the application for a Remise, grants a further stay in the *dégrèvement* proceedings, then the Attournés cannot take the necessary steps to progress matters as described above. If, on the other hand, the Court lifts the stay and fixes a new date for the *dégrèvement* proceedings which allows sufficient time for the various steps to be taken, that date will be outside the six-week period (after allowance for the periods of stay) which Mr Pallot says is not permissible. (iv) I accept that, as Vos JA said in the appeal in this case (*Ansbacher (Channel Islands) Limited v HSBC Bank plc*

[2007] JCA 228 at para 34) practical consequences cannot outweigh the proper meaning of the 1880 Law construed on normal principles. However, the practical consequences of Mr Pallot's interpretation are material as to whether what he is putting forward is the correct interpretation and they are also material as to whether any failure to comply with any deadline can have been intended by the States to result in total invalidity. In my judgment, the interpretation of Article 91 is straightforward. As already stated, it does not prevent the Court adjourning the hearing of a *dégrèvement* from a date duly fixed within the six-week period to a date which falls outside that period if there are proper grounds for doing so, as there were in this case. Mr Pallot's very complicated method of calculating the six-week period does not appear in the statute and I see no reason to read in the necessary wording i.e. wording which provides that one should not count periods during which the *dégrèvement* proceedings are stayed but should count all other periods, particularly when the consequences of doing so are potentially so illogical and unsatisfactory. (v) The Court also put to Mr Pallot the point that, assuming he was right and the *dégrèvement* was void because of non-compliance with Article 91, that would result in stalemate. The applicants' property could remain adjudicated renounced by reason of the Act of 13 March 2007 but no *dégrèvement* could ever take place because the Attournés would not be able to comply with the six-week deadline. Mr Pallot replied that the act of adjudication would also become void because of the failure to proceed with the *dégrèvement* within the required period. He added for good measure that the 'Acte Vicomte chargé d'écrire' would also become void. On the basis that there were valid grounds for obtaining the Act of adjudication of renunciation and that the proper procedure was followed for obtaining that Act, it is not clear to me why the mere fact that the Attournés did not comply with the provisions of Article 91 should result in the applicants' property being restored to them. However, assuming for the moment that Mr Pallot is right, the result will simply be one of delay in that *Ansbacher* will have to begin the process all over again. (vi) Mr Pallot argued that the time limit contained in Article 91 was for the protection of the debtor and that the

applicants had been prejudiced by delay and by what had occurred because they had had the dégrèvement hanging over them for a lengthy period. In my judgment, Mr Thompson was correct when he argued that it is the creditors who are likely to be prejudiced by delay and that the time limits in Article 91 were probably inserted for their protection. In this case, as a result of the earlier proceedings, Ansbacher is third in line as a secured creditor behind HSBC and Mrs Lesslie. I was informed that, assuming Ansbacher elects to take the property on the dégrèvement, there will be sufficient value in the property to pay off HSBC and Mrs Lesslie entirely but that Ansbacher will only make partial recovery of its debt. As interest continues to accrue on the debt, the percentage level of its recovery is declining with continued delay. If Mr Pallot is right, the applicants will obtain a further delay of several months at the expense of Ansbacher. I do not consider that the justice of the situation favours the applicants and I do not consider that the States would have intended this as a consequence of non-compliance. (vii) Mr Pallot concedes that, if the correct steps had been taken (i.e. a stay of the dégrèvement had been granted at the conclusion of the Court of Appeal hearing and upon presentation of the representation by Ansbacher on 26 th January 2008) the dégrèvement could perfectly lawfully have been fixed for 7 th July 2008. In my judgment, the fact that this was a perfectly reasonable and indeed necessary outcome and could have been achieved had the Court been invited to grant the necessary stay, points strongly in favour of Mr Thompson's argument that to declare the dégrèvement proceedings entirely void simply because there was only an implicit stay rather than an express one, would be wholly disproportionate and cannot fairly have been intended as a result by the legislature. 24. In summary:- (i) I do not consider that there has been a breach of the requirements of Article 91. The requirement of that Article is that a date within the 4-6 week period be fixed initially by the Greffier on the application of the Attournés. However, this does not exclude any jurisdiction on the part of the Court to adjourn the hearing of the dégrèvement beyond that limit if there are valid grounds for doing so, as there were in this case. I do not accept Mr Pallot's complicated method of calculating time or that any decision of the Court to adjourn the date can only be made within the six-week period after allowance for any period during which the proceedings have been stayed. In my judgment the Court has all the powers which it normally has to adjourn a date where it thinks this necessary in the interest of justice and there is nothing in Article 91 which excludes such powers. (ii) Even if I am wrong and there has been a failure to comply with the time limits set out in Article 91, I do not consider that the States can fairly be taken to have intended total invalidity as being the consequence of non-compliance with those time limits. 25. For these reasons I held that the dégrèvement proceedings to be held on 7 th July would not be void and ought to proceed. *Authorities Loi (1880) sur la Propriété Foncière. R v Soneji*

[2006] 1 AC 340 . *AG v Da Silva*

[2008] JRC 033 . *Re Barker* [1985-6] JLR 186. *Ansbacher (Channel Islands) Limited v HSBC Bank plc*

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