

## The Security Interests (Jersey) Law 2012- Enforcement...

Insights - 05/01/2022

The Security Interests (Jersey) Law 2012 (the SIJL) came into force on 2 January 2014, changing the way in which security is created, perfected and enforced over Jersey intangible movable property. This briefing note is one of a series relating to the SIJL, dealing with enforcement of security interests.

### Enforcement under the 1983 Law

Under the Security Interests (Jersey) Law 1983 (the 1983 Law), the powers of a secured party on enforcement were limited to a power of sale, although a power of appropriation was available where the collateral was money or represented by a negotiable instrument or moneys held in a bank account. In addition, the 1983 Law required a 14 day statutory grace period before exercise of the power of sale where the event of default complained of was capable of remedy.

### Powers of enforcement under the SIJL

The SIJL provides for a wide range of enforcement powers, as follows:

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In practice, the most widely exercised enforcement powers under the SIJL are sale and appropriation. Jersey law does not have the concept of receivers enforcing security and enforcement must be completed by the secured party (or its nominees/agents). An enforcement sale involves the secured party selling the collateral to a third party, whereas appropriation involves the secured party taking full ownership of the collateral in return for reducing the secured obligations by the value appropriated.

Under Article 43 of the SIJL, these powers became exercisable upon (a) the occurrence of an event of default as provided for in the security agreement and (b) the secured party serving written notice on the grantor specifying the event of default. The powers can be exercised more than once after an event of default and in respect of all or part of the collateral.

In *Albion Energy Limited v Energy Investments Global Limited and Heritage Oil Limited [2020] JRC 147A*, a secured party applied for orders under Article 52 of the SIJL to enable it to enforce its security interest over shares in the grantor's subsidiary in respect of a debt which arose under a share purchase agreement. The Royal Court of Jersey confirmed that the doctrine of merger, whereby a cause of action is extinguished once a court has given judgment on it so that the claimant cannot bring further proceedings for the same cause of action, is part of Jersey law. However, the principle behind the doctrine of merger does not extend to the enforcement of security after a judgment for the secured debt is obtained. The secured party was entitled to choose to obtain a judgment for the outstanding secured debt in England and then enforce its security interest securing the debt under the SIJL. Contrary to the allegations of the grantor, this was not contrary to Article 8 of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

## Pre-enforcement steps

Typical pre-enforcement steps for a secured party (taken prior to serving written notice of default under Article 43 of the SIJL) include:

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When exercising pre-enforcement rights, the secured party should be careful to avoid exercising such rights in a manner which would be deemed to be an enforcement by way of appropriation or sale (in which case, the statutory duties described below would apply). The secured party should also be careful to avoid exercising its rights in a manner which would constitute a clog on the equity of redemption, i.e. the right of the grantor to redeem the collateral upon discharge of the secured obligations. However, it is not necessary for the secured party to obtain valuations of the collateral before exercising pre-enforcement rights.

In practice, any notices should be served in accordance with the provisions of the transaction documents and third parties (e.g. corporate administrators and account banks) may have KYC or other requirements which need to be satisfied before they will comply with instructions from the secured party, which may impact on timing.

## **Notice of appropriation or sale**

A secured party must give 14 days' written notice of an appropriation or sale of the collateral to:

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## **Duties on appropriation or sale**

On an appropriation, a secured party must take all commercially reasonable steps to determine the fair market value of the collateral at the time of appropriation, and must act in all other respects in a commercially reasonable manner in relation to the appropriation.

On a sale, a secured party must take all commercially reasonable steps to obtain fair market value of the collateral at the time of sale, must act in all other respects in a commercially reasonable manner in relation to the sale and must enter into any agreement in relation to the sale on commercially reasonable grounds.

Therefore the secured party should obtain valuations of the collateral before proceeding with enforcement by way of appropriation or sale. The Jersey courts have recently considered the duty

of a secured party to take all commercially reasonable steps to determine the fair market value of the collateral prior to a sale or appropriation.

In *Re Bayswater Road (Holdings) Limited [2019] JRC 102*, the Royal Court concluded that the secured party had taken all commercially reasonable steps to obtain a fair market value for the collateral prior to the sale of the borrower's shares as: (i) the secured party had repeatedly attempted to sell the underlying property owned by the borrower; and (ii) an independent valuer had confirmed that it was unlikely that an offer for the property would be made that would exceed the proposed purchase price of the borrower's shares (which was a lot less than the debt owed).

The Royal Court further clarified the position on the secured party's duty to take all commercially reasonable steps to determine the fair market value of the collateral at the time of an appropriation in *Kidd and Ors v All Service Group Holdings [2019] JRC221*). This case suggests that a secured party should not rely on only a single valuation, especially if the value of the collateral may be more than the outstanding debt. In addition, the court confirmed that a grantor of security has the right to challenge the secured party's proposed appropriation upon receiving the statement of account.

These provisions only apply on an appropriation or sale, and not on the other enforcement actions (although there may be general obligations applicable where the collateral is dealt with). Subject to these duties, there are no limitations on the method of sale.

## Statement of account and distribution of surplus

Upon an appropriation or sale, the secured party must within 14 days produce a statement of account showing:

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The statement of account must be sent to the grantor and any other person who (a) has a subordinate security interest in the collateral and has registered a financing statement in the SIR, or (b) has given the secured party notice of a proprietary interest in the collateral.

Any surplus must then be distributed by the secured party in the following order:

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Given that this puts the onus on the secured party to deal with subordinate secured parties and other interested parties, it may be preferable for an enforcing secured party to pay the surplus into the Royal Court of Jersey for it to deal with claims for distribution.

On an appropriation or sale, all security interests subordinate to that of the enforcing secured party are extinguished. Any appropriation or sale remains subject to any senior security interest; it would be difficult for a junior secured party to enforce its security effectively without the co-operation of the senior secured party.

## | Insolvency and enforcement

Unlike some other jurisdictions, in Jersey there is no moratorium on enforcement of security following the commencement of insolvency proceedings. Article 56 of the SIJL provides that if the grantor of a perfected security interest becomes bankrupt or subject to Jersey or foreign insolvency proceedings, that shall not affect the power of the secured party to appropriate or sell the collateral, or otherwise act in relation to collateral in connection with enforcement. This is subject to Article 59 of the SIJL, which provides that unperfected security becomes void upon insolvency. It is market standard for Jersey security agreements to include a security power of attorney which is irrevocable, facilitates the exercise of powers by the secured party and survives insolvency.

Other briefing notes in this series cover the following topics:

- [attachment and perfection](#)
- [taking free of security](#)
- [priority](#)
- [registration](#)
- [transitional provisions](#)

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## Meet the Author



Katrina Edge

Partner

Jersey

E: [katrina.edge@ogier.com](mailto:katrina.edge@ogier.com)

T: [+44 1534 514192](tel:+441534514192)

## Key Contacts



Bruce MacNeil

Partner

Jersey

E: [bruce.macneil@ogier.com](mailto:bruce.macneil@ogier.com)

T: [+44 1534 514394](tel:+441534514394)



[Kate McCaffrey](#)

Partner

[Jersey](#)

E: [kate.mccaffrey@ogier.com](mailto:kate.mccaffrey@ogier.com)

T: [+44 1534 514355](tel:+441534514355)

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