Realising Security over Jersey Property

Insights - 02/02/2023

Immovables

There are two principal insolvency procedures by which a lender can bring about the realisation of a property in Jersey, namely dégrèvement and désastre.

A debtor who fears that his property is going to be taken for his creditors either by way of a dégrèvement or by way of a désastre can apply to the Royal Court for a "Remise de Biens". A remise grants a debtor time to get his affairs in order and effect an orderly sale of all or some of his property thereby enabling him to retain that which he can afford.

A remise will only be granted where there is sufficient value in the immovable property to settle secured charges.

The remise is conducted under the auspices of the Royal Court. Two jurats are appointed to investigate whether it would be appropriate to grant a remise and thereafter (if a remise is granted) administer the property of the debtor and oversee and control any sales.

A remise is granted for up to a year and a day. If the remise is a failure it is automatically followed by a dégrèvement.

If a debtor fails to co-operate with a voluntary disposal and does not pursue a remise application the only way to achieve realisation is by applying for a désastre or dégrèvement procedure to be implemented.

Dégrèvement

The dégrèvement was introduced by the 1880 law. It was more likely to be resorted to by a pursuing creditor in the past than is now the case. An amendment to the Housing Law closed a loophole which resulted in a property acquired by a creditor during a dégrèvement being available

for sale to a person who lacked housing qualifications thereby boosting the value of a property above its open market value.

The procedure is slow and cumbersome and open to interruption by the debtor. Right up until the final moment and taking of the property by a creditor the debtor can abort the proceedings if he obtains a remise or declares himself en désastre provided that he makes such application before the Royal Court adjudges his property as renounced.

If it is decided that the best way forward is by way of dégrèvement then the lawyer needs to obtain a judgment against the borrower in favour of the lender. A summons to appear before the Royal Court on a Friday afternoon is sent to the debtor at least four clear days before the Friday requiring him to attend to submit to judgment or to defend the action. If he attends and defends further delays may ensue.

After judgment is obtained no further action can be taken (other than the institution of a désastre) against the debtor for one month. The creditor then has the right to apply to the Royal Court by means of an ex parte application for an "Acte Vicomte Charge d'Ecrire". Such an order takes the form of a direction from the court to its chief executive officer (known as the Viscount) to write to the debtor to advise that if he does not discharge the judgment granted against him within two months of the date of the Viscount's letter, all his property in the island both moveable and immovable is liable to be adjudged renounced in favour of all his creditors.

If the debtor fails to settle the debt within this two month period the creditor may at any stage thereafter make an ex parte application to the Royal Court requesting an order that all the debtor's property be adjudged renounced and that attorneys (advocates or solicitors of the court) be appointed by the court on behalf of the creditors to conduct a dégrèvement of his immovable property and a "realisation" of all his movable property.

One of the first steps taken by the attorneys once they have been appointed is the fixing of a date for the holding of the dégrèvement. The date must be at least four weeks from the date of the Act of court adjudicating the renunciation but no more than six weeks after that date. Almost invariably the date is six weeks after.

Creditors are called in accordance with the priority of their claim with the unsecured creditors being called en masse first to make their election. The creditor with the most senior claim/hypothec is called last.

A creditor who elects to take a property en dégrèvement is obliged to honour and pay all claims/hypothecs prior in time to his own but is under no legal obligation to account to his debtor for any profit he might make upon an eventual sale of the property.

The purpose of the dégrèvement is not to achieve an equal division of the debtor's estate but is rather to disencumber over-encumbered immovable property so that it is once again able to

honour the outstanding obligations attached to it.

Désastre

One of the main advantages of a désastre is the speed with which it may be obtained. Essentially a creditor with a liquidated claim above a prescribed amount may make an ex parte application supported by an affidavit for an order that his debtor's property be declared en désastre. The creditor need not have obtained any judgment or any other form of prior court order. At least 48 hours previous notice must have been given to the Viscount's department of the intention to bring the application. The Viscount's department will encourage the creditor to give the debtor notice of the application.

The debtor may make representations to the court that a désastre is not appropriate and at any time during the désastre he may apply for it to be lifted on the basis that his assets exceed his liabilities.

No creditor may commence any legal proceedings against the debtor during a désastre.

When a désastre declaration has been made, all of the debtor's movable and immovable property vests in the Viscount who is responsible for gathering in and liquidating all of the debtor's property. Creditors file their claims which can be challenged if not properly due or as to amount. Claims are paid out in accordance with criteria established in legislation. A hypothecary creditor will receive priority against sale proceeds derived from the disposal of a corpus fundi against which he is secured.

There are certain aspects of the désastre procedure which might encourage a creditor to prefer a dégrèvement as opposed to a désastre. One bonus is that it embraces all the debtor's assets worldwide. There are however, very distinct disadvantages.

A désastre can prove to be a very expensive procedure. The Viscount charges fees at a rate of 12½% of the value of the assets he administers, although this can be negotiated down in certain instances. Fees in a dégrèvement would, in the normal course, probably not be in excess of 1% of the value. Additionally in more complex bankruptcies the Viscount may engage the services of accountants and lawyers which can lead to significant disbursements.

There is scope for delays by way of applications to court. Perhaps the most significant are those which can be brought under Article 12 of the 1990 Bankruptcy Law which enable the spouse of the debtor to make an application for a relief order. A spouse can be someone who is living with the debtor but to whom the debtor is not married. This application must be brought by the spouse within three months of the désastre declaration.

The powers of the court are wide ranging and it can order:

(i) the vesting of title (subject to any outstanding hypothecs or security interests if a share transfer property) in the name of the spouse;

(ii) the sale of the property and the distribution of the sale proceeds to such persons and in such proportions as the court may direct; and

(iii) the creation of a right to enjoy and occupy in favour of the applicant spouse for such period as the court thinks fit. Obviously any of those forms of order could severely frustrate the efforts of a creditor to obtain repayment.

The duty of the court in considering a spouse's relief application is to give "first consideration to the desirability of reserving the matrimonial home for the occupation of the spouse and any dependants of the debtor having regard to all the circumstances of the désastre including the interests of the creditors." The definition of matrimonial home is wide enough to embrace commercial premises which the debtor and his spouse occupy part of as their matrimonial home.

There is little even a diligent lender can do to avoid the possibility of seeing its right to realise its security suspended by a spouse's application particularly taking into account that fact that the spouse might not even meet the debtor and move into the matrimonial home until after the loan has been made. The law states that a spouse's application may be made notwithstanding any agreement made to the contrary. Accordingly letters obtained by a spouse prior to the creation of a hypothec against the matrimonial home will not prevent the court from entertaining a relief order application. However the existence of such a letter should be of some limited value to the extent that it would demonstrate that the spouse at least was aware that the loan was being made and did not object to it.

The fact that the right of a spouse to make a relief application is not available in respect of the dégrèvement procedure will be one reason why debtors will be inclined to submit to a désastre rather than a dégrèvement.

Movables

Where the lender holds a security interest over shares, default by the borrower followed by a failure to remedy that default after the giving of the required notice entitles the lender, without a Court judgement, to assume title to the shares and to sell them in order to enable the debt to be repaid.

The Security Interests Law provides for when and how a power of sale arises, and the means by which the collateral is realised. It imposes duties on the secured party to achieve a sale within a reasonable time and at a commercially reasonable price as well as making provision for applying the proceeds of sale.

Where a creditor has security by possession or control, but title remains with a debtor who is

subsequently declared en désastre, the Viscount has the right to apply to the court for an order vesting in him the rights of the secured party to the collateral and directing that it be sold. In such a situation, the proceeds of sale would be applied by the Viscount in the same order as if there had been to the exercise of a power of sale by the secured party. Despite being fully secured, the secured party will still be required to prove the debt owed to it in the bankruptcy proceedings as title will have passed to the Viscount by operation of Article 8 of the Bankruptcy (Désastre) (Jersey) Law 1990.

It is considered likely that the Viscount would only exercise such right if the secured party were delaying enforcement unreasonably or conducting it in such a way so as to prejudice other creditors and where the value of the collateral was such that, after discharge of the security interest, a surplus would be generated that could be applied to a distribution to other entitled.

Where a security interest is created using the "title-acquired" method, i.e. where the secured party has title to the collateral, the debtor's bankruptcy (or the subjection of the debtor's property, whether in Jersey or elsewhere, to any judicial arrangement or proceeding consequent on insolvency) will not affect the power of a secured party to realise, or otherwise deal with, the collateral in the same manner as he would have been entitled to realise or deal with it had the debtor not become bankrupt or subject to the insolvency-related proceedings.

Where a debtor is jointly beneficially entitled to any movable property or undivided interest in shares, the vesting in the Viscount of the debtor's assets does not affect the security interest, which will be apportioned between the debtor and the other beneficial owner(s) so that the debtor's portion vesting in the Viscount continues to bear its portion of the security interest.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

Key Contacts

Jonathan Hughes

Partner

Jersey

E: jonathan.hughes@ogier.com

T: +44 1534 514336

Katharine Marshall

Partner

Jersey

E: katharine.marshall@ogier.com

T: +44 1534 514304

Related Services

Legal

Property law