

PROJET DE LOI (200-) (AMENDEMENT No. 4) SUR LA PROPRIETE FONCIERE

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ETATS DE JERSEY

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REPORT

PART I

The drafting of contracts (“conveyances”)

The *Loi (1880) sur la propriété foncière* contains a number of provisions as to the manner in which contracts for the sale of land are to be drafted. In particular, Article 21 relates, amongst other things, to what is known in Jersey law as a *corps de bien-fonds*. This denotes a particular unit or parcel of land on which a hypothec may be charged. A hypothec is the legal charge on land similar in English law to a mortgage. The *Loi* of 1880 went to some lengths to make it absolutely clear that two separate parcels of land could not be the subject of one hypothec. Each parcel of land had to be mortgaged separately and it was crucial that a conveyance of more than one parcel or unit of land identify the boundaries of each piece of land and the charges on it separately and distinctly. This particular requirement is contained at the end of Article 21 in the following terms

“*Si deux ou plusieurs corps de biens-fonds sont aliénés par un même contrat: le contrat devra, sous peine de nullité, énoncer distinctement et séparément le prix de chaque corps de bien-fonds, et les rentes, charges, redevances et servitudes, auxquelles chacun d’eux est respectivement assujetti, de la même manière que s’ils eussent été vendus par les contrats distincts.*”

In translation this reads -

“If two or more *corps de biens-fonds* are transferred by a single contract: the contract must, on pain of nullity, set out distinctly and separately the price of each *corps de bien-fonds*, and the *rentes*, charges, quit rents and servitudes, to which each of them is respectively subject, in the same manner as if they had been sold by separate contracts.”

For some time the legal profession has been troubled at the prospect of contracts being rendered void by reason only of a technical failure to comply with the explicit drafting requirements which the above provision imposes. The Article was enacted in 1880 to overcome earlier injustices associated with the system of *décret* which now is in desuetude. Nonetheless, the implications in the present day of holding that a conveyance of land is invalid because of a technical drafting omission are serious and this provision has the potential to cause injustice and hardship were it enforced to the letter. For that reason, the Legislation Committee supports (as does the Law Society) an amendment which would remove the words “on pain of nullity” and the words “and separately” in order to ensure that the efficacy of any contract passed before the Royal Court should not be threatened by reason only of a technical irregularity in its drafting. The recital in the contract of the various matters referred to above would continue - but as a matter of good practice rather than as a matter of essential validity. *Article 3* of the draft Law would amend Article 21 of the 1880 Law to achieve that result.

Article 8 of the draft Law would provide that any contract passed before the Royal Court either before or after the coming into force of the Law should not be rendered void or voidable by reason only of a failure to specify in the contract distinctly and separately the matters referred to in Article 21.

PART II

The “ten day rule”

Article 52 of the *Loi (1880) sur la propriété foncière* provides (in translation) that -

“Any contract passed before Court relating to immovables, and any hypothec, shall be absolutely null, if the contract has been passed or the hypothec obtained within the ten days immediately preceding a declaration of *désastre* on the property of one or more of the parties, or his reduction *aux petits dépens*, or an application on behalf of one or the other to be admitted to make *cession générale*, or to place his property in the hands of the Court. Nevertheless, if the *désastre* was lifted judicially, the said contracts and hypothecs shall remain in force, as though the *désastre* had not been declared. Those who have paid any part of the consideration set forth in the contracts rendered null by the present Article shall have, for what they have paid, a claim ranking only as an unsecured debt, without hypothec or preference, against those to whom or for whose benefit such payments were made”.

In summary, this provision invalidates a contract concerning land in the event of the supervening insolvency of either party. If, in the ten days after passing of contract, the property of either party is declared *en désastre* or is subject to certain other forms of bankruptcy known to Jersey law, then the contract is *absolument nul*. This rule has come to be known as “the ten day rule” and regarded as a protection against attempts to put assets out of the reach of creditors by deliberately dissipating property on the brink of a bankruptcy.

The practical effect of the ten day rule is that, because contracts are not ‘perfected’ until ten days after they are passed (i.e. they are at risk of being invalidated if there is a *désastre* etc. within ten days), the purchase monies cannot be released to the vendor until ten days after the Friday upon which the contract has been passed before Court. This means that the lawyers acting for the purchasers retain the purchase monies in the interim. This complicates the final step in the already tedious conveyancing process.

There was an understandable purpose behind the ten day rule until the Bankruptcy (Désastre) (Jersey) Law 1990 enabled the Viscount to apply to the Royal Court to set aside transactions at an undervalue and preferences. Now, where it can be shown that a debtor has tried to dissipate his property and thereby put assets out of reach of creditors in anticipation of impending bankruptcy, the Court can restore the position to what it would have been had the debtor not entered into such a transaction or given such preference. It is difficult now to think how the ten day rule protects an unsecured creditor to a greater extent than if the Viscount were to request the Royal Court to exercise its powers under the 1990 Law to restore the position to what it would have been had the debtor not entered into a transaction at an undervalue or given a preference.

In the absence of any real benefit to creditors from the preservation of the ten day rule over and above the protection already afforded by the Bankruptcy (Désastre) (Jersey) Law 1990, the ten day rule ought in the opinion of the Committee to be repealed. The Law Society supports this view. This would mean that a contract relating to land would be ‘perfected’ when passed before the Royal Court and the vendor would not be kept out of the proceeds of sale unnecessarily for a period of ten days.

Article 5 of the draft Law would therefore repeal Article 52 of the *Loi (1880) sur la propriété foncière*. Articles 4, 6 and 7 would make consequential amendments to the 1880 Law, the *Loi (1904) (Amendement No. 4) sur la propriété foncière* and to Article 17 of the Bankruptcy (Désastre) (Jersey) Law 1990.

PART III

Judicial hypothecs

Article 13 of the *Loi (1880) sur la propriété foncière* relates to judicial hypothecs. There is a distinction in Jersey law (as in French law) between contractual, judicial and legal hypothecs. Contractual hypothecs (*hypothèques conventionnelles*) as their name suggests, are created by contract between the parties passed before the Royal Court. Legal hypothecs arise by operation of law, the prime examples historically being that of a widow to secure rights of dower (“*douaire*”) and the legal hypothec on the estate of a deceased debtor.

The judicial hypothec arises from any judgment given in civil proceedings by the Royal Court. Article 13 of the 1880 Law is a lengthy provision which reads in translation [insofar as relevant] as follows -

“..... all actes and judgments of the Royal Court, issued in presence of the parties or by default, in any action for the recovery or the acknowledgement of a bond, claim, or other debt, or for a settlement of accounts, shall confer upon the party obtaining the same, for the amount which is definitively found to be due to him, a judicial hypothec upon the real property ('les biens-fonds') of his debtor: provided that the acte or judgment, if only one shall have been issued in the course of the proceedings or, if there have been several, one of the actes or judgments, has been registered in the Public Registry..... Such hypothec shall bear the same date as the registered acte or judgment, provided the latter has been delivered to the Registrar within fifteen days from the date of obtaining it, inclusive of the day it was obtained. If the acte or judgment is not delivered to the Registrar within that period, the hypothec shall date from the day of delivery. The Registrar shall certify under his signature, both at the foot of the entry which he makes thereof in the Public Registry, the date of such delivery in order that the date of the hypothec may be determined accordingly.In all actions containing an arbitrary claim for damages or compensation for an alleged wrong, the first judgment of the Court determining the amount of such damages or compensation, and the subsequent actes or judgments in the same action, shall alone be capable of producing (by due registration) a hypothec upon the property of the debtor for such damages or compensation. Where several actes or judgments issued in the same action have been registered, the hypothec shall rank from the date of the last entry”.

Members of the legal profession have criticised the wording of Article 13 as being confusing and not sufficiently clear on certain important matters. For example, the Royal Court was recently asked to decide whether a judicial hypothec secured the payment of interest as well as capital. The Court held that it did, but Article 13 does not make this clear and there remains the possibility that that judgment may be overruled.

Article 13 in its existing form also does not make it clear whether *part* of a *corps de bien-fonds* may be charged by a judicial hypothec, nor does it expressly permit the registration of charges securing guarantee obligations or floating overdrafts.

The draft Law would repeal and re-enact Article 13 so as to resolve these areas of doubt. It would also separate the Article into six separate paragraphs in an attempt to render it more readily comprehensible.

PART IV

Conclusion

The draft Law would give effect to a number of technical improvements in the procedures under, and in the wording of, the *Loi (1880) sur la propriété foncière*. These amendments have been drafted in close consultation with the Law Society. The Legislation Committee believes that these reforms (albeit limited ones) will be of practical benefit and will help to reduce in some measure the problems associated with conveyancing and the taking of security over immovable property.

Explanatory Note

This draft *Loi* amends the *Loi (1880) sur la propriété foncière* (“the principal *Loi*”) by -

- (a) repealing and re-enacting, primarily for purposes of clarification, Articles 13 and 14 of the principal *Loi* which deals with judicial hypothecs, being hypothecs which arise from judgments given by the Royal Court (*Article 1*);

- (b) repealing those provisions of the principal Law which have the effect of invalidating a contract concerning land in the event of the supervening insolvency of either party (the so-called “10 day rule”), this matter now being adequately dealt with by the provisions of the Bankruptcy (Désastre) (Jersey) Law (*Articles 2, 4, 5, 6 and 7*);
- (c) amending Article 21 of the principal *Loi* to remove provisions under which a contract for the sale of land can be rendered invalid by reason only of a technical irregularity in its drafting (*Articles 3 and 8*).

[TRANSLATION]

LAW (200-) (AMENDMENT No. 4) ON REAL PROPERTY

A LAW to amend further the Law (1880) on real property, the Law (1904) (Amendment No. 2) on real property and the Bankruptcy (Désastre) (Jersey) Law 1990; sanctioned by Order of Her Majesty in Council of the

(Registered on the day of 200-)

STATES OF JERSEY

The day of 200-

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law -

ARTICLE 1

For Articles 13 and 14 of the Law (1880) on real property, as amended (hereinafter referred to as “the principal Law”), there shall be substituted the following Article -

“**ARTICLE 13.**

(1) Any act or judgment of the Royal Court given in the presence of the parties or by default in an action for the payment or acknowledgment of an obligation existing or contingent, account, or other debt or for the settlement of an account, or fixing the quantum of damages, confers, subject to the provisions of this Article, upon the person obtaining it in respect of the amount determined by the Court or acknowledged by the defendant to be due to him or, in the case of a guarantee or other contingent obligation, acknowledged to be due potentially to him, being one or more sums, with or without interest, a judicial hypothec either on all the corporeal hereditaments of the defendant or on one or more of the corporeal hereditaments of the defendant (or on any part thereof) specified in the act or judgment.

(2) The act or judgment referred to in paragraph (1) of this Article, if there be only one in the course of the proceedings (or, if there be several, one of the acts or judgments) must be registered in the Public Registry for the hypothec resulting therefrom to take effect.

(3) The judicial hypothec shall bear the same date as the registered act or judgment, provided that it has been delivered to the Judicial Greffier within 15 days of obtaining it, including the day it was obtained.

(4) If the act or judgment has not been delivered to the Judicial Greffier within the period referred to in paragraph (3) of this Article, the hypothec resulting therefrom shall date from the day of delivery.

(5) The Judicial Greffier shall note on the acts and judgments delivered to him by virtue of paragraph (4) of this Article the date of delivery.

(6) The provisions of this Article are without prejudice to Article 11 of this Law as regards the legal hypothec on the property of a deceased debtor.”

ARTICLE 2

In Article 15 of the principal Law, the words “, and of those which” to the end of the Article are deleted.

ARTICLE 3

In the last sentence of Article 21 of the principal Law, the following words are deleted -

- (a) “, on pain of nullity,”; and the words
- (b) “and separately”.

ARTICLE 4

In Article 22 of the principal Law, the words “, and except in the cases provided for by Article 52” are deleted.

ARTICLE 5

Article 52 of the principal Law is repealed.

ARTICLE 6

In Article 6 of the Law (1904) (Amendment No. 2) on real property, as amended, the following words are deleted -

- (a) “both that”; and the words
- (b) “as well as that which is brought back within his estate by virtue of the provisions of Article 52 of the Law on Real Property”.

ARTICLE 7

Paragraph (8) of Article 17 of the Bankruptcy (Désastre) (Jersey) Law 1990, as amended, is repealed.

ARTICLE 8

For the purposes of Article 3 of this Law, no contract passed before the Royal Court (either before or after the coming into force of this Law) by which two or more corporeal hereditaments are alienated shall be rendered void or voidable by reason of a failure to satisfy the requirements of the last sentence of Article 21 of the principal Law.

ARTICLE 9

- (1) This Law may be cited as the Law (200-) (Amendment No. 4) on real property and, subject to the provisions of paragraph (2) of this Article, shall come into force on the day of its registration.
- (2) Articles 2, 4, 5, 6 and 7 of this Law shall come into force three months after the day of its registration.

LOI (200-) (AMENDEMENT No. 4) SUR LA PROPRIÉTÉ FONCIÈRE

LOI pour modifier en plus la Loi (1880) sur la propriété foncière, la Loi (1904) (Amendement No. 2) sur la propriété foncière et la Loi dite “Bankruptcy (Désastre) (Jersey) Law 1990”; confirmée par Ordre de Sa Majesté en Conseil en date du

(Enregistré le _____ jour de _____ 200-)

AUX ETATS DE L’ILE DE JERSEY

L’An 200-, le _____ jour de _____

LES ETATS, moyennant la sanction de Sa Très Excellente Majesté en Conseil, ont adopté la Loi suivante -

ARTICLE 1

Aux Articles 13 et 14 de la Loi (1880) sur la propriété foncière, telle que ladite Loi a été modifiée^[1] (ci-après désignée “la Loi principale”), sera substitué l’Article suivant -

“ARTICLE 13.

(1) Tout acte ou jugement de la Cour Royale rendu contradictoirement ou par défaut dans une action pour le paiement ou la reconnaissance d’une obligation actuelle ou contingente, compte, ou autre dette, ou pour le règlement d’un compte, ou statuant le montant des dommages-intérêts, donne, sous réserve des dispositions de cet Article, à la personne qui l’obtienne pour le montant qui est déterminé par la Cour ou reconnu par le défendeur lui être dû ou, en cas d’une caution ou autre obligation contingente, reconnu lui être dû potentiellement, étant une ou plusieurs sommes, avec ou sans intérêts, une hypothèque judiciaire soit sur tous les biens-fonds du défendeur soit sur un ou plusieurs des biens-fonds du défendeur (ou sur toute partie d’iceux) spécifiés dans l’acte ou jugement.

(2) L’acte ou jugement visé à l’alinéa (1) de cet Article, s’il n’y en a qu’un seul dans la procédure (ou, s’il y en a plusieurs, un des actes ou jugements) doit être enregistré dans le Registre Public afin que l’hypothèque y résultant puisse prendre effet.

(3) L’hypothèque judiciaire aura la même date que l’acte ou jugement enregistré, pourvu qu’il ait été remis au Greffier Judiciaire dans les quinze jours de son obtention, y compris le jour de cette obtention.

(4) Si l’acte ou jugement n’a pas été remis au Greffier Judiciaire dans le délai visé à l’alinéa (3) de cet Article, l’hypothèque y résultant datera du jour de la remise.

(5) Le Greffier Judiciaire notera sur les actes et jugements qui lui seront remis en vertu de l’alinéa (4) de cet Article la date de la remise.

(6) Les dispositions de cet Article ne préjudicient point l’Article 11 de la présente Loi en ce qui touche l’hypothèque légale sur les biens d’un débiteur décédé.”.

ARTICLE 2

Dans l’Article 15 de la Loi principale,^[2] sont supprimés les mots dès “, et de ceux qui” jusqu’à la fin de l’Article.

ARTICLE 3

Dans la dernière phrase de l'Article 21 de la Loi principale,^[3] sont supprimés les mots -

- (a) “, sous peine de nullité,”; et les mots
- (b) “et séparément”.

ARTICLE 4

Dans l'Article 22 de la Loi principale,^[4] sont supprimés les mots “, et sauf les cas prévus par l'Article 52”.

ARTICLE 5

Est abrogé l'Article 52 de la Loi principale.^[5]

ARTICLE 6

Dans l'Article 6 de la Loi (1904) (Amendement No. 2) sur la propriété foncière, telle que ladite Loi a été modifiée,^[6] sont supprimés les mots -

- (a) “tant celle”; et les mots
- (b) “que celle qui est rentrée parmi ses biens en conséquence des dispositions de l'Article 52 de la Loi sur la propriété foncière”.

ARTICLE 7

Est abrogé l'alinéa (8) de l'Article 17 de la Loi dite “Bankruptcy (Désastre) (Jersey) Law 1990”^[7] telle que ladite Loi a été modifiée.

ARTICLE 8

Aux fins de l'Article 3 de la présente Loi, aucun contrat passé devant Justice (soit avant soit après l'entrée en vigueur de la présente Loi) par lequel sont aliénés deux ou plusieurs corps de biens-fonds ne sera rendu ni nul ni annulable à raison d'une manque de satisfaire les exigences de la dernière phrase de l'Article 21 de la Loi principale.^[8]

ARTICLE 9

(1) La présente Loi pourra être citée sous le titre de "Loi (200-) (Amendement No. 4) sur la propriété foncière" et, sous réserve des dispositions de l'alinéa (2) de cet Article, entrera en vigueur le jour de son enregistrement.

(2) Les Articles 2, 4, 5, 6 et 7 de la présente Loi entreront en vigueur trois mois après le jour de son enregistrement.

^[1] Tomes I-III, pages 394 and 395.

^[2] Tomes I-III, page 396.

^[3] Tomes I-III, page 399.

^[4] Tomes I-III, page 400.

^[5] Tomes I-III, page 417.

^[6] Tomes IV-VI, page 228.

^[7] Volume 1990-1991, page 64.

^[8] Tomes I-III, page 399.