CREDITORS' COSTS IN A *DÉGRÈVEMENT*—A WRONG TURNING?

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The bankruptcy procedure known as dégrèvement *was created by the* Loi (1880) sur la Propriété Foncière. *A recent decision of the Court of Appeal has held that any costs incurred by a senior secured creditor in seeking to recover the debt are embraced by the hypothec securing the principal obligation, even if those costs were incurred after the registration of an intervening hypothec, and are payable by the* tenant après dégrèvement. *This article analyses the decision.*

Introduction

1 When the Bankruptcy (*Désastre*) (Jersey) Law 1990 was enacted, it was thought that the *dégrèvement* procedure under the *Loi (1880) sur la Propriété Foncière* would atrophy and die.[1] The broad object of *dégrèvement* is to enable a creditor with an hypothec over immoveable property, or occasionally an unsecured creditor, to take possession of that property in order (perhaps) to realise it and to discharge the debt. The creditor can, however, whether he sells the property or not, retain any equity in it to the prejudice of the debtor.[2] In modern times this is thought to be unfair. When immoveable property came within the ambit of the *désastre* procedure for the first time in 1990, it was anticipated that in every bankruptcy case there would be a *désastre*. Why would a debtor risk losing any equity in his immoveable estate when he could simply declare his property *en désastre* and receive any balance from the Viscount at the end of the process? *Dégrèvement* has, however, doggedly refused to die and continues to occupy the attention of the courts with surprising frequency.[3]

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[1] See, *e.g.*, Matthews & Nicolle, *The Jersey Law of Property* (Key Haven Publications, London, 1991) 74, at para 7.32.

[2] In England foreclosure can put the mortgagee in the position of keeping the outstanding equity—but only with the consent of the court. See ss 88 and 91 of Law of Property Act 1925.

[3] See *e.g. Eves v Hambros Bank (Jersey) Ltd* 1995 JLR *N*–1 (*Acte Vicomte chargé d'écrire* obtained *ex parte* is not subject to appeal unless underlying debt flawed or procedural impropriety); *In re Santer* 1996 JLR 233 (failure of *remise de biens* operates as immediate *cession* leading to *dégrèvement*);

2 A recent judgment of the Court of Appeal[4] bears careful consideration by creditors considering acceptance of a tenancy *après dégrèvement*. The issue was whether the costs incurred by a senior secured creditor in proceedings against the debtor were covered by the judicial hypothec which secured the principal debt, so that the *tenant après dégrèvement* was obliged to pay them. The *Loi (1880) sur la propriété foncière* ("the 1880 Law") makes it clear that up to three years' interest are covered by the hypothec,[5] but there is no mention of costs in the statute. The Royal Court (Le Cocq, Deputy Bailiff, as he then was)[6] decided that they were not covered by the hypothec; the Court of Appeal decided that they were.

3 Mrs Powell ("the debtor") had defaulted on a number of debts secured by hypothec against her immoveable property, and the court had eventually ordered the adjudication of renunciation of her property.[7] The bankruptcy proceedings were interrupted by an application by the debtor for a *remise de biens*, but that was eventually refused. There were three secured creditors, including the appellant before the Court of Appeal, Jersey Home Loans Ltd. ("JHL") which held a judicial hypothec dating back more than 10 years. At the hearing before the Judicial Greffier, Mr Hill, the assignee of a junior

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Ansbacher (CI) Ltd v HSBC Bank plc 2007 JLR 593 (earlier hypothec extinguished by registration of later hypothec *dans la même procédure*); *In re dégrèvement Walton* 2015 (1) JLR 129 (undivided share in immoveable property capable of hypothecation).

[4] *Jersey Home Loans Ltd v Hill* 2019 (1) JLR 233 (Bompas, Perry and Williams JJA).

[5] Article 101 of the 1880 Law; *In re Super Seconds Ltd* 1996 JLR 117.

[6] *In re dégrèvement Powell* 2019 (1) JLR 1.

[7] The *dégrèvement* process involves a formal demand for repayment (*Vicomte chargé d'écrire*) whereby the debtor is notified that, after an interval of two months, it will be open to the creditor to apply to the Royal Court for an order of "adjudication and renunciation". Upon the making of that order, Attornies ("*Attournés*") are appointed to conduct the *dégrèvement.* A statement ("*Etat*") of the property subject to *dégrèvement*, describing it and the hypothecs secured against it, is submitted by the Attornies to the Judicial Greffier. Unsecured creditors may also submit claims to the Greffier who then draws up a register ("*Codement*") describing the property and listing the claims secured by hypothec and the unsecured claims. At the *dégrèvement* hearing, the creditors are called in the reverse order of their seniority until one of them accepts the tenancy *après dégrèvement*. The *tenant après dégrèvement* is obliged to pay all claims secured by prior hypothecs and becomes the owner of the property in question free from all encumbrances.

secured creditor, accepted the tenancy *en dégrèvement*. He acknowledged his obligation to pay the capital and up to three years' interest due to the senior secured creditors, but refused to pay their costs.

Royal Court decision

4 The Royal Court found that there was nothing in the bond and security documentation between the debtor and JHL which obliged the debtor to pay costs incurred in the recovery of the debt; nor was there any relevant provision in the 1880 Law requiring the *tenant après dégrèvement* to do so.[8] The court accepted a submission from counsel for Mr Hill that the ability of potential creditors to ascertain the extent of existing creditors' interests could be inhibited if notional sums of costs could be added to what was seen to be secured in the Public Registry. Counsel had cited in support a decision of the Royal Court in *HSBC v Ansbacher (CI) Ltd*.[9] The court also found that Mr Hill was not standing in the shoes of the debtor,[10] and that the relationship between the *tenant après dégrèvement* and the secured creditors was governed by the 1880 Law.[11] Finally the court, rejecting the arguments of JHL that one should look at the pre-existing customary law which appeared to indicate that costs and expenses were embraced by a hypothec, held that the *dégrèvement* procedure's "comprehensive incorporation into statute creates a statutory system which from that time applied to the exclusion of any pre-existing system".[12] Costs were not secured by hypothec unless they formed the subject matter of a separate judgment which had also been registered in the Public Registry. However, the Deputy Bailiff added, by way of exception to that finding, that if the actual principal obligation was less than the amount of the hypothec (perhaps because the entire loan had not been drawn down), an element of costs could be secured up to the value of the hypothec provided that there was an obligation to pay such costs

[8] Article 95 (in translation) requires the *tenant après dégrèvement* to pay all *rentes* and hypothecs of earlier date relating to the property *en dégrèvement*, but no more.
[9] [2006] JRC 167.
[10] The Royal Court cited no authority for the proposition, although it is clear, however, that the obligations of the debtor do not pass to the *tenant après dégrèvement* except to the extent laid down by arts 95 and 101 of the 1880 Law.
[11] 2019 (1) JLR 1, at para 39.
[12] *Ibid*, at para 66.

within the loan documentation. In such circumstances the costs could be "rolled into the capital sum".[13]

Court of Appeal judgment

5 The Court of Appeal first of all accepted, as did the Royal Court, that English law did not assist. Bompas JA referred to the Jersey Law Commission Consultation Paper[14] and stated—

> "it would be a mistake to look to the common law of England and Wales for assistance in the resolution of the question raised by this appeal: mortgage and hypothec as methods of providing security originate in quite distinct legal backgrounds and, apart from legislative intervention, are quite different in operation."[15]

6 The Court of Appeal differed from the Royal Court in four respects.

(1) It found that the pre-1880 customary law on hypothecs was relevant, and that this finding was supported by authority[16] and by the *Lettre Explicative* of Sir Robert Marett, the draftsman of the 1880 Law.[17]

(2) It found that, according to the pre-1880 customary law, costs were accessory to the principal debt and carried the same hypothec.[18]

(3) It disagreed with the Royal Court's finding that inspection of the Public Registry "must be capable of revealing the maximum amount of any secured obligation".[19] Article 14 of the original 1880 Law had required that the validity of a judicial hypothec was dependent upon the Act or judgment inscribed in the Public Registry articulating "*une ou plusieurs sommes certaines*", beyond which the

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[13] *Ibid*, at para 70.

[14] Consultation Paper No 8 of May 2006. The paper contains a clear and erudite summary of the problems leading up to the enactment of the *dégrèvement* procedure.

[15] 2019 (1) JLR 233, at para 25.

[16] *Ibid*. at para 91, where the court referred to *In re Walton* 2015 (1) JLR 129. Customary law authorities were there held, in the absence of anything to the contrary in the 1880 Law, to support the conclusion that an undivided share of immoveable property owned in common could be subject to hypothecation.

[17] "This point appears to be reinforced by Sir Robert Marett's *Lettre Explicative*, which contains a commentary on particular Articles in the 1880 Law, many described as being based on the *Code Civil Français*". 2019 (1) JLR 233 at para 89.

[18] *Ibid*, at para 106.

[19] *Ibid*, at para 86.

principal claim of the hypothecary creditor could not go. But that article had been repealed in 2000.[20] There was no reason why an obligation to pay a sum in the future, as and when determined on a contingency, could not fall within the language of art 2 (which defined an hypothec).[21] The amount of the secured claim did not constitute a ceiling above which the hypothecary creditor could not go.[22]

(4) The Court of Appeal considered that the Deputy Bailiff's concession that there were circumstances in which costs might be secured by the hypothec rather undermined his conclusion that costs were not capable of being secured.[23]

1. *Relevance of pre-1880 customary law*

7 The question whether pre-1880 customary law is relevant to the construction of the 1880 Law is not straightforward. It is true that Sir Robert Marett made it clear in his *Lettre Explicative*[24] that some parts of the 1880 Law were based upon the French Civil Code and others reflected existing statutory processes, *e.g.* the *Loi (1832) sur les décrets*. Yet, viewed as a whole, the 1880 Law represented a complete break with the past and was a remarkable piece of legislative re-engineering. All immoveable property acquired after the coming into force of the 1880 Law was "*propriété nouvelle*", subject to an entirely different legal regime from "*propriété ancienne*", which had been acquired before the Law came into force.[25] In answering criticism that the Law was too long, Marett wrote—

> "*Est-il donc étonnant qu'un projet qui a pour but d'établir une législation nouvelle à l'égard de la propriété foncière dans toutes ses parties et de ménager la transition de l'ancien système au nouveau, en conservant et protégeant les droits acquis, s'étende à 107 articles?*"
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> [Is it surprising that a bill with the object of establishing an entirely new system of law relating to the ownership of land in all respects and of arranging the transition from the old system to the new, while preserving and protecting established legal rights, should extend to 107 articles?]

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[20] *Loi (2000) (Amendement No. 4) sur la propriété foncière.*
[21] 2019 (1) JLR 233, at para 66.
[22] *Ibid*, at para 86.
[23] *Ibid*, at para 65.
[24] (1999) 3 Jersey Law Review 41 https://www.jerseylaw.je/publications/jglr/Pages/JLR9902_lettre_explicative.aspx (accessed 14 April 2020).
[25] Article 1 of the 1880 Law.

8 However, there is no indication in the 1880 Law that it was to be regarded as a form of codification, to the exclusion of any pre-existing law. Even if the *dégrèvement* was an entirely new system, the concepts which it used, *e.g.* hypothecs, were not new. Under the old law, hypothecation was the means by which the all-embracing system of guarantee bound contracting parties together. Why should the incidents of the legal concept of hypothec be different pre- and post-1880, unless specifically decreed to be different by the 1880 Law?

2. *The pre-1880 customary law in relation to hypothecs and costs*

9 If pre-1880 customary law in relation to the ambit of an hypothec is relevant, what was that law? The Court of Appeal accepted as correct the submissions of counsel for JHL "concerning the position of costs under the pre-1880 customary law, namely that costs were accessory to the principal debt and carried the same hypothec . . .".[26] This finding is unfortunately not easy to analyse because the Court of Appeal did not specify the authorities upon which counsel for JHL relied and which they accepted. There is a general reference to extracts from Basnage, Pothier, Domat, Bourjon and Le Geyt[27] which the court considered "clearly support the foundation for [counsel's] argument" but the only specific reference is to Bourjon's *Droit Commun de la France et de la Coutume de Paris.* Bourjon wrote that—

> "[*l*]*es intérêts & les frais étant l'accessoire du capital, doivent être colloquies à la même hypothèque que le capital, ils marchent de pas égal avec lui . . .*"[28]
>
> [interest and costs being accessory to capital, are embraced by the same hypothec as the capital, and march in step with it.]

10 It is necessary to go to the judgment of the Royal Court to find more detail of counsel's submissions on this point.[29] Extracts from Pothier writing on the *Coutume d'Orléans*[30] and Domat writing in his *Loix Civiles*[31] make the same point that interest and costs are accessory to capital. The authors are of course writing of legal rights as between the hypothecary creditor and the debtor, and not of rights involving a third party, the *tenant après dégrèvement*, as indeed was

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[26] 2019 (1) JLR 233, at para 107
[27] *Ibid*, at para 69.
[28] *Ibid*, at para 70.
[29] 2019 (1) JLR 1, at paras 55–58.
[30] *Traité d'Hypothèques, Titre X*, para 45.
[31] *Livre III, Titre* I.

noted by the Deputy Bailiff in the Royal Court.[32] However, although possession of the property passes to the Attornies appointed to conduct the *dégrèvement* when the Court orders the adjudication and renunciation of the debtor's property, ownership does not pass until the Court confirms the tenancy *après dégrèvement*,.[33] The debtor may no longer deal with his property, but he remains the owner, and hypothecs continue, of course, to be attached to the property.

11 More importantly, it is trite law that the custom which is the basis of Jersey law is the customary law of Normandy, of which Jersey once formed part. It is only legitimate to have recourse to the *Coutumes* of neighbouring provinces such as Orléans or Paris, or to the civil law, when the customary law of Normandy is silent or ambiguous on the issue in point.[34] The Royal Court was referred to Basnage, writing on the customary law of Normandy, but the cited extract dealt only with the question of interest.

> "*Enfin c'est une règle que l'hypothèque a son effet non seulement pour le principal, mais aussi pour les intérêts légitimes, s'ils ont été stipulés par le contrat . . . & même quoi qu'ils n'aient pas été stipulez, si toutefois ils en ont dû, le gage n'est point liberé qu'en païant le principal & les intérêts . . .*"
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> [Finally, it is a rule that the hypothec takes effect not only in relation to the capital, but also in relation to lawful interest, if that has been stipulated in the contract . . . and even if it has not been stipulated, if it is properly due, the security is not released until payment of principal and interest.]

This passage does not deal with costs and expenses, but they are treated elsewhere by Basnage, who distinguished the customary laws of Normandy and Paris in this respect.

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[32] 2019 (1) JLR 1, at para 58.

[33] Article 7 of *Loi (1904) (Amendement No 2) sur la Propriété Foncière*; *Re Barker* 1985–86 JLR 186, at 192.

[34] See Nicolle, *The Origins and Development of Jersey Law* (St Helier, 5th ed, 2009) at para 12.4.17—

> "When a *coutum*e does not contain a provision to cover the matters in issue, recourse should be had to usage in the province. If usage does not cover the point, recourse should be had to the neighbouring *coutumes*, to the general spirit of the *coutumes* of France, or finally to the rationale of Roman law. This is subject to the qualification that neither *coutumes* of other provinces, nor the rationale of Roman law, can be considered as having the authority of law."

12 Maître Henri Basnage first published his *Traité des hypothèques* as a separate volume in 1681. It was later appended to his *Commentaires sur la Coutume de Normandie*.[35] According to Basnage, the concept of hypothec was drawn from Greek law, and introduced into Roman law and into the different provinces of France where the customary law held sway (the *pays du droit coutumier*). The rules relating to hypothecs were not universally the same, and in particular were different in relation to the ambit of a hypothec securing a debt or other obligation.

13 Basnage writes–

> "*Par la jurisprudence du Parlement de Paris, lorsque cette clause, 'à peine de tous dépens, dommages & interêts' est inserée en l'obligation, elle a cet éfet de faire remonter l'hipotéque pour les intérêts ajugez, au jour de l'obligation . . .*
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> *. . .*
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> *Nous ne suivons point en Normandie la jurisprudence du Parlement de Paris, & bien que le contrat porte cette clause 'à peine de tous dépens dommages & intérêts', si ces interêts sont jugez, ils n'ont hipotéque que du jour de l'action; l'on juge rarement les interêts d'une obligation pour prest, & quand il y a lieu de condamner aux interêts, l'hipotéque n'en remonte point au jour de l'obligation, on ne la donne que du jour de le demande, & les raisons de nôtre usage sont beaucoup meilleures que l'on opose au contraire; car les interêts n'étant point dûs par la nature de l'obligation, mais pour la peine du retardement & pour la contumace du debiteur, on ne peut en avoir l'hipotéque que du jour de la contumace, c'est-à-dire du jour que la demande en a été faite en Jugement, & pour la clause 'à peine de tous dommages, dépens & interêts', outre qu'elle est du stil des Notaires, elle n'est point considerable parce que les interêts ne sont pas dûs ipso jure, en vertu d'icelle, mais seulement en vertu de la condamnation intervenuë sur la demande. En éfet ils ne laisseroient pas d'être dûs encore que cette clause n'y fût emploiée: Or il implique contradiction que l'hipotéque pour ces interêts puisse courir avant qu'ils soient nez ni dûs; & il est encore plus injuste qu'ils soient préferez au créancier qui a contracté avant que le debiteur par sa contumace & son*

[35] The 5th edition of the *Traité des Hipotéques* is to be found appended to the 3rd edition of Basnage's *Commentaires* (Rouen, 1709) and it is to that text that the author refers. The title page of the *Traité* refers to his first name as Henry, but he is generally known as Henri Basnage.

> *retardement ait donné ouverture à la demande & à la condamnation de ces interêts*."[36]
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> [By the case law of the *Parlement de Paris*, when this clause "subject to all expenses, damages and costs" is included in the obligation, it has the effect of causing the hypothec for the costs awarded to date back to the day of entering into the obligation . . .
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> In Normandy we do not follow the case law of the *Parlement de Paris*, and although the contract may contain the clause "subject to all expenses, damages and costs", if costs or damages are awarded, they are secured by hypothec only from the date of the action; costs in relation to a loan obligation are rarely awarded, but when there is occasion to award costs, the hypothec does not date back to the day of entering into the obligation but only to the date of the application. The reasons for our custom are much superior to those urged to the contrary; for costs do not arise from the nature of the obligation but on account of the delays and contempt of the debtor. One can therefore only claim a hypothec from the date of the contempt, that is to say from the date of the application made for judgment. So far as concerns the clause "subject to all expenses, damages and costs", notwithstanding that it is often used by Notaries, it is not of any weight because costs are not due as a matter of law, in themselves, but only as a result of a judgment given on the application. In effect, they would not be due even if this clause were not employed. There is an implicit contradiction in the notion that a hypothec for costs might exist even before they have been awarded or are due. It would be even more unjust if they were to have a preference over a creditor who had contracted [with the debtor] before the debtor's contempt and delays had given rise to the application and to the award of costs and damages.][37]

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[36] *Ibid*, at page 57.

[37] The translation of this passage gives rise to difficulties arising from the different meanings of the word "*intérêts*". Houard's *Dictionnaire du Droit Normand* (Rouen, 1781), Tome III, p 51 *et seq* gives a number of different meanings. It can mean commercial interest on a debt or a *rente*. But it can also mean damages or compensation for expense incurred or a wrong suffered. At p 56 Houard states that the applicant might be awarded "*intérêts*" if he had suffered loss "*soit par les dépenses que la procédure lui occasionne, soit . . .*". This seems to the author to be a reference, in effect, to costs as understood in contemporary procedure. The translation accordingly uses the words "costs", "interest" and "damages" as seem best to meet the sense of the French text.

14 If this passage from Basnage is accepted as an authoritative statement of pre-1880 Norman customary law, it seems clear that costs and expenses were not regarded as accessory to the principal obligation and were not embraced by the hypothec securing it until judgment had been given against the debtor for such costs and expenses. Indeed, these differences between the customary laws of the *pays du droit coutumier* may very well have been in the mind of Sir Robert Marett when he drafted art 101 of the 1880 Law, making it clear that only three years of interest up to the date of the adjudication of the renunciation could be claimed against the *tenant* in a *dégrèvement*. Had he intended that costs and damages awarded to the creditor should be similarly embraced by the hypothec securing the principal obligation, it is surprising that he did not say so. It is unfortunate that this passage does not appear, at least from the judgments, to have been cited either to the Royal Court or to the Court of Appeal. It would have been useful to know what the Court of Appeal made of it. At the least, it would surely have rendered the references to the customary laws of Paris and Orléans irrelevant.

15 Yet, the other side of the coin implied by the opinion of Basnage is that by the customary law of Normandy, as between debtor and creditor, costs and expenses were embraced by the hypothec securing the loan, but only from the date upon which proceedings were instituted. They were not accessory to the hypothec from the date of its creation. This principle, of liability for costs and expenses incurred in proceedings based upon non-payment of the debt, seems to have been extended to a *tenant après décret* by the Royal Court in *Re Skelton.*[38] This case was placed before the Court of Appeal,[39] but was not referred to in the judgment. The Royal Court found—

> "*Qu'il est de principe que l'héritage qui, à raison des charges dont il est grévé, est cause d'un décret, est garant des frais de ce décret en sorte que celui qui se porte tenant après décret à cet héritage est de droit responsable des frais de toute procédure judiciaire résultant en principal et accessoires du non-paiement de ces charges à dues échéances*."[40]
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> [It is a principle that property which, by reason of legal charges with which it is encumbered, is the cause of a *décret*, is security for the expenses of the *décret* so that whoever becomes a *tenant après décret* of that property becomes in law responsible for the expenses, both principal and incidental, of any judicial

[38] (1904) 223 Ex 170.
[39] Information given to the author by a legal adviser to one of the parties.
[40] *Ibid*, at 174.

> proceedings resulting from the non-payment of these debts on the due date for payment.]

16 As is customary with *jugements motivés*, no reasoning or justification explains that statement. The finding is, however, not inconsistent with the passage from Basnage cited at para 13 above.

3. *The Public Registry*

17 In the Royal Court, the Deputy Bailiff endorsed the view of his predecessor, Birt, Deputy Bailiff (as he then was) in *HSBC v Ansbacher (CI) Ltd* that—

> "it was surely the intention of the [1880 Law] that the Public Registry should give a fair and accurate picture and enable a potential lender to assess with certainty the extent to which any property is charged",[41]

and the concurring view of Vos JA in the Court of Appeal in that case.[42] That was precisely the point made by Sir Robert Marett in his *Lettre Explicative* in 1878 where he wrote—

> "*. . . il est évident qu'il sera facultative à l'acquéreur d'une propriété, en compulsant le Registre Public, de s'assurer exactement des charges qui la grèvent et de la responsabilité qui s'attache . . .*"[43]
>
> [. . . it is obvious that it will be helpful to the purchaser of a property, in consulting the Public Registry, to make sure exactly what charges are secured and what liabilities are attached to it.]

The Court of Appeal in *Jersey Home Loans* accepted that reasoning but did not think that it compelled a conclusion "against costs being held to be accessory to and carrying the same hypothec as a principal debt."[44] The court considered that the Public Registry would still—

> "reveal enough for an intending purchaser, *tenant après dégrèvement*, or creditor to avoid being taken by surprise and to

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[41] [2006] JRC 167, at para 24(vii) RC.

[42] 2007 JLR 593, at para 33. *Per* Vos JA: "There is, nonetheless, much force in the Deputy Bailiff's finding that the Public Registry must have been intended to give a fair and accurate picture of the indebtedness secured against the property of the debtor . . .".

[43] Marett, "*Lettre explicative du projet de loi amendé sur la propriété foncière* " (1999) 3 *Jersey Law Review* 41, at 48.

[44] 2019 (1) JLR 233, at para 117.

> know what further investigations to make before dealing in relation [to] any secured land."[45]

18 But is that correct? Suppose that A owns a property valued at £100,000 against which B has lent £60,000 and obtained a judicial hypothec. B has been engaged in lengthy litigation with A in relation to non-payment of interest and incurred costs of £30,000. A is desperate and approaches C to obtain a further loan. C consults the Public Registry and agrees to lend A £20,000, secured by hypothec. Later a *dégrèvement* ensues. Before the Greffier, C has an unattractive choice—take the property and be left £10,000 out of pocket, or abandon his claim and be left £20,000 out of pocket. Worse still, suppose that at the hearing before the Greffier, C is unaware of the outstanding costs which B does not disclose. He assumes the tenancy on the assumption that there is plenty of equity in the property, but there is not.

19 As a variation on that example, suppose that the litigation between A and B takes place after C has agreed to lend A the £20,000. The costs incurred by B will (even if unregistered) leapfrog C's second charge of £20,000 and take preference as accessory to the principal debt secured by B. That is indeed the example given by Basnage, which he considered to be unfair and a reason why the customary law of Normandy was superior to that of Paris.[46]

20 It is possible that rules or a practice direction could require the secured creditor seeking to recover costs from any prospective *tenant après dégrèvement* to disclose the extent of any costs purportedly secured by the hypothec, and perhaps to have such costs taxed by the taxing officer, but it is difficult to see how the prospective *tenant* could be given a right to challenge the quantum of costs. He does not stand in the shoes of the debtor. He would have no knowledge of the dispute between the debtor and the secured creditor. There could be no adversarial process to determine the proper extent of the creditor's costs. The Deputy Bailiff considered that one of the purposes of the 1880 Law was—

> "to provide certainty so that a potential creditor of a person holding immoveable property in Jersey could consult the Public Registry in order to form an informed view as to whether or not he might safely lend . . .".[47]

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[45] *Ibid*, at para 118.
[46] See para 13 above.
[47] 2019 (1) JLR 1, at para 68.

If the Public Registry does not give a fair and accurate picture of the secured debts, it is difficult to see how other creditors or prospective creditors can protect themselves from potential injustice.

4. *The Royal Court's concession that costs might be secured*

21 In the Royal Court, the Deputy Bailiff conceded, on the basis of agreement between both counsel, that there were circumstances in which costs might be secured by hypothec. He stated—

> "There is, however, it seems to me one potential exception to this principle [that costs are not accessory to the principal obligation and secured by hypothec] as I understand it. To the extent that the face value of the debt is more than the actual debt (either because the debtor has not drawn down the entirety of the facility that has been secured or because the debtor has paid an element of it back) it seems to me that all or an element of the costs incurred by the creditor, provided that there is an obligation to pay those costs within the loan documentation, may also be claimed as part of the secured debt up to the face value of the capital sum. This would not embarrass or prejudice a *tenant après dégrèvement* who would have already had the expectation of paying the entirety of the face value of the capital sum and it would be of no concern to them whether or not that was made up of original capital advance or costs. As I say, it seems to me that those costs could be rolled into the capital sum provided the total claimed, capital plus costs, does not exceed the face value of the sum secured."[48]

22 The Court of Appeal considered that that concession undermined Mr Hill's case that costs are not capable of being secured.[49] There is nothing in the 1880 Law which suggests that costs up to the ceiling of the principal claim can be recovered from the *tenant après dégrèvement*. If some costs can be recovered, why not all of them? It is on the face of it a surprising concession, but it was a position with which both counsel concurred, and does not appear to have been the subject of argument.

Effect of Loi (2000) (Amendement No 4) sur la Propriété Foncière

23 If the Deputy Bailiff had been aware of the passage from Basnage cited at para 13 above, the concession might not have been made in quite those terms, or at all. The concession seems to have had its

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[48] *Ibid*, at para 70.
[49] 2019 (1) JLR 233, at para 65

genesis in argument about the effect of the *Loi (2000) (Amendement No 4) sur la Propriété Foncière* ("the 2000 Law"). The 2000 Law abolished what had been art 14 of the 1880 Law. That article provided that the Act of the Royal Court leading to the creation of the judicial hypothec should contain—

> "*l'énonciation d'une ou plusieurs sommes certaines: au delà desquelles la reclamation principale du créancier hypothécaire vers la personne assujettie à l'hypothèque ne pourra être portée—quoi qu'elle puisse être réduite, s'il y a lieu.*"
>
> [the statement of one or several fixed amounts: above which the principal claim of the hypothecary creditor against the person subject to the hypothec may not be brought—although it may be reduced, should the need arise.]

Counsel for JHL contended that the abolition of that article meant that the mandatory ceiling of the principal claim had been removed, and thus costs of any amount could be added to the principal claim and secured.

24 That submission was accepted by the Court of Appeal. It noted that JHL's hypothec was created after the abolition of art 14 by the 2000 Law, and stated—

> "Given that nothing is stated in the new Article 13, or elsewhere in the 1880 Law in its amended form, requiring a judicial hypothec to specify a maximum sum beyond which any debt due to the hypothecary creditor cannot be secured by the hypothec, we are unable to agree with the conclusion that inspection of the register in the Public Registry must be capable of revealing the maximum amount of any secured obligation."[50]

The notion that the amount of the hypothec securing the obligation need not be stated or revealed is surprising. To begin with, it runs counter to Sir Robert Marett's view that the new provision that only "*bien-fonds*" were capable of being hypothecated[51] was of the first importance. It meant, he said, that—

> "*comme la propriété visible sera seule hypothécable, il pourra, par inspection même, se former une idée de la valeur réelle de la propriété qu'il s'agit d'hypothéquer, après s'être assuré, au moyen du Registre Public, de la valeur du titre du débiteur, et des charges sur la propriété.*"[52]

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[50] *Ibid*, at para 86.
[51] See art 3 of the 1880 Law.
[52] *Lettre Explicative* at 4.

> [as only the property that can be seen can be hypothecated, he (the prospective lender) can, simply by an inspection, gain an idea of the actual value of the property which is to be hypothecated, after having established, by means of the Public Registry, the validity of the debtor's title and the charges secured against the property.]

Of course, that statement was made about the 1880 Law as originally enacted, and before the 2000 Amendment. But art 3 of the 1880 Law remains unamended.

25 Furthermore, although the 2000 Amendment did abolish art 14, its expressed purpose was not to remove the requirement to specify the amount of the hypothec. The Explanatory Note stated—

> "This draft *Loi* amends the *Loi (1880) sur la Propriété Foncière* ('the principal *Loi*') by—
>
> (a) repealing and re-enacting, primarily for the purposes of clarification, Articles 13 and 14 of the principal *Loi* which deals (sic) with judicial hypothecs, being hypothecs which arise from judgments given by the Royal Court (*Article* 1) . . ." [53]

The report of the Legislation Committee stated (as noted by the Court of Appeal)[54]—

> "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*" [Author's emphasis.]

26 Practitioners with long memories will recall the concern about art 14, the relevant part of which is cited at para 23 above. The concern was that the hypothec might reduce if the amount of the principal claim had at any time reduced. Thus, if in 1990 X borrowed £100,000 secured by hypothec, and the borrowing on a floating overdraft reduced in 1991 to £50,000, would the £75,000 at which the overdraft stood in 1992 be wholly secured by the hypothec?[55] It was that concern about art 14 and fluctuating overdrafts which the 2000

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[53] https://statesassembly.gov.je/assemblypropositions/2000/35554-33656-1942006.pdf (accessed on 12 March 2020).

[54] 2019 (1) JLR 233, at para 52.

[55] The concern had its genesis in a celebrated English banking case—*Clayton's Case* or, more properly, *Devaynes v Noble* (1816) 1 Mer 529, at 572.

Amendment was designed to address. The "statement of one or several fixed amounts" was also problematic in relation to hypothecs securing a percentage of the value of a property—a defect which was cured by the *Loi (2018) (Amendement No 6) sur la propriété foncière*.[56]

27 It would seem contrary to principle that the abolition of art 14 could, by a side wind, be held to have swept away an important provision of the 1880 Law.[57]

Conclusion

28 Where does this leave the prospective or actual *tenant après dégrèvement*? It is submitted that the judgment of the Court of Appeal leaves such a *tenant* in a difficult position. When the court has ordered a *dégrèvement*, the procedure is that a list of secured creditors (*liste nominative*),[58] ranked in the order of their hypothecs, is submitted by the Attornies appointed by the court to the Judicial Greffier. The Greffier then prepares a register or *Codement*[59] of the secured debts as well as of any unsecured debts which have been submitted to him for insertion in the *dégrèvement*. The creditors are summoned to appear before the Greffier[60] and invited in turn to accept the "*teneure*"[61] of the property, or to renounce their hypothec. First to be called are the

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[56] See now art 13(1)(A) of the 1880 Law, as amended in 2018, which provides that the amount of the hypothecated claim may be calculated by reference to the value of the property from time to time, or to a percentage of the value from time to time.

[57] "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably in that direction"; *per* Devlin J (as he then was) in *National Assistance Bd v Wilkinson* [1952] 2 QB 661, cited with approval in *Bradshaw v McCluskey* 1976 JJ 335, at 342.

[58] See art 93 of 1880 Law.

[59] The word defeated the translator of the 1880 Law, and appears in French in the translation on www.jerseylaw.je. Harrap's French Dictionary (Edinburgh 2007) has no reference to the word, nor does De Ferrière's *Dictionnaire de la Coutume de Normandie* (Rouen, 1780), nor does the Council of Europe's French–English Legal Dictionary (Strasbourg, 2002).It seems to have been an invention of Sir Robert Marett. Perhaps he was unhappy with the word *Registre* and sought to convey a greater sense of formality or orderliness.

[60] If a secured creditor fails to answer the summons, he will lose his security (*i.e*. his hypothec will fall away).

[61] *Teneure* should not really be translated as "tenancy" which could be confused with rights under a lease. It is possessory title that is in question. The *tenant après dégrèvement* is taking on the property.

unsecured creditors as a group, and then the secured creditors in the reverse order of their seniority. If any creditor accepts the *teneure*, he is obliged to discharge the obligations secured by all prior hypothecs.[62] There is no doubt that up to three years' outstanding interest (up to the date of the court order of adjudication and renunciation) are accessory to the principal obligation and secured by the relevant hypothec.[63] But what of costs?

29 It is noteworthy that, in practice, the register or *Codement* contains, with two exceptions, no reference to any costs incurred during litigation preceding the *dégrèvement*. The first exception relates to proceedings in the Petty Debts Court where judgment entails the automatic award of fixed costs in accordance with a tariff. Thus, in the register drawn up for the *dégrèvement* of Mrs Powell, two judgments of the Petty Debts Court (which had been registered, thereby creating judicial hypothecs) were listed for amounts which included "fixed costs". Such costs were specified and expressly embraced by the hypothec at the time of registration in the Public Registry. The second exception relates to the costs of the Attornies (*Attournés)* in the *dégrèvement* which are specifically set out as a privileged claim.[64] Nothing in the register for the *dégrèvement* of Mrs Powell gave any indication of the amount or indeed the existence of any claim for costs incurred by secured creditors in previous litigation. The register set out the secured claim of JHL as follows—

> "Jersey Home Loans Limited at the instance of which an Act of the Royal Court dated 14th March, 2008, was registered by which Mrs Powell was condemned to pay the sum of Five hundred thousand pounds (£500,000) Sterling with interest thereon to Jersey Home Loans Limited."

30 The Court of Appeal found, however, that any costs incurred by JHL and any other senior creditor in proceedings to recover the secured debt were also accessory to the respective hypothec and embraced by it. A person accepting the *teneure après dégrèvement* was accordingly obliged to pay them. That finding was based upon the understanding that such was the position under customary law before 1880. The problem with this finding is that although it appears to have been the law in other provinces of France, it was, unknown to the judges, not so under Norman customary law. The finding is, it is

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[62] If the unsecured creditors accept the tenancy, they will hold as tenants in common in the proportion that their debt bears to the whole of the unsecured debts.

[63] See art 101 of the 1880 Law.

[64] They lodge a *Protêt* which is included in the *Codement* by the Greffier.

respectfully submitted, fundamentally flawed. It may appear to do justice to the secured creditor in question, but fairness is not in point.

31 One could well argue that *dégrèvement* was, and is, a rather unfair process, not just to the debtor who might be deprived of some equity in his property, but also to other junior creditors who lose their security and are excluded from recovery should they elect not to take over the property. The purpose of *dégrèvement* was, however, to ensure that immoveable property could be freed, for the first time, from the interlinking shackles of hypothecs and guarantees which bedevilled the sale of immoveable property, and commerce in general, before 1880. "*Dégrèver"* means in this context to liberate from any burdens or encumbrances. The object was to enable citizens, after the ownership of the property *en dégrèvement* had been confirmed by the court, to transact freely in that immoveable property untrammelled by any prior hypothec.

32 In order to do that, it was necessary to impose an obligation on the *tenant après dégrèvement* to discharge the obligations secured by the prior hypothecs. Those obligations certainly include any interest due on the principal debts[65] up to the three-year maximum[66] which can accurately be described as accessory to the principal debt and secured by the original hypothec. But are costs and expenses embraced by the original hypothec from the date of its creation? The Court of Appeal found that "[t]he starting point is that in principle costs are secured as being accessory to the principal obligation".[67] That finding is contrary to the view of Basnage which was that "costs are not due as a matter of law, in themselves, but only as a result of a judgment given on the application."[68] Furthermore, Basnage must now be read in the light of the changes brought about by the 1880 Law.

33 The Court of Appeal's decision means that if a junior secured creditor, whose hypothec antedates the award of costs in favour of a senior secured creditor, accepts the *teneure après dégrèvement*, he will find his hypothec leapfrogged by the award of costs, and be obliged to settle the costs awarded to the senior secured creditor against the debtor. This is the very point which Basnage said distinguished the customary law of Normandy from that of other provinces. According to Basnage, the costs are secured by hypothec only from the date at which judgment for those costs is pronounced.

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[65] See art 13(1) of the 1880 Law.
[66] See art 101 of the 1880 Law.
[67] 2019 (1) JLR 233, at para 115.
[68] See para 13 above.

34 In the author's submission, the law has taken a wrong turning. The instinct of Le Cocq, Deputy Bailiff (as he then was), even if he too was unaware of the passage in Basnage referred to at para 13 above, was sound. For the reasons given above, costs incurred by a senior creditor in proceedings related to a *dégrèvement* should not be regarded as accessory to the hypothec securing the principal obligation from the date of the original hypothec. Prior to the 1880 Law they would have become secured only from the date of judgment. Now, however, the rule set out by Basnage must be read in the light of the statutory changes introduced by the 1880 Law. Article 12 states that a judicial hypothec results from a judgment of the Royal Court (or the Petty Debts Court) only if the provisions of the Law have been complied with. Article 13(2) states that the judgment "*doit être enregistré dans le Registre Public afin que l'hypthèque y résultant puisse prendre effet*" [must be registered in the Public Registry in order that the hypothec resulting therefrom can take effect]. A judgment for costs is surely in no different position from any other judgment. It is to be hoped that the issue may be re-considered by the courts in due course.

Postscript

35 At para 24 of its judgment, the Court of Appeal expressed surprise that the facility letter leading to the loan by JHL was expressed in a way—

> ". . . which would be familiar to a lawyer practising in England and Wales dealing with the giving and taking of security over land. It offers the debtor 'a mortgage' before stipulating more specifically for a '£500,000 First Registered Charge' and for the interest of JHL 'as Mortgagees' to be noted on the property's insurance cover."

The court was clearly right to express such surprise. A mortgage is quite different from a hypothec. A mortgage of a legal estate in English land is achieved by creating a "charge by way of legal mortgage" under s 85 of the Law of Property Act 1925. The borrower (or mortgagor) has an equity of redemption once the loan has been repaid. Section 105 of the Act sets out how the proceeds of sale of the mortgaged property are to be dealt with by the mortgagee, and makes express provision that the proceeds are "to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him . . .". In Jersey, title remains throughout with the borrower. A hypothec is an entirely different legal concept.

36 It is interesting that Harrap's French Dictionary translates "s*a propriété est grevée d'hypothèques*"[69] as "he is mortgaged up to the hilt". While it may be permissible in common parlance to refer to a borrower in Jersey obtaining a "mortgage", the use of such inaccurate terminology in a legal document carries risks for the lender. Sir Robert Le Masurier, Bailiff, stated in *Re Knight's (Jersey) Ltd*—

> "Finally the Court wishes to add this, that it will not readily uphold documents which are fiction in the sense that they bear no real relation to the facts of a transaction the terms of which they purport to embody . . ."[70]

A similar point was made by William Bailhache, Deputy Bailiff (as he then was) in *Flynn v Reid*[71] when he refused to give legal effect to a contract "which did not reflect the reality of the parties' relationship."[72] Lenders take a risk in using terminology in their security documentation which is borrowed from a different system of law.

Sir Philip Bailhache was Bailiff of Jersey between 1995 and 2009 and a Commissioner of the Royal Court and Ordinary Judge of the Court of Appeal between 2009 and 2011. He has been the editor of the Jersey and Guernsey Law Review *since its foundation in 1997.*

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[69] Edinburgh 2007, at 573.
[70] 1962 JJ 207, at 210.
[71] 2012 (1) JLR 370.
[72] *Ibid.* at 382, para 20.