

Joint Ownership and Ownership in Common of Guernsey Real Property

Preface

This memorandum has been prepared for the assistance of clients considering incorporating a company under the laws of Guernsey. It is intended to provide only a summary of the main legal requirements and general principles applicable to the establishment of a company in Guernsey and it is not intended to be comprehensive in its scope. It is recommended that a client seeks legal advice on any proposed transaction prior to taking steps to implement it.

A series of briefings on other aspects of Guernsey law have been produced by Ogier and are available on request.

This memorandum has been prepared on the basis of the law and practice as at 1 March 2006.

Introduction

Constitutional position of Guernsey

Guernsey is a self-governing dependency of the British Crown and does not form part of the United Kingdom. By constitutional convention established over some 900 years the Island has complete autonomy in all matters of internal government, including taxation. The legal system is derived in part from the customary laws of Normandy but has been strongly influenced by English law in company and commercial matters and the Judicial Committee of the Privy Council remains the Island's ultimate court of appeal. The Island's special constitutional position has been recognised by the European Union in a protocol (No.3) attached to the United Kingdom's Act of Accession to the EU. The protocol provides that the Treaty of Rome shall apply to Guernsey only to the extent necessary in relation to the arrangements for the free movement of goods. Accordingly, European Union directives on fiscal harmonisation, financial services and company law do not have effect in Guernsey. The Island has as a result of its constitutional position developed into a leading international finance centre.

Joint Ownership and Ownership in Common

Under the laws of Guernsey there are two forms of co-ownership of real property; "joint ownership" and "ownership in common".

As was noted by the Court of Appeal in *Waterman v McCormack* (25 May 2002) the only material distinction between two forms of co-ownership is the right of survivorship. This is an incidence of joint ownership but not of ownership in common. Essentially, "survivorship" means that where a co-owner dies, his or her interest in the property vests automatically in the other co-owner. It does not pass to the deceased's heirs and is not available to satisfy the deceased's creditors. If there is a reference in the conveyance to a right of survivorship (as was the situation in the *Waterman* case) the interests will be held in joint ownership.

Joint ownership may be brought to an end by any co-owner (in accordance with the ancient Norman maxim "Nul n'est tenu de rester dans l'indivision") or by the court.

When joint ownership is severed by one of the joint owners, the joint ownership (and consequently the right of survivorship) ceases and is replaced by ownership in common. This feature is of great importance in the context of third party rights.

The Court of Appeal in the *Waterman* case expressed the view that a single joint owner may alienate or hypothecate his or her interest in the jointly owned property referring as it did to Deputy Bailiff Frossard's judgment in *Carpenter et al v Field Aviation Limited* (11 January 1982, Royal Court). However a differently constituted Court of Appeal in *Pirito v Curth* (10 April 2003) expressed doubt as to this proposition and, by reference to the Jersey case of *Dégrévement of Bonn* (1971) JJ 1771, Deputy Bailiff Ereat) expressed the view that alienation by a single joint owner is probably not possible until after severance, which will involve partage or licitation. It is to be hoped that future case law will address this question authoritatively.

Respective Interests of Former Joint Owners After Severance

The Guernsey Court of Appeal has now held on two occasions (*Waterman and Pirito*) that, unless different shares are stated in the conveyance itself, in the event of severance of joint ownership the joint owners will be entitled to the property or proceeds of its sale in equal shares. However the question has been expressly left open as to whether a private arrangement outside of a conveyance may validly be made to the same effect.

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Accordingly, in the situation where parties purchase a property “for themselves the survivor of them and heirs of such survivor”, or “jointly and for the survivor of them” (as was the case in *Waterman* and *Pirito* respectively (each party will acquire an equal interest in the property irrespective of the size of their respective financial or other contributions to it.

Taking Security

The Court of Appeal’s judgment in *Waterman* will be of wider interest to anyone who takes security over Guernsey real property which is held in joint ownership. In that case the court made a number of comments in an attempt to clarify the position of a lender when taking security over the interest of one co-owner. The court suggested that taking security does not in itself automatically sever joint ownership: accordingly, the joint ownership (and the consequential right of survivorship) remains. It follows, according to the court, that the secured party’s security will be over the property interest of the co-owner who granted it and is therefore subject to survivorship. Thus, the court took the view that if the debtor dies, the lender’s security over the property will die with him.

The court also noted that the making of an interim vesting order for the purposes of saisie proceedings taken by a lender will sever their joint ownership by operation of law.

Comment

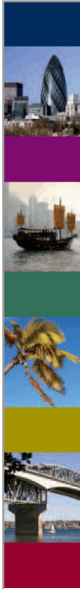
Most real property in Guernsey which is held in joint ownership is held by married or unmarried couples and in this case the lender will normally hold security over the interests of both parties. An issue may arise however where for some reason only one of the joint owners has given security over his joint interest. For the reasons noted above it is important for secured lenders to ensure that they take security over the interests of all co-owners or, if this is not possible, at least to ensure that the joint ownership has been severed and converted to ownership in common.

Conveyancers should take great care to explain the legal nature and effect of the words used in the Habendum clause to their clients.

About Ogier

Ogier is an award winning offshore legal and fiduciary services provider. The Group advises on all aspects of BVI, Cayman, Guernsey and Jersey law and associated fiduciary services through a global network of offices covering all time zones and key financial markets.

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