# Chan Shwe Ching *v* Leong Lai Yee
# [2015] SGHC 210

**Case Number** : HC/Suit No 342 of 2015 (HC/Summons No 3087 of 2015)

**Decision Date** : 12 August 2015

**Tribunal/Court** : High Court

**Coram** : Edmund Leow JC

**Counsel Name(s)** : Chia Soo Michael and Hany Soh Hui Bin (Chia-Thomas Law Chambers LLC) for the plaintiff.

**Parties** : Chan Shwe Ching — Leong Lai Yee

*Civil Procedure—judgments and orders—enforcement*

*Credit and security – remedies – writs of seizure and sale*

12 August 2015

**Edmund Leow JC:**

**Introduction**

1 This application was filed by the plaintiff for the defendant's interest in the property at 9 Jalan Tanah Rata, Singapore ("the Property") to be attached and taken in execution to satisfy the judgment in Summons No 2470 of 2015 ("SUM 2470/2015") and the costs order in Summons No 2813 of 2015 ("SUM 2813/2015") (referred to as "the Judgment Debt"). The Property is held by the defendant and her husband as joint tenants. After hearing the *ex parte* application and perusing the submissions, I allowed the application on 10 July 2015. As important questions concerning the enforceability of a writ of seizure and sale ("WSS") on an immovable property held by joint tenants arose in the present case, I now give my reasons for allowing the application.

**Facts**

2 The plaintiff commenced proceedings against the defendant on 10 April 2015 for payment of the sum of approximately $1.43m. By May 2015, the defendant was reported missing and numerous police reports had been lodged by up to 60 investors claiming that she owed them about $60m. The defendant has since been uncontactable. The plaintiff obtained summary judgment against the defendant on 22 May 2015 for the sum of approximately $1.43m by way of SUM 2470/2015. The defendant was also ordered to pay the plaintiff costs fixed at $22,000 with reasonable disbursements. The plaintiff has since provided the court with a list of disbursements incurred amounting to $6,052.10. The plaintiff also applied by way of SUM 2813/2015 to appoint a receiver over the Property. On 23 June 2015, the court granted her application for the appointment of a receiver and awarded her costs in the sum of $1,500.

3 Unfortunately, the appointment of a receiver as a method of enforcing the Judgment Debt did not assist the plaintiff in this case, as there was no rent to receive in respect of the Property. Without a WSS, the plaintiff could not force a sale and was left without any satisfactory remedy for the enforcement of the Judgment Debt. Further, in the event that the defendant is declared to be bankrupt, the plaintiff will lose her priority over the Property to the Official Assignee pursuant to s

105(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) given that no execution against the Property by way of a WSS has been completed. The total sum due to the plaintiff under the Judgment Debt of about $1.47m remains unpaid to this date.

4 The plaintiff then commenced the present action, for the interest of the defendant in the Property to attach and be taken in execution to satisfy the Judgment Debt.

**The plaintiff's arguments**

5 Counsel for the plaintiff submits that *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 ("*Malayan Banking*") should not be followed as it has "produced an inequitable result in this case". In particular, he makes the following arguments in support of the proposition that a WSS should be granted in this case:

(a) There is no need for severance of a joint tenancy to occur *prior* to a WSS being able to *attach* to the interest of a judgment debtor in a property held in joint tenancy.

(b) There is no prejudice to the third party (*ie*, the "innocent" joint tenant).

(c) The position in Singapore under *Malayan Banking* in relation to WSS of an immovable property held in the manner of joint tenants is at odds with the position in other Commonwealth jurisdictions.

6 I will address each of the arguments in turn, but will first consider the arguments and reasons given for the decision in *Malayan Banking*.

**The current state of the law as *per Malayan Banking***

7 The facts in *Malayan Banking* concern two writs of seizure and sale which had been registered against a property held by joint tenants. The first WSS was registered only against the husband's interest in the property by Focal Finance Ltd. The second WSS was registered against the property as a whole by Malayan Banking Bhd. The issue before the High Court was how the surplus from the sale proceeds of the property should be apportioned between the respective parties. The High Court held that a WSS against immovable property could not be used to enforce a judgment against a debtor who was one of two or more joint tenants of that property (at [24]). The registration of the first WSS was thus declared to be invalid and was set aside, and the surplus from the sale proceeds were ordered to be paid to Malayan Banking Bhd. The court reasoned (at [15]) that:

> ... Although joint tenancy in immovable property is an interest recognised in law, the "interest of the judgment debtor" attachable under a WSS under O 47 r 4(1)(*a*) *must surely be a distinct and identifiable one*. A joint tenant has no distinct and identifiable share in land for as long as the joint tenancy subsists. To seize one joint tenant's interest is to seize also the interest of his co-owners when they are not subject to the judgment which is being enforced. ...
>
> [emphasis added]

8 This forms the fundamental premise of the court's reasoning and very materially shapes the scope of the court's subsequent inquiry. Hence, the focus of the inquiry shifted to whether the registration of a WSS severs the joint tenancy, rather than whether the interest of a judgment debtor is attachable to a WSS in the first place. As the registration of a WSS did not sever a joint tenancy, the court concluded that the interest of a joint tenant could not be the subject of a WSS as the

interest was neither "distinct" nor "identifiable". The court was of the view that a judgment creditor could proceed against a judgment debtor (who is a joint tenant of land) by the appointment of a receiver by way of equitable execution (under O 30 and O 51 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules")) instead (at [23]).

9 In my view, the court correctly rejected the argument that a WSS severs a joint tenancy at the time of registration. After all, it is difficult to see what would constitute an "act operating on the joint tenant's own share" at the time the WSS is registered by the judgment creditor who is not a party to the joint tenancy. But it does not necessarily follow that a joint tenant's interest is therefore incapable of being identified and seized under a WSS. Further, the appointment of a receiver as an alternative method of enforcing a judgment debt does not appear to be a satisfactory one. The appointment of a receiver merely entitles the judgment creditor to rental and profits from the property and is ultimately a very different remedy from the execution of a WSS. I will now turn to the preliminary question of whether the interest of a judgment debtor in a joint tenancy *can attach* to a WSS, which is a separate question from the question of when severance of a joint tenancy occurs.

**WSS of a joint tenant's interest in property**

10 On the face of the wording of O 47 r 4 of the Rules, WSS on immovable property can be carried out on "*any* interest therein" (emphasis added), which would presumably include the interest of a joint tenant. There appears to be nothing in the wording of the Rules which would support a restrictive interpretation of the type of interest in immovable property which can attach to a WSS.

***The requirement of a "distinct and identifiable" interest in land***

11 In fact, the requirement that an interest in land has to be "distinct and identifiable" for a WSS to seize such an interest, and that to be distinct and identifiable, a share in the land has to be a separate and undivided one, appeared for the first time in *Malayan Banking* at [15]. There is a notable absence of any citation of supporting authority for this proposition in *Malayan Banking*. There is also no mention of such a requirement in the academic writing that existed at the time of the decision in *Malayan Banking* on the availability of a WSS in respect of immovable property (see *eg*, Jeffrey Pinsler, *Civil Procedure* (Butterworths Asia, 1994) at pp 939–941). The absence of any discussion on the type of interest in land which can be subject to a WSS suggests that traditionally, there was no need for a distinction to be drawn between the types of co-ownership in this context, and at the very least suggests that a WSS was available in respect of a judgment debtor's interest in an immovable property held in joint tenancy. Professor Tan Sook Yee ("Professor Tan") further states in Tan Sook Yee, Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 2010) ("*Principles (2010)*") at para 9.42 that "[u]ntil *Malayan Banking Bhd v Focal Finance Ltd*, it was accepted that the interest of a joint tenant can be subject to a writ of seizure and sale". Upon careful consideration of the above, I am of the view that prior to *Malayan Banking*, severance of a joint tenancy into undivided shares was not a prerequisite for a WSS to be issued against a joint tenant's interest in land.

12 The concept of joint tenancy is admittedly a somewhat strange legal creation. Every joint tenant in a joint tenancy arrangement is entitled to the whole of the property. This may give the impression that a joint tenant's share of the property is one that is incapable of being determined. But the plaintiff cites Tan Sook Yee, "Execution Against Co-owned Property" [2000] SJLS 52 ("Tan (2000)") in this regard to argue that even though a joint tenant does not have an undivided share of the land for as long as the joint tenancy subsists, the joint tenant has an interest in land which is identifiable and capable of being determined. Professor Tan explains (at p 57) that this is because the interest of a joint tenant can be converted into undivided shares by alienation, and "for [the]

purposes of alienation each is conceived as entitled to dispose of an aliquot share" (*per* Dixon J in *Wright v Gibbons* (1949) 78 CLR 313). When the property is sold for example, the joint tenants will be entitled to the sale proceeds according to their interest in the property and their exact "share" of the property can be grasped. The joint tenants are usually entitled to the proceeds equally unless they are holding the property on trust for themselves as tenants-in-common in undivided and unequal shares, perhaps proportionate to their contribution.

13 I am of the view that this reasoning is logical and compelling. In fact, there are many instances before the court in which it has to determine what a joint tenant should be entitled to out of the sale proceeds of a property, based on his interest in the said property. These include applications under s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") read with para 2 of the First Schedule thereto, which allows a co-owner to apply to the High Court for an order of the sale of the property "where it appears necessary or expedient". In these cases, the court similarly has to determine how the net sale proceeds should be divided amongst the co-owners after a sale, and very often in the context of joint tenancy arrangements (see *eg*, *Neo Hui Ling v Ang Ah Sew* [2010] SGHC 328 and *Gurnam Kaur d/o Sardara Singh v Harbhajan Singh s/o Jagraj Singh (alias Harbhajan Singh s/o Jogaraj Singh)* [2004] 4 SLR(R) 420). This can also happen even after a sale has been ordered, and the court has to declare each joint tenant's beneficial interest in the property to apportion the sale proceeds (see *eg*, *Lim Geok Swan v Lim Shook Luan* [2012] SGHC 18). Thus, if the interest of a joint tenant in land is one that is capable of being alienated and identified, and it is commonly accepted that severance of a joint tenancy will occur when the sheriff sells the land pursuant to a WSS, there is no reason why a WSS cannot be issued against a joint tenant's interest in land.

14 In any event, the challenge of having to particularise the exact interest that the judgment creditor is entitled to similarly arises in the appointment of a receiver, which was the alternative method of enforcing a judgment debt suggested in *Malayan Banking*. As Professor Tan rightly points out in Tan (2000) at p 57, even if a receiver were to be appointed, the receiver cannot receive more rent and profit than what the joint tenant is entitled to, and hence his exact "share" of the joint tenancy has to be determined. It is difficult to see why the situation involving a WSS of a joint tenant's interest in the property should be any different. It is the same interest in an immovable property that has to be quantified in both scenarios, merely that the scenarios relate to two different methods of enforcement of a judgment debt.

***The practice in other Commonwealth jurisdictions***

15 Case law seems to indicate that the courts in other Commonwealth jurisdictions do not even consider the question of whether a WSS (or its equivalent) can be carried out on a joint tenant's interest in land, and assume that it can be done. The courts in other jurisdictions proceed on the assumption that an interest of a joint tenant can be taken in execution under a writ of execution over land, and focus on the priority between different creditors, the effect of the registration of a writ of execution on severance, and other related issues instead. For example, in *The Registrar-General of New South Wales v Wood* (1926) 39 CLR 46, a wife's interest in land held in tenancy in entireties (a special form of joint tenancy between husbands and wives) was seized and sold by a sheriff under a writ of *fieri facias* (the equivalent of the WSS in Singapore). The High Court of Australia held that the Registrar General was bound to register the transfer of the wife's interest by the sheriff, pursuant to a sale carried out by him under the writ of *fieri facias* issued only against the wife's interest in land. In *Mitrovic v Koren* [1971] VR 479, the Supreme Court of Victoria held that a judgment debtor who had a writ of *fieri facias* executed against his interest in a joint tenancy was required to yield possession or control of his duplicate certificate of title. In both cases, there was no question or doubt over whether the writ of execution over a joint tenant's interest in the property could be carried out.

16 Similarly, the Canadian courts have considered whether the writ of *fieri facias* against the interest of a joint tenant resulted in a severance of the joint tenancy and if so, at what point in time the severance occurred. But they have no difficulty accepting that the interest can be subject to a writ in the first place (see *eg*, *Re Young* [1968] 70 DLR (2d) 594, *Power v Grace* [1932] 2 DLR 793 ("*Power v Grace*")). It seems uncontroversial to them that this can be done, and this supports Professor Tan's views. Further, s 9 of the Execution Act (RSO 1990, Chapter E.24) makes it clear that under Canadian law, there is no distinction drawn between a writ of execution over land held in joint tenancy and land held in tenancy-in-common. The section reads:

> **Sheriff may sell any lands of execution debtor**
>
> **9.** (1) The sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor and including any interest of the execution debtor in lands held in *joint tenancy*.
>
> [emphasis added]

At this point, I note that the High Court in *Malayan Banking* had focussed on the legal position in Canada in coming to its conclusion that the registration of a WSS does not sever a joint tenancy arrangement. I concur with this reading of the Canadian cases that the delivery of a writ of execution to the sheriff does not in itself amount to a severance. But as stated above, it does not necessarily mean that a WSS cannot attach to the interest of a joint tenant at the first instance. In fact, in the context of a charging order, the Supreme Court of Canada has also expressly recognised that the interest of a joint tenant is "exigible" and hence can be subject to a charging order (*Maroukis v Maroukis* [1984] 2 SCR 137 at 142). In Singapore, prior to 1991, a charging order was available as a statutory charge that could be lodged over a property pursuant to a judgment debt, and was capable of protection by a caveat. Though the workings of the WSS and the charging order may differ in some respects, there is no indication that the amendments in 1991 to the Rules of the Supreme Court 1970 (S 274/1970) were intended to remove the remedy of a WSS for a judgment creditor in the context of a joint tenancy. There are also similarities between the WSS and the charging order as they are both methods of levying execution over land and only take in execution the beneficial interest of the judgment debtor. If the interest of the judgment debtor in a joint tenancy could be the subject of a charging order before 1991, there is no reason why that same interest cannot be capable of forming the subject of a WSS today.

***Severance of the joint tenancy in the context of a WSS***

17 For completeness, I will now address the question of when severance of a joint tenancy can occur in the context of a WSS. It is uncontroversial that at the time the land is sold, there will be a severance of the joint tenancy (see *Principles (2010)* at para 9.42). But it is less clear whether severance can occur before the sale. Given that the registration of a WSS may be cancelled because it is subsequently withdrawn or lapses, the court in *Malayan Banking* held that the *registration* of a WSS does not sever a joint tenancy (at [17] and [18] of *Malayan Banking*). It was of the opinion that a "fine mess" would be created if that were so, because the status of the joint tenancy arrangement following the withdrawal of the WSS would be highly uncertain – would the position of the co-owners in relation to one another revert to being joint tenants again? Further, it stated that the registration of a WSS merely prevents transfers of interest by the joint tenant before the sheriff transfers that interest to another person, and thus registration in and of itself does not sever the joint tenancy.

18 Professor Tan acknowledged in *Principles (2010)* (at para 9.43) that a writ of execution over

the interest of a joint tenant does not vest any interest in land in the judgment creditor, and so it does not effect a severance. But she also highlighted certain anomalies which may arise when we reject the notion that severance can occur at registration. For example, if the joint tenancy has not yet been severed, and if the judgment debtor were to die before the sheriff sells it, the right of survivorship would operate. What would happen then to the writ of execution? Would it continue to bind the land or would it be ineffective as the interest of the judgment debtor has disappeared on his death? These problems may be avoided if the notion of an "act operating on his own share" is given an expansive definition to include the deliberate act of a third party as allowed by the law. The registration of a WSS would then fall within such a definition and effect a severance of the joint tenancy.

19 It is interesting to note that the Canadian courts have adopted an intermediate approach. They have long stated that the mere registration of a writ of *fieri facias* does not sever a joint tenancy and that the judgment creditor needs to take *sufficient* steps to execute the judgment against the debtor's interest in the property (see *eg*, *Power v Grace* and *Toronto-Dominion Bank v Phillips* (2014) ONCA 613). If, for example, the advertisement of the upcoming sale of the debtor's interest in the property has commenced, this could constitute sufficient steps to sever the joint tenancy. This seems to me a possible approach to take. But given that each case turns on its own facts, and that this question is not directly relevant to the present case, I am of the view that this question would be more appropriately addressed in future cases.

20 For the purposes of the present case, the relevant question to be asked when a WSS attaches to an interest in land should not be whether severance of the joint tenancy *has* occurred or will *immediately* occur, but whether severance *can* occur in the future. Given that it is accepted that when a sheriff decides to sell the land under a WSS severance of a joint tenancy will occur if it has not already occurred, and that the interest of a joint tenant can be determined when severance occurs, there is no reason why a WSS cannot be issued against a joint tenant's interest in land.

**Prejudice to the co-owner**

21 In *Malayan Banking*, the court also expressed concern that the joint tenant who does not owe a judgment debt may be forced to sell his share of the property when the WSS is executed, and this may result in unfairness. But it should be clarified that when a joint tenant's interest in the property is seized under a WSS, this has no bearing on another joint tenant's interest in that same property as the judgment creditor only takes what the judgment debtor is entitled to, and nothing more. In the event of a sale of the property, the sheriff can only market the judgment debtor's share of the property and has to give notice to the other party prior to doing so.

22 But given that the sheriff may apply to the court for directions under O 47 r 5(*g*) of the Rules, it is recognised that a sale of the whole property may still be ordered, in spite of the objections of a co-owner of the property. It may seem to some that the "innocent" joint tenant, who does not wish to sell his property, is "forced" to sell his interest in the property. But the risk of unfairness is inherent in any form of co-ownership (see Tan (2000) at p 58) and is not confined to the context of WSS of a property held by joint tenants. The situation would be very similar in cases involving the WSS of an immovable property held as tenants-in-common and its subsequent sale. The court even has the power to order the sale of a property in cases which do not involve the enforcement of a judgment debt, even if it means overriding the consent of a co-owner as long as the court deems it "necessary or expedient" to order a sale of the whole property (see s 18(2) read with para 2 of the First Schedule of the SCJA).

23 Such "unfairness" is thus not peculiar to a case in which a WSS is registered over a judgment

debtor's interest in a property held in joint tenancy, and courts should hesitate to treat judgment debtors differently based on the type of co-ownership by which their property is held. From the point of view of the judgment creditor, why should he be prejudiced in the enforcement of a judgment debt merely because his debtor is a joint tenant and not a tenant-in-common? The perceived "unfairness" to the co-owner of the property must also be balanced against the "unfairness" to a judgment creditor in a similar case as the one before us. Without a WSS in the present case, the plaintiff would be left without any remedy and will have no means of enforcing the Judgment Debt of about $1.47m. I find no reason to maintain a distinction between the two types of co-ownership and in fact, there are clear policy reasons against such a distinction. After all, it would be altogether too easy for a judgment debtor to prevent execution of a judgment debt over his property by refusing to sever a joint tenancy. The interest of a judgment debtor in both forms of co-ownership should thus be liable to be seized under a WSS.

**Clarifying nomenclature**

24 Section 105(1) of the Bankruptcy Act establishes that between the judgment creditor who has issued execution against the property of a bankrupt, and the Official Assignee, the Official Assignee takes priority unless the execution or attachment has been completed before the issuance of the bankruptcy order. The plaintiff has asked for the court's clarification on the nomenclature used in O 47 r 4(1)(*a*) of the Rules in comparison with s 105(2)(*c*) of the Bankruptcy Act. The former states:

> **Immovable property (O. 47, r. 4)**
>
> **4.**—(1) …
>
> (*a*) seizure shall be effected by registering under any written law relating to the immovable property an *order of Court* in Form 96 (which for the purpose of this Rule and Rule 5 shall be called the order) attaching the interest of the judgment debtor in the immovable property described therein and, upon registration, such interest shall be deemed to be seized by the Sheriff;
>
> [emphasis added]

The latter states:

> **Restriction of rights of creditors under execution or attachment**
>
> **105.** …
>
> (2) …
>
> (*c*) … an execution against land or any interest therein is completed by registering under any written law relating to the registration of land a *writ of seizure and sale attaching the interest of the bankrupt in the land* described therein.
>
> [emphasis added]

The plaintiff argues that though there is a difference in nomenclature, both provisions are referring to the same document.

25 I would first point out that O 47 r 4(1)(*e)*(i) actually makes reference to a writ of seizure and sale in Form 83, which is a separate document from the order of Court, and is to be filed *after*

registering the order of Court. There is a clear procedure that can be discerned from the current O 47 r 4: an order of Court is first obtained under Form 96 and registered, and thereafter the judgment creditor must file a writ of seizure and sale in Form 83. The question thus becomes this: is s 105(1) of the Bankruptcy Act referring to the current Form 96 or Form 83?

26 In comparing the recently amended O 47 r 4(1)(*a*) of the Rules with s 105(2)(*c*) of the Bankruptcy Act, the similarity is that both are concerned with the registration of a particular document which will attach the interest of the judgment debtor described therein. Thus, the key point in time we are looking at is the time at which the execution or attachment of the judgment debt to the judgment debtor's interest in the property occurs, which amounts to a completed execution against land and would take priority over the Official Assignee. O 47 r 4(1)(*a*) clearly states that the interest of the judgment debtor attaches at the time of registration of the order of Court and such interest shall be deemed to be seized by the sheriff. Thus, I am of the view that the order of Court in O 47 r 4(1)(*a*) (*ie*, the document in Form 96) is the same document as the writ of seizure and sale in s 105(2)(*c*) of the Bankruptcy Act for the purposes of s 105(1) of the said Act. Perhaps some deliberation on the wording of the relevant sections of the Bankruptcy Act in future amendments may be helpful to avoid uncertainty in the law in the area of the enforcement of judgment debts of bankrupts.

**Conclusion**

27 Therefore, for the reasons given above, I allowed the *ex parte* application for the interest of the Defendant in the property to be attached and taken in execution to satisfy the Judgment Debt. I also awarded costs of $5,000 to the plaintiff.