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EXECUTION AGAINST CO-OWNED PROPERTY

Malayan Banking Bhd v *Focal Finance Ltd*[1]

CO-OWNERSHIP of land is common in Singapore. The context ranges from family situations to partnerships in commercial settings. While the tenancy in common gives to each tenant in common an undivided share in the property, the joint tenancy involves each joint tenant owning the whole. There are no shares in a joint tenancy. But in both forms of co-ownership there is unity of possession. On the death of a joint tenant the survivor becomes the sole owner if there were only two joint tenants in the first place. Co-ownership in the form of a tenancy in common, with the co-owners holding in undivided shares, is clearly more equitable in commercial settings, as the undivided share of the deceased tenant in common forms part of his estate. On the other hand, the right of survivorship makes the joint tenancy a convenient form of co-ownership in the context of trustees and in family settings.

It is thus disturbing to read that in *Malayan Banking Bhd* v *Focal Finance Ltd* [*Focal*] the High Court held that where joint tenant is a judgment debtor, his judgment creditor is not able to levy a writ of seizure and sale against his interest in land which he holds jointly with others. If this is correct, does it apply only to land or to all forms of property held in joint tenancy? Tay Yong Kwang JC who gave judgment in *Focal* did indicate that a judgment creditor may satisfy his judgment debt by applying for a receiver under Order 51 and Order 30. This solution only permits the judgment creditor to take the rents and profits of the property. This is infinitely different from being able to have the property sold to satisfy the entire judgment debt in one step. Is the judgment creditor to be so handicapped on the off chance that his judgment debtor is a joint owner rather than a tenant in common of land? These are some the questions which Tay JC's judgment in *Focal* raises.

[1] [1999] 3 SLR 229.

As is well known, in a joint tenancy each joint tenant owns the whole property together with the other joint tenants. There are the four unities and the key feature is the right of survivorship. Unlike the other form of co-ownership, the tenancy in common, there are no shares, not even undivided ones. A joint tenant can alienate his interest, either totally or partially, during his lifetime and when he does so the joint tenancy is converted, by severance, into a tenancy in common.[2] The interest of a joint tenant can also be involuntarily alienated as when a joint tenant becomes a bankrupt. His joint interest can be taken by the Official Assignee and when this happens, the joint tenancy becomes a tenancy in common. However unlike other owners of property a joint tenant cannot transfer his interest held in joint tenancy by will. Aside from this a joint tenant rights are the same as other owners of property. So why is it that an interest of a joint tenant cannot be the subject of a writ of seizure and sale?

I. Method of Levying Execution Against Land[3]

Since 1907, except for an interlude between 1970 and 1990 the writ of seizure and sale has been and remains the only way in which judgment creditors may levy execution against the property of their judgment debtors. The writ may be used in respect of all kinds of property, immovable or movable.[4] Where the property affected consists of chattels the writ entitles the Sheriff to seize the chattels and if the judgment debt is not paid the chattels may be sold and the proceeds used to satisfy the judgment creditor.[5] In the case of land, under general law seizure consists of registering the writ of seizure and sale in the Registry of Deeds.[6] In the case of land under the Land Titles Act seizure is effected through the registration of the writ in the Land Titles Registry.[7] It has been held that the writ does not give the judgment creditor any interest in the land.[8] But he does have a right

2 See *Wright* v *Gibson* (1949) 78 CLR 313 at 330.

3 See generally, Tan SY, "Execution against land in Singapore – Some problems" [1987] 1 MLJ xv.

4 O 46 & 47 Rules of Court (1997 Rev Ed).

5 O 46 rr 16 & 22 Rules of Court (1997 Rev Ed).

6 O 47 r 4 Rules of Court (1997 Rev Ed); Sections 2 & 4 Registration of Deeds Act Cap 269 (1988 Rev Ed); Section 132 Land Titles Act (1994 Rev Ed).

7 O 47 r 4 Rules of Court, Section 132 Land Titles Act.

8 *Hall* v *Richards* (1961) 108 CLR 84, *Re Palmer* (1871) 5 AJLR 80; *Bruce* v *Woods* [1951] VLR 49.

to have the sheriff sell the land. It is also well accepted that a judgment creditor may take only property to which the debtor is beneficially entitled.[9]

In addition to the writ of seizure and sale, another mode of execution available is equitable execution. In Singapore this is under Order 51 and Order 30 rule 1 Rules of the Supreme Court 1997. This method envisages the appointment of a receiver to receive rents and profits and so pay off the judgment debt. The receiver has no right to sell the property without another court order specific for the purpose. Historically, in England, equitable execution was used to levy execution against equitable interests in property of the judgment debtor where he was not entitled to the whole beneficial interest. Now under section 36(1) Administration of Justice Act 1956 (UK) equitable execution can also be levied against legal owners of interests in land, while the charging order can be used in respect of all kinds of property.

The writ of seizure and sale in Singapore is similar to the writ for levy of property (formerly the writ of *fieri facias*) in New South Wales, Australia. There the writ for levy of property can be used for all kinds of property including equitable interests in property,[10] and equitable execution is resorted to where legal methods of execution are inadequate.

In Singapore the writ of seizure and sale is applicable to interests in all kinds of property,[11] and the writ can also be used for execution against equitable interests in land of the judgment debtor.[12] Thus equitable execution under Order 51 and Order 30 rule 1 of the Rules of Court 1997 like its counterparts in England and New South Wales should only be resorted to where it is more appropriate or where the legal method is inadequate.[13] Where is the inadequacy in regard to a joint tenant's interest in land?

II. Joint Tenancy in Land and the Writ of Seizure and Sale

A joint tenant, together with the other joint tenant, is entitled to the whole but his entitlement can be severed *inter alia* by alienation. Moreover the

9 *Fung Sin Wa* v *Moi Chen Hen* (1897) 5 SSLR 29; *Ng Boo Bee* v *Khaw Joo Choe* (1921) 14 SSLR 90; *Chung Khiaw Bank* v *United Overseas Bank Ltd* [1970] 1 MLJ 185; *OA of Lim Chiak Kim* v *United Overseas Bank Ltd* [1988] 3 MLJ 189; *Bank of China* v *First National Bank of Boston* [1992] 1 SLR 44; Section 135 Land Titles Act.

10 Sections 13 & 310 Judgment Creditors Remedies Act 1901, *Trustees Executors & Agents Ltd* v *Butler* [1905] VLR 650.

11 Section 13, Supreme Court of Judicature Act Cap 322; O 46 and 47, Rules of Court (1997 Rev Ed).

12 See *Mallal's Supreme Court Practice* (1961) at 607 referring to O XL1 R 1 & R 6 which provides for the writ of seizure and sale and equitable execution. These rules are the predecessor of the current O 47 and O 51.

13 *Morgan* v *Hart* [1914] 2 KB 183; *Henry* v *Murphy* (1900) 21 LR (NSW) Eq 1; See also *Mallal's Supreme Court Practice* (1983) Vol 1.

order issued against the interest of a joint tenant is capable of being registered under the Registration of Deeds Act or of being registered under the Land Titles Act. Thus there is no reason against a writ of seizure and sale being issued against such an interest. Neither is there any authority supporting the proposition that a joint tenant's interest in land cannot be subject of a writ of seizure and sale.[14]

At common law the availability of the writ to tenancies in common and joint tenancies in personalty is not in doubt.[15] The judgment creditor is entitled to seize the chattels of which the judgment debtor is a joint owner. But he can only take the interest of the judgment debtor and not the entire interest.[16] Since the facts of *Focal* concerned a joint tenancy in land the decision thus must be restricted to land.[17] The question then is whether there is any distinctive aspect relating to joint tenancy of land in Singapore that singles it out for special treatment.

It would appear that in other Commonwealth jurisdictions there has not been any question as to whether the interest of a joint tenant in land can be subject to a writ of *fieri facias*. On the contrary such cases as have arisen, proceeded on the assumption that an interest held under joint tenancy can be taken in execution under a writ of execution. In *The Registrar General of New South Wales* v *Wood*[18] a sheriff had seized and sold under a writ of *fieri facias*, the wife's interest in land which she held in tenancy in entireties (a special form of joint tenancy between husbands and wives). The High Court of Australia held that the Registrar General was bound to register a transfer by the sheriff, pursuant to a sale by him under a writ of *fieri*

[14] The wording of O 47 r 4 Rules of Court 1997 referring to the application of the writ against immovable property is similarly worded as the equivalent provision in O 41 r 1 1934 Rules of the Supreme Court. Both rules provide that "[w]here the property to be seized consists of immovable property or *any interest therein* ..." [my italics] seizure is effected by registering the writ under the registration of the writ under the relevant legislation. It has been held by Hyndman-Jones CJ in *Muthoo Karuppan Chitty* v *Onan Executor of Rajeedin deed* Suit No 688 of 1907 that the term "any interest therein" referred to an interest against which an assurance could be registered under the Registration of Deeds Ordinance "such as the interest of a tenant in common, a joint tenant..." See also *Straits Settlements Practice* (1937), BA Mallal & N Mallal.

[15] *Farrar* v *Beswick* (1836) 1 M & N 682; *Mayhew* v *Herrick* (1849) 7 CB 229; *The James W Elwell* [1921] P 351.

[16] *Mayhew* v *Herrick* (1849) 7 CB 229, 150 ER 92.

[17] Although the land was subsequently sold by the mortgagee and the dispute was actually concerned with the proceeds of sale, the issue turned on whether the judgment creditor of the husband could levy a writ of seizure and sale on the interest of the husband in the land prior to its being sold. In any event Tay JC clearly referred to a WSS against immovable property [1999] 3 SLR 229 at 238.

[18] (1926) 39 CLR 46.

facias issued against the wife, of all her interest in the land. *Re Young*,[19] *Re Macdonald and the Queen*,[20] *Power* v *Grace*[21] are Canadian cases which concern the issue whether the writ of *fieri facias* against the interest of a joint tenant worked a severance of the joint tenancy. There was no issue as to whether, in the first place, the interest of a joint tenant can be the subject of a writ of *fieri facias.* In the light of this background, from the perspective of convenience and simplicity of proceedings and on authority, I would submit that unless there are compelling reasons for singling the joint interest in land for special treatment in regard to modes of execution, we should not begin to do so.

In *Focal*, the land was owned by a husband and wife as joint tenants. The land was mortgaged to the OCBC Bank. The husband became a judgment debtor to Focal Finance who registered a writ of seizure and sale against the husband's interest in the land. Malayan Banking Berhad as the judgment creditor of both the husband and wife then registered a writ of seizure and sale against whole interest. Meanwhile the mortgagee exercised its power of sale and the issue related to the entitlement of the remainder of the proceeds of sale. The husband and wife had indicated that the remainder of the proceeds should be divided into two equal portions and half should go to Focal as the husband's judgment creditor and the other half should be paid to Malayan Banking. This was not agreed to by Malayan Banking who claimed to be entitled to the entire sum on the grounds that Focal could not register a writ of seizure and sale against the husband's interest in the land as a joint tenant. The High Court found for Malayan Banking and held that the writ of seizure and sale cannot be levied against interests held in joint tenancy.

Apart from the consequence implicit in the holding in *Focal*, generally in other respects there would appear to be no difference in nature between a joint tenancy of personalty or of real property. The distinction is rather with the two forms of co-ownership *viz* joint tenancy and a tenancy in common. In his judgment Tay JC was much concerned with the issue of whether the writ of seizure and sale effected a severance. He seemed to be of the view that there must be a distinct share in the ownership before a writ of seizure and sale can be registered against the interest.[22]

Whether a writ of seizure and sale against a joint tenant's interest effects a severance is an interesting point. The writ of seizure and sale gives the

[19] (1968) 70 DLR (2d) 594.
[20] (1969) 8 DLR (3d) 666.
[21] (1932) 2 DLR 793.
[22] [1999] 3 SLR 229 at 234-5.

judgment creditor no interest in the land seized.[23] It would be logical, therefore, to conclude that there is no severance.[24] But it does not follow from this that the interest, which a joint tenant does have in the land, cannot be seized. It is submitted that severance into undivided shares is not a prerequisite for the issuance of a writ of seizure and sale against a joint tenant's interest. He has an interest, which can be converted into an undivided share by alienation, and "for the purposes of alienation each is conceived as entitled to dispose of an aliquot share".[25] The judgment creditor however does have to state clearly that he is only taking the interest to which the joint tenant is entitled. Although a joint tenant does not have an undivided share, yet when the property is sold, the erstwhile joint tenants will be entitled to the proceeds equally unless they were holding in trust for themselves as tenants in common in undivided and unequal shares, perhaps proportionate to their contribution. Unlike the situation in tenancies in common where the co-owners may own in unequal shares, in the case of a joint tenancy when the issue of the precise entitlement has to be particularised, for example, when there has been an alienation by a joint tenant, it must be in equal shares, for prior to the alienation each was entitled to the whole.[26] If there are three joint tenants in law and in equity, and one of them alienates his interest to a fourth party, the alienee would get one third undivided share. In any event, the alternative of equitable execution and the appointment of a receiver, which was suggested by Tay JC, does not avoid the problem of having to particularise the exact quantum of interest that the judgment debtor is entitled to.[27] If a receiver were to be appointed by a judgment creditor by way of equitable execution, the receiver cannot receive more than what the joint tenant is entitled to.[28] Thus inevitably the nettle of the

[23] *Hall* v *Richards* (1961) 35 ALJR 95; *Re Palmer* (1871) 75 ALJR 80; *Bruce* v *Woods* (1951) VLR 49.

[24] In any event whether the joint tenancy was severed was not relevant in the instant case as there was no issue regarding the right of survivorship.

[25] *Wright* v *Gibson* (1949) 78 CLR 313 at 330 *per* Dixon J.

[26] *Ibid.*

[27] Tay JC said at p 234 "...the interest of the judgment debtor attachable under a WSS under O 47 r 4(1)(a) must surely be *a distinct and identifiable* (my italics) one. A joint tenant has no distinct and identifiable share in land for as long as the joint tenancy exists." By this he must mean a clear undivided share rather than one which is actually separately identifiable, otherwise even an interest of a tenant in common would not be seizable under a writ of seizure and sale.

[28] Section 73A Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed).

exact "share" of the joint tenant has to be grasped. As argued above this is not a problem.[29]

Tay JC also seemed to have been concerned with the prejudicial effect of such a writ on the other joint tenant who is not otherwise involved in the judgment debt.[30] If the writ of seizure and sale was allowed and if the judgment creditor did ask the Sheriff to sell the property, the Sheriff can only sell the judgment debtor's interest under the joint tenancy. As Tay JC himself noted Order 47 rule 5(g) permits the Sheriff to apply to the Court for directions and it also provides for notice to be given to all parties interested in the property. Thus there are provisions which enable the affected co-owners to monitor the situation and present their position. An interest of a joint tenant may not be as marketable as the sale of the entire interest. Therefore it may be more advantageous to the judgment creditor to persuade the joint tenants to agree to sell the entire interest. The judgment debt then can be satisfied out of the share of the judgment debtor in the proceeds of sale. Should the other joint tenant object to a sale of the entire interest, a possible alternative would be for the judgment creditor to persuade the judgment debtor to ask for a sale in lieu of partition. The other erstwhile joint tenant would then receive his share of the proceeds while the judgment creditor would the take the judgment debtor's share in satisfaction of the judgment debt. It should be noted that this practical problem is not peculiar to the interest of a joint tenant. It applies also to the sale of an undivided share of the tenant in common. The purchase of an undivided share of a tenancy in common is as attractive as a purchase of the interest of a joint tenant. In either case the purchaser becomes a tenant in common having unity in possession with the other tenants in common.

By being "forced" to sell it may be said that the "innocent" joint tenant is prejudiced, however, it is submitted that this problem would also be present where an undivided share of a tenant in common is taken in execution proceedings. The "unfairness" is inherent in the concept of co-ownership, whether it be in undivided shares or in the case of a joint tenancy of each owning the whole. Invariably where the co-owner wishes to deal with his own interest with a third party it is less marketable than if the whole interest

[29] See also *Wright* v *Gibson* (1949) 78 CLR 313 at 330-331 *per* Dixon J, "[i]f one joint tenant proved to be an alien the Crown, on office found, took only his share. Execution on a judgment for debt against one joint tenant bound his aliquot share and continued to do so in the hands of his survivor if the execution debtor afterwards died...For all purposes of alienation, each is seised of and has the power of alienation over that share only which is his aliquot part...joint tenants have the whole for the purpose of tenure and survivorship, while for the purpose of immediate alienation, each has only a particular part.... "

[30] At p 234.

is disposed of. Where as in the case of the writ of seizure and sale, the dealing involves the court through the sheriff, the court can ensure that the process does not prejudice the "innocent" party unduly. This is a balance between the ownership rights of the co-owners. If the interest of a joint owner cannot be taken in execution under a writ of seizure and sale, the joint tenant's ownership rights are restricted. Moreover this restriction impacts unfairly on the third party judgment creditor. As stated above the appointment of a receiver by way of equitable execution does not in itself entitle the receiver to sell the property.

The trend, in regard to modes of execution, in most Commonwealth jurisdictions is to have the same mode apply to all property regardless of the type of property. There is no reason, whether based on policy or on authorities,[31] why we should treat the joint tenancy in land differently.

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[31] In fact such local authority as can be found support the view that the writ of seizure and sale can issue against the interest of a joint tenant. See above and footnote 14.

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