

## A TRAP FOR THE UNWARY: ENFORCING WRITS OF SEIZURE AND SALE AGAINST JOINT TENANCIES

Joint tenancies are a common method of holding properties in Singapore, and yet, the issue in relation to enforcing writs of seizure and sale against a judgment debtor who owns a property on a joint tenancy with another is fraught with great legal and procedural uncertainty. This paper seeks to cut through the thicket of confusion by unpacking the various legal and procedural difficulties surrounding enforcing a judgment via a writ of seizure and sale against a judgment debtor who owns property as a joint tenant with another. Specifically, this article seeks to offer solutions to the practical difficulties of registering a writ of seizure and sale, effecting a sale in the face of a prior mortgagee's objection and the issue of priorities in relation to the surplus of the sale proceeds.

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### I. Introduction

1 A judgment creditor is entitled to reap the fruits of his or her successful litigation by enforcing the judgment against the debtor's properties. For money judgments, a judgment creditor may enforce the judgment by applying for a garnishee order, writ of seizure and sale ("WSS") or filing for the debtor's bankruptcy. If a debtor owns real estate, then the obvious mode of enforcement is to obtain a WSS which allows the Sheriff to seize the property in execution of the judgment. Once seized, the property will be sold at a later stage to satisfy the costs of execution and judgment debt. However, various legal and practical difficulties may

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arise in relation to enforcing a WSS against the judgment debtor's real estate. First, the property may not be owned solely by the debtor but rather it is owned as a joint tenancy with another. In Singapore, there are conflicting authorities on whether the debtor's interest in the joint tenancy is exigible to a WSS. Second, the property may be subject to a prior registered mortgage. If there is a prior mortgage, then this poses two complications in relation to the enforcement of the judgment debt. As a matter of practicality, the mortgaged sum may be quite substantial and there may not be any equity left in the property after paying off the mortgagee and costs of sale. Hence, it may not be worthwhile for the judgment creditor to pursue a WSS in this situation. Third, even if there is sufficient equity in the property, the mortgagee may not consent to the sale of the property especially if the judgment debtor is a valued client and servicing the mortgage debt every month.<sup>2</sup> In this situation, the judgment creditor is put in an extremely frustrating situation of seeking to effect a sale of the property without the mortgagee's consent. In this article, the author reviews and unpacks the legal controversy behind the enforcement of a WSS against a debtor who owns jointly tenanted property with another.

2 In light of these formidable difficulties, one might ask whether it is even worth applying for a WSS? Would a bankruptcy application against the debtor be a more effective mode of enforcement? Under the Insolvency, Restructuring and Dissolution Act 2018<sup>3</sup> ("IRDA"), a method a judgment creditor may enforce a judgment debt is by taking out a winding up application (if the judgment debtor is a company),<sup>4</sup> or by making a creditor's bankruptcy application (if the judgment debtor is an individual).<sup>5</sup> A bankruptcy application would overcome the difficulty with the issue of whether a debtor's interest under a joint tenancy is exigible to a WSS. It is settled law that when a joint tenant is made bankrupt, his or her property which includes property owned as a joint tenant vests in the Official Assignee.<sup>6</sup> Hence, the joint tenancy would be severed when a joint tenant is adjudicated a bankrupt. However, there is a major drawback to enforcing a judgment debt via bankruptcy as compared to a WSS. In the bankruptcy process, should the property be insufficient to meet all debts, the judgment creditors and other unsecured creditors share the debtor's assets *pari passu* amongst themselves (assuming that the secured creditors

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2 See para 80(1)(c) of the Supreme Court Practice Directions which provides that a judgment creditor who seeks to effect the sale of mortgaged immovable property that has been seized under a WSS must state that the mortgagee had consented to that sale.

3 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018).

4 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 124.

5 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ss 307–311.

6 *Re Dennis* [1995] 1 WLR 367; *Jones v Jones* [1996] 3 WLR 703.

have already been fully paid and the debtor still has surplus property for the unsecured creditors).<sup>7</sup> The danger for the judgment creditor is that in filing for bankruptcy, this may cause other unsecured creditors to surface and file a proof of debt with the Official Assignee. Due to the *pari passu* principle, the judgment debt may not be fully paid. In contrast, if a judgment creditor successfully enforces a judgment debt via a WSS and the property is sold, that judgment creditor is entitled to the surplus of the sale proceeds after paying off the costs of the sale and mortgage over the property.<sup>8</sup> Thus, enforcing a judgment through the bankruptcy process may actually yield a lesser sum as compared to a WSS. It is for this reason that the WSS remains an important and effective mode of enforcing a judgment.

3 Unfortunately, the simple question of whether a creditor may enforce a judgment by way of a WSS against a judgment debtor who owns a jointly tenanted property with another has been fraught with uncertainty for more than 20 years. In fact, even the threshold issue of whether a WSS may attach to jointly tenanted property has been subject to controversy, with numerous conflicting cases at the High Court level.

4 Besides this controversy, the procedure in relation to executing a WSS is mystifying to say the least. The principal statute governing land registration, the Land Titles Act<sup>9</sup> (“LTA”), and Rules of Court<sup>10</sup> (“ROC”) are not harmoniously drafted and use different terms resulting in the law in this area to be bewildering. It is not an exaggeration to say that the current state of law and procedure is nothing short of a disgrace and may be likened to a treacherous maze for unwary judgment creditors and their advisors.

5 In terms of the law and procedure of executing a WSS, the following are issues to be resolved:

- (a) What is the correct form to register under the LTA and ROC?
- (b) How long does registration under the LTA last?
- (c) How does a judgment debtor extend the registration?
- (d) How does a debtor compel a sale if there is a pre-existing mortgagee who does not consent to the sale?

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7 See s 203 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) for distribution rules pertaining to companies, and s 327 for rules pertaining to bankrupt individuals.

8 See paras 61–65 below.

9 Cap 157, 2004 Rev Ed.

10 Cap 322, R 5, 2014 Rev Ed.

(e) Whether a sale pursuant to a WSS is merely a sale of the judgment debtor's *aliquot* share in the jointly tenanted property or the entire property?

(f) How are priorities in relation to the surplus sale proceeds determined?

6 A failure to comply with the proper procedure in connection with the registration of the WSS and effect a sale before the registration lapses may lead to the dire consequence of loss of priority. This article seeks to offer solutions to the theoretical and practical difficulties of registering a WSS, compelling a sale in the face of a mortgagee's objection and the issue of priorities in relation to the surplus of the sale proceeds.

## II. Is the interest of a joint tenant exigible to a Writ of Seizure and Sale?

### A. What is a Writ of Seizure and Sale?

7 A WSS is the principal way a judgment creditor may enforce a money judgment in Singapore against a judgment debtor's property.<sup>11</sup> Section 13 of the Supreme Court of Judicature Act ("SCJA") provides:<sup>12</sup>

A judgment for the payment of money to any person ... may be enforced by a writ, to be called a *writ of seizure and sale*, under which all property, movable or *immovable*, of whatever description, of a judgment debtor may be seized ... [emphasis added]

8 Thus, this section provides that amongst other things, a WSS may be used against immovable property.<sup>13</sup> In other words, the WSS allows for the Sheriff to seize a judgment debtor's interest in land. If the judgment debt is not paid, the interest in land may then be sold and the proceeds used to pay the judgment creditor.<sup>14</sup> The governing provision for selling land pursuant to a WSS is s 135(1) of the LTA, which reads:<sup>15</sup>

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11 See O 46 and O 47 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). For a history of WSS see the comprehensive analysis of Pang Khang Chau JC in *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [22]–[33]. See also *Singapore Civil Procedure 2020* (Chua Lee Ming & Paul Quan eds) (Thomson Reuters, 10th Ed, 2019) at pp 880–889 for a commentary on execution by WSS after a judgment has been obtained.

12 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 13.

13 See n 5 above and O 47 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

14 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 47 rr 4 and 5.

15 Land Titles Act (Cap 157, 2004 Rev Ed) s 135(1).

The interest in registered land which may be sold in execution under a writ shall be the interest which belongs to the judgment debtor at the date of the registration of the writ.

9 If the type of co-ownership concerned is a tenancy in common, little difficulty arises given that tenants in common have clearly demarcated interest in the property. For example, if A and B are tenants in common each owning 50% interest in land, then A's judgment creditors may seize A's 50% interest in land. In fact, the land registry would spell out the exact interests of each tenant in common in the property. Therefore, a WSS would attach over the interest of the debtor in a tenancy in common which is expressed in the land register

10 The difficulty arises when the interest of the debtor is in the form of a joint tenancy owned with another. The controversy surrounding recent conflicting Singapore case law tackled this vexed question: What is the interest, if any, of a joint tenant which is subject to a WSS? In a joint tenancy, it is often said that co-owners together own the whole interest rather than a part.<sup>16</sup> Joint tenants have rights between themselves; however, against the world, they are viewed as one.<sup>17</sup> According to Bracton, a joint tenancy is expressed in the classic Latin maxim *totum tenet et nihil tenet* ("each holds everything but yet holds nothing").<sup>18</sup> *The First Part of the Institutes of the Laws of England; or, A Commentary upon Littleton, not the Name of a Lawyer Only, but of the Law Itself* ("Coke on Littleton") highlighted that the main difference between a joint tenant and a tenant in common is that "joint-tenants have the lands by one joint title and in one right, and tenants in common by several titles, or by one title and by several rights".<sup>19</sup> This expression of a joint tenancy has been recognised in Singapore. Chao Hick Tin JA in *Goh Teh Lee v Lim Li Pheng Maria* described the joint tenancy as follows:<sup>20</sup>

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16 *Goh Teh Lee v Lim Li Pheng Maria* [2010] 3 SLR 364 at [13]; see also Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 4th Ed, 2019) at p 206.

17 *Goh Teh Lee v Lim Li Pheng Maria* [2010] 3 SLR 364 at [13]; see also Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 4th Ed, 2019) at p 206.

18 This was noted in Barry C Crown, "Partial Alienation by One Co-Owner of Land" [2000] Sing JLS 92 at 92, citing Henry de Bracton in *De Legibus et Consuetudinibus Angliae* vol 4 (George E Woodbine ed) (Oxford University Press, 1932) at p 336. See also Barry C Crown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 LQR 477 at 477.

19 Edward Coke, *The First Part of the Institutes of the Laws of England; or, A Commentary upon Littleton, not the Name of a Lawyer Only, but of the Law Itself* (J & W T Clarke, 19th Ed, 1832) at para 189a.

20 *Goh Teh Lee v Lim Li Pheng Maria* [2010] 3 SLR 364 at [11].

In a joint-tenancy, each joint tenant holds the whole jointly and nothing severally: *quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se* [each holds the entirety and yet holds nothing; that is, the entirety in common, and nothing separately by itself]. Joint tenants have rights *inter se*, but against the world they are seen as one single owner. Thus, no one joint tenant holds any specific or distinct share of the co-owned interest himself.

11 Given the idea that each joint tenant holds the whole jointly and nothing severally, is a joint tenant's interest in the property an "interest which belongs to the judgment debtor" for the purposes of s 135(1) of the LTA?

12 There have been several conflicting decisions from the Singapore High Court about the issue of whether a judgment creditor can apply for a WSS against jointly tenanted property. The table below shows a summary of the conflicting decisions.

Property Held in Joint Tenancy is Subject to Writ of Seizure and Sale	Property Held in Joint Tenancy is not Subject to Writ of Seizure and Sale
<ol style="list-style-type: none"> <li>1. <i>Chan Shwe Ching v Leong Lai Yee</i> [2015] 5 SLR 295</li> <li>2. <i>Peter Low LLC v Higgins, Danial Patrick</i> [2018] 4 SLR 1003</li> <li>3. <i>Ong Boon Hwee v Cheah Ng Soo</i> [2019] 4 SLR 1392</li> <li>4. <i>Chain Land Elevator Corp v FB Industries Pte Ltd</i> [2020] 5 SLR 1336</li> </ol>	<ol style="list-style-type: none"> <li>1. <i>Malayan Banking Bhd v Focal Finance Ltd</i> [1998] 3 SLR(R) 1008</li> <li>2. <i>Chan Lung Kien v Chan Shwe Ching</i> [2018] 4 SLR 208</li> </ol>

13 Even though two cases have taken the view that a creditor may not apply for a WSS against jointly tenanted property,<sup>21</sup> recent jurisprudence has come to the opposite conclusion.<sup>22</sup> At present, this issue has not been conclusively resolved by the Singapore Court of Appeal. We now turn to

21 See *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 and *Chan Lung Kien v Chan Shwe Ching* [2018] 4 SLR 208.

22 See *Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295; *Chan Yat Chun v Sng Jin Chye* [2016] SGHCR 4; *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003; *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 and *Chain Land Elevator Corp v FB Industries Pte Ltd* [2020] 5 SLR 1336. The Singapore Academy of Law's Law Reform Committee has also considered this issue, recommending for the Land Titles Act and the Rules of Court to be amended to clarify that a judgement debtor's interest may be subject to a Writ of Seizure and Sale. See Law Reform Committee, Singapore Academy of Law, *Report of Civil Remedies* (December 2020) at para 1.76(1) (Chairman: Kannan Ramesh J).

the debate canvassed in these cases, namely whether an interest of a joint tenant is exigible to a WSS.

**B. *Is a joint tenant's share in a property exigible to a Writ of Seizure and Sale?***<sup>23</sup>

14 The first modern case that dealt with this issue was *Malayan Banking Bhd v Focal Finance Ltd*<sup>24</sup> (“*Focal Finance*”). This case involved a couple who owned a property as joint tenants. The property was mortgaged to OCBC. Upon the couple’s default in mortgage payments, OCBC exercised its power of sale.<sup>25</sup> After the property was sold and mortgage sum repaid, there was a surplus of proceeds. Two judgment creditors, Focal Finance (the creditor of only the husband) and Malayan Banking Bhd (the creditor of the couple) claimed for the surplus proceeds.<sup>26</sup> Focal Finance registered its WSS in November 1996 whereas Malayan Banking Bhd had registered its WSS in December 1996.

15 Tay Yong Kwang JC held that only Malayan Banking Bhd, being the creditor of the couple, was entitled to the surplus of sale proceeds. According to Tay JC, a WSS against immovable property cannot be used to enforce a judgment against a debtor who is a joint tenant of that immovable property for the following three reasons.<sup>27</sup> First, according to Tay JC, a WSS must attach to a distinct and identifiable interest.<sup>28</sup> However, the learned judge reasoned that a joint tenant does not have a distinct and identifiable share in land (as required by O 47 r 4(1)(a) of the ROC) unless the joint tenancy is severed.<sup>29</sup> Thus, to Tay JC, “[t]o seize one joint tenant’s interest is also to seize also the interest of his co-owners when they are not subject to the judgment which is being enforced”.<sup>30</sup>

16 Second, Tay JC thought that the court should not hold a WSS, when registered, severs a joint tenancy because it would create a “fine mess”.<sup>31</sup> This is because the learned judge said that the position of the co-owners *vis-à-vis* each other would be uncertain should the WSS

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23 This issue was recently analysed in Alvin W L See, “Reconciling Joint Tenancies with Writs of Seizure and Sale” (2021) 85 Conv 45.

24 [1998] 3 SLR(R) 1008.

25 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [2].

26 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [4].

27 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [24].

28 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [15].

29 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [15].

30 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [15]. Also cited in *Chan Lung Kien v Chan Shwe Ching* [2018] 4 SLR 208 at [29].

31 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [18].



subsequently be withdrawn, or should its registration lapse.<sup>32</sup> Another reason given was that the registration of a WSS (if that was even possible) does not result in severance of the joint tenancy until the Sheriff transfers the judgment debtor's interest to another person.<sup>33</sup> Finally, Tay JC noted that his holding was consistent with the position of Canadian case law such as *Power v Grace*.<sup>34</sup>

17 Writing in a case note, Professor Tan Sook Yee doubted the reasoning of *Focal Finance*, characterising this judgment as “disturbing”. Professor Tan observed as follows:<sup>35</sup>

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. 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's 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?

18 Despite Professor Tan's trenchant criticism, *Focal Finance* remained unchallenged for over 15 years in Singapore. A possible reason is because judgment creditors did not wish to spend the legal cost of bringing the matter to the Court of Appeal when their chances of recovery are uncertain. It was only in 2015 when the *Focal Finance* decision was doubted by Edmund Leow JC in *Chan Shwe Ching v Leong Lai Yee*<sup>36</sup> (“*Chan Shwe Ching*”). Leow JC did not think that an interest in land had to be “distinct and identifiable” for a WSS to attach.<sup>37</sup> In this regard, Leow JC noted that there was a “notable absence of any citation of supporting authority for this proposition in [*Focal Finance*]”.<sup>38</sup> Citing Professor Tan, Leow JC pointed out that since every joint tenant was entitled to dispose of an *aliquot* share by alienation, it follows that a joint tenant had an interest in land which was identifiable and capable of being determined.<sup>39</sup> Thus, Leow JC held that a WSS could be issued against a joint tenant's interest in land.

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32 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [18].

33 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [18].

34 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [20], citing the Canadian case of *Power v Grace* [1932] 1 DLR 801.

35 Tan Sook Yee, “Execution Against Co-Owned Property: *Malayan Banking Bhd v Focal Finance Ltd*” [2000] Sing JLS 52 at 53.

36 *Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295.

37 *Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295 at [11].

38 *Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295 at [11].

39 *Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295 at [12].



19 However, the tide quickly turned in favour of the *Focal Finance* position in two subsequent decisions. First, the High Court case of *Chan Lung Kien v Chan Shwe Ching*<sup>40</sup> (“*Chan Lung Kien*”) which involved competing judgment creditors who had obtained summary judgment against a debtor in a lawsuit. The debtor held an interest in a property with her husband in joint names. Both judgment creditors used the WSS process to satisfy their respective judgment debts. Adopting the reasoning in *Focal Finance* (and rejecting Leow JC’s reasoning in *Chan Shwe Ching*), Chua Lee Ming J held that the WSSes obtained by both the judgment creditors did not attach to the debtor’s interest as a joint tenant in the property.<sup>41</sup> It should be noted that *Chan Lung Kien* is a related case to *Chan Shwe Ching*. Chua J set aside the earlier WSS obtained in *Chan Shwe Ching* and therefore undermined the weight of authority of *Chan Shwe Ching*.

20 Next, in *One Investment and Consultancy Ltd v Cham Poh Meng*, Kannan Ramesh J appeared to have some sympathy for the *Focal Finance* position by way of *obiter dicta* saying:<sup>42</sup>

The approach in *Chan Shwe Ching* glosses over the key point made in *Malayan Banking* which was that the interests of the parties in a joint tenancy were not ‘distinct and identifiable’, and as such were not capable of being seized. It also did not consider the suitability of the modalities of the WSS mechanism to an assessment of interests in a jointly owned asset. I say no more as the issue before me concerned the attachment of a joint account by a garnishee order, and not the attachment of jointly owned assets under a WSS.

21 Twenty years later after it was decided the reasoning in *Focal Finance* was comprehensively refuted in *Peter Low LLC v Higgins, Danial Patrick*<sup>43</sup> (“*Peter Low*”). The defendant co-owned a property with his wife as joint tenants and the plaintiff was a law firm that represented the defendant in two lawsuits. Subsequently, the plaintiff ceased to act as the defendant’s solicitors and obtained judgment in default of appearance against the defendant for unpaid legal fees. The plaintiff then applied for an order attaching the defendant’s interest in the property to satisfy the judgment. However, this application was dismissed by the Assistant Registrar because he considered himself bound by the *Focal Finance*

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40 *Chan Lung Kien v Chan Shwe Ching* [2018] 4 SLR 208 at [29]–[33]. This case was appealed but the point on whether a joint tenancy was exigible to a WSS was, unfortunately, *not* one of the grounds of appeal. Hence, the Court of Appeal did not have the opportunity to weigh in on this issue. The main issue on appeal was whether the actions of the other joint tenant prior to the second WSS had in fact severed the joint tenancy.

41 *Chan Lung Kien v Chan Shwe Ching* [2018] 4 SLR 208 at [61].

42 *One Investment and Consultancy Ltd v Cham Poh Meng* [2016] 5 SLR 923 at [5].

43 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003.

decision (which was followed by the *Chan Lung Kien* case). According to the assistant registrar, the cases of *Chan Shwe Ching* and *Chan Lung Kien* involved the same WSS. Since *Chan Lung Kien* set aside the order granted in *Chan Shwe Ching*, the former had precedential force.<sup>44</sup> The plaintiff appealed, arguing that *Focal Finance* should not be followed.

22 Pang Khang Chau JC held that a joint tenant's interest was sufficiently distinct and identifiable to be seized by a WSS for the purposes of O 47 r 4(1)(a) of the ROC.<sup>45</sup> Pang JC gave four reasons comprising historical, doctrinal and policy explanations for this. First, the historical jurisprudence did not support the *Focal Finance* position. In an impressive historical analysis, Pang JC surveyed the genesis behind the WSS and found that prior to that decision, English law had always allowed for the execution of money judgments against the interest of a joint tenant in land via the use of the writ of *eligit*.<sup>46</sup> This position is illustrated in *Lord Abergavenny's case*<sup>47</sup> and Sir Edward Coke's publication, *Coke on Littleton*.<sup>48</sup>

23 Thus, when the British government acquired sovereignty over Singapore in 1824, this was likely the position received by Singapore pursuant to the Second Charter of Justice.<sup>49</sup> Eventually, even though the writ of *eligit* had been replaced by newer writs pursuant to the Civil Procedure Ordinance 1878, the Civil Procedure Code 1907, the Courts Ordinance 1934, the Courts Ordinance 1955 and finally, the Supreme Court of Judicature Act 1969, all of those statutes supported the view that the interest of a joint tenant in land was exigible to execution.<sup>50</sup> John Baalman, the draftsman of the Land Titles Ordinance 1956<sup>51</sup> was also of the same view. In his commentary on s 106(1) of the Land Titles Ordinance, he wrote:<sup>52</sup>

It has been held in Australia that the interest of a joint tenant can be taken under a writ [citing *Registrar-General v Wood* (1926) 39 CLR 46]. So also that of a tenant in common [citing *In re Guss* (1927) 28 SR (NSW) 226]. There is nothing in this Ordinance which makes those decisions inapplicable.

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44 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [2]

45 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [88] and [141].

46 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [15]–[20].

47 *Lord Abergavenny's case* (1607) 6 Co Rep 78b; 77 ER 373.

48 J & W T Clarke, 19th Ed, 1832.

49 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [21].

50 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [22]–[33].

51 Land Titles Ordinance 1956 (Ord 21 of 1956).

52 John Baalman, *The Singapore Torrens System – Being a Commentary on the Land Titles Ordinance, 1956 of the State of Singapore* (The Government of the State of Singapore, 1961) at p 218. Cited in *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [35].

24 Second, the position in all Commonwealth jurisdictions allowed for a joint tenant's interest in land to be taken in execution of money judgments.<sup>53</sup> Pang JC noted that even though the Canadian decision of *Power v Grace* was cited in *Focal Finance* as supporting the proposition that a joint tenancy may not be taken in execution of a judgment, it was misinterpreted.<sup>54</sup> On closer examination of *Power v Grace*, Pang JC found that that the case decided that under Ontario law, severance occurred when a sheriff advertises the land for sale.<sup>55</sup> Thus, Pang JC reasoned the true proposition to be derived from *Power v Grace* was that the relevant statutory context determines when severance actually occurs. In other words, *Power v Grace* did not stand for the proposition that a joint tenant's interest may not be taken in execution of a judgment. Besides Canada,<sup>56</sup> the Commonwealth jurisdictions of England,<sup>57</sup> Australia,<sup>58</sup> Hong Kong,<sup>59</sup> Ireland,<sup>60</sup> New Zealand,<sup>61</sup> Bahamas,<sup>62</sup> Barbados<sup>63</sup> and Jamaica<sup>64</sup> also took the view that a joint tenant's interest in land may be subject to execution. Pang JC held that the position adopted by the Commonwealth courts should be followed in Singapore. This was because it was generally desirable for courts to harmonise the development of common law around the world, especially on issues where other jurisdictions were already aligned upon. Moreover, Pang JC did not see any local circumstances for this not to be the position in Singapore as well.<sup>65</sup>

25 Third, Pang JC was of the view that joint tenants did have a notional share in the property.<sup>66</sup> This is because a joint tenant may sever the joint tenancy without the prior consent of the other joint tenants<sup>67</sup> or

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53 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [37]–[56].

54 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [92].

55 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [92]–[94].

56 See for example *Power v Grace* [1932] 2 DLR 793 and *Maroukis v Maroukis* [1984] 2 SCR 137.

57 In England, the position has been reflected by *Lord Abergavenny's case* and Edward Coke, *The First Part of the Institutes of the Laws of England; or, A Commentary upon Littleton, not the Name of a Lawyer Only, but of the Law Itself* (J & W T Clarke, 19th Ed, 1832) at p 184b.

58 See *Wright v Gibbons* (1949) 78 CLR 313 at 324 and *Boyd v Thorn* [2017] NSWCA 210 at [78].

59 See *Yu Pei-Tseng v Mong Wing Ho Alexander* [1978] HKDCLR 15 at 19.

60 See the cases of *Containercare (Ireland) Ltd v Geoffrey Wycherley* [1982] IR 143 and *Judge Alan Mahon v Noel Lawlor* [2011] IR 311.

61 See *Gateshead Investments Ltd v Christopher Michael Harvey* [2014] NZCA 361.

62 See *James F Walker v Susan Lunborg* [2008] UKPC 17.

63 See the cases of *Royal Bank of Canada v Jordan*; *Barclays Bank plc v Jordan* (1994) 48 WIR 61.

64 See *First Global Bank Ltd v Rohan Rose* [2016] JMCC COMM 19.

65 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [128].

66 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [88].

67 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [88].

alienate his or her share to a third party. By doing so, this severs the joint tenancy and crystallises the joint tenant's interest into an *aliquot* share which can be sold independent of the co-tenant's interest.<sup>68</sup> Even though one perspective of the joint tenancy is that a joint tenant holds the whole with other joint tenants but nothing by himself or herself, there is also another equally valid aspect that a joint tenant has an ownership interest capable of immediate alienation even without the consent of the other joint tenants which must be recognised as well.<sup>69</sup> Once this is recognised, Pang JC thought that it no longer appeared "incompatible with the nature of the joint tenancy to hold that a joint tenant's interest in land is exigible to a WSS".<sup>70</sup> Finally, seizure of a joint tenant's interest by WSS does not necessarily result in a seizure of the other joint tenant's interest because the latter remained free to deal with his or her own share independently of the debtor-joint tenant.<sup>71</sup>

26 *Peter Low* seems to have turned the tide against *Focal Finance*. Two subsequent decisions, namely *Ong Boon Hwee v Cheah Ng Soo* ("*Ong Boon Hwee*") and *Chain Land Elevator Corp v FB Industries Pte Ltd* ("*Chain Elevator Corp*"), have held that a WSS may attach to a joint tenant's share in a property. Notably, both cases also recognised the importance of emphasizing the second aspect of the joint tenancy articulated in *Peter Low* (ie, that a joint tenant has an ownership interest capable of immediate alienation even without the consent of the other joint tenants). *Ong Boon Hwee* concerned judgment creditors who sought to enforce their judgment by way of a WSS against a jointly tenanted property owned by the defendant and her husband. The husband applied to set aside the WSS. Chan Seng Onn J agreed with Pang JC's finding in *Peter Low* that prior to *Focal Finance*, the proposition that a joint tenant's interest in land could be taken under a writ had been accepted by all the Commonwealth authorities<sup>72</sup> and even by a Straits Settlement authority.<sup>73</sup> Moreover, Chan J noted that the intention of the drafter of the Land Titles Ordinance was for a joint tenant's interest to be exigible under a WSS.<sup>74</sup>

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68 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [71]. Also noted in Barry C Crown, *Severance of Joint Tenancy of Land by Partial Alienation* (2001) 117 LQR 477 at 478 (cited in *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [72]). See also *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [74]–[75] which cited the Australian case of *Wright v Gibbons* (1949) 78 CLR 313 and how Dixon J talked about this second aspect of the joint tenancy.

69 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [77].

70 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [77(a)].

71 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [77(b)].

72 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [36].

73 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [35], citing the local Straits Settlements case of *Muthoo Karuppan Chitty v Onan* Suit No 688 of 1907 (28 August 1912).

74 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [39]–[40].

Finally, with respect to the two conflicting aspects of joint tenancy noted in *Peter Low*,<sup>75</sup> Chan J was of the opinion that the second aspect should be recognised, and thus a WSS may attach to a joint tenant's interest in land independent of severance.<sup>76</sup> The case of *Chain Land Elevator Corp* involved a similar factual pattern. There, Tan Siong Thye J also accepted Pang JC's decision in *Peter Low*. First, Tan J agreed with the analysis in both *Peter Low* and *Ong Boon Hwee* that there was no requirement that a joint tenant's interest in land had to be "distinct and identifiable interest" for a WSS to attach.<sup>77</sup> Next, Tan J similarly mentioned that the second aspect of joint tenancies noted in *Peter Low* should be emphasised. Finally, Tan J believed the comparative prejudice that would result to the creditor attempting to execute a WSS outweighed that of the non-debtor joint tenant in allowing for a WSS to attach to a jointly tenanted property.

27 The surrounding uncertainty in the law has also caused the Singapore Academy of Law's Law Reform Committee to consider this matter in the recent *Report of Civil Remedies*.<sup>78</sup> After reviewing the jurisprudence in this area, the Law Reform Committee recommended that the current regulations on WSS to be amended to "clarify that a judgment debtor's interest as a joint tenant in immovable property is exigible to execution".<sup>79</sup> This is because severance as a concept is already allowed under the LTA, given that bankruptcy and sale both operate to sever a joint tenancy. Thus, it "would not be a stretch to allow a court to order statutory severance in instances where a judgment debtor is also a joint owner of [a] property".<sup>80</sup>

**C. *If a Writ of Seizure and Sale may attach to a joint tenancy, when is the joint tenancy severed?***

28 If a WSS may attach to a joint tenancy, a related issue that is often debated is when exactly does severance take place. There are at least three

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75 See above at para 22 and *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [77].

76 *Ong Boon Hwee v Cheah Ng Soo* [2019] 4 SLR 1392 at [47]–[50].

77 *Chain Land Elevator Corp v FB Industries Pte Ltd* [2020] 5 SLR 1336 at [40].

78 Law Reform Committee, Singapore Academy of Law, *Report of Civil Remedies* (December 2020) (Chairman: Kannan Ramesh J).

79 Law Reform Committee, Singapore Academy of Law, *Report of Civil Remedies* (December 2020) at para 1.48 (Chairman: Kannan Ramesh J). The Law Reform Committee also proposed that the caveat system be amended to include judgment creditors with a registered WSS order. With respect, this proposal is flawed because a judgment creditor is not a secured creditor. The proposal to allow a judgment creditor to be able to lodge a caveat would complicate matters because it might potentially allow a judgment creditor to be ranked higher than a secured creditor.

80 Law Reform Committee, Singapore Academy of Law, *Report of Civil Remedies* (December 2020) at para 1.49 (Chairman: Kannan Ramesh J).

distinct views on this thorny issue. First, Tay JC in *Focal Finance* thought that a joint tenant's interest in land cannot be subject to a WSS,<sup>81</sup> if the joint tenancy is not severed. In fact, this appears to be one of the principal reasons why the learned judge held that a WSS may not attach to a joint tenancy. Severance in this context, would create a "fine mess". According to Tay JC, the following consequences would follow:<sup>82</sup>

Bearing in mind that any of the above contingencies could happen, it would be creating a fine mess to hold that a WSS when registered severs a joint tenancy. What would be the position of the co-owners in relation to each other should the WSS subsequently be withdrawn or its registration lapse? Do they revert to being joint tenants again? If the WSS is renewed or a second or subsequent one issued, do the rights of the co-owners change once again?

29 Second, severance occurs at the time the WSS is registered albeit in the form of a temporary severance. Pang JC in *Peter Low* said severance occurred when the judgment debtor's interest in the land is seized (*ie*, when the WSS is registered).<sup>83</sup> As alluded to above, Pang JC believed the true proposition to be derived from the Canadian case of *Power v Grace* was that consideration of the relevant statutory context was necessary to identify when severance occurs. Pang JC held that the statutory framework in Singapore supported the conclusion that severance occurs at the time the WSS is registered. This was because O 47 r 4(1)(a) of the ROC provided that seizure shall be effected by registration of the WSS, and that upon registration, the interest of the judgment debtor in the land "shall be deemed to be seized by the Sheriff".<sup>84</sup> This deeming provision appears to support the conclusion that severance occurs when the WSS is registered. In response to Tay JC's "fine mess" problem, Pang JC noted that there was some attraction with adopting the doctrine of temporary severance.<sup>85</sup> This means that if the WSS is registered the joint tenancy is temporarily severed. However, if for some reason the registration of the WSS lapses, then the joint tenancy is deemed to be intact. An advantage of the temporary severance reasoning is that to allow for the interests of the co-owner to be restored into a joint tenancy upon the lapse or withdrawal of a WSS better accords with the co-owner's original intention

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81 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [24].

82 *Malayan Banking Bhd v Focal Finance Ltd* [1998] 3 SLR(R) 1008 at [18].

83 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [97]. This has been subsequently approved in *Chain Land Elevator Corp v FB Industries Pte Ltd* [2020] 5 SLR 1336 at [79]. This is also the view of the Singapore Academy of Law's Law Reform Committee: see Law Reform Committee, Singapore Academy of Law, *Report of Civil Remedies* (December 2020) at para 1.53 (Chairman: Kannan Ramesh J).

84 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [95].

85 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [103]–[104]. This solution stemmed from a reading of the Australian case of *Wright v Gibbons* (1949) 78 CLR 313 at 328–329.



for holding the land on joint tenancy.<sup>86</sup> Quite apart from the doctrinal reasons identified by Pang JC, there is also a compelling policy reason for adopting the temporary severance solution. If there was no severance, the other joint tenant would be entitled to the property by way of the right of survivorship upon the death of the debtor-joint tenant. This may have the effect of encouraging debtors to end their lives to benefit their next of kin. This macabre scenario is illustrated by the Ontario Court of Appeal case of *Maimets v Williams*,<sup>87</sup> which concerned a property which was jointly owned by a husband and wife. The husband promised to grant a mortgage on the property to Williams, but that mortgage was never registered. Later, Williams obtained a judgment against the husband. The husband committed suicide on that very day. As a result, the wife was entitled to the whole property free of the debt.

30 Finally, there is the view that severance only occurs when the Sheriff sells the property. This appears to be Leow JC's position in the case of *Chan Shwe Ching*.<sup>88</sup> Alvin See justifies this stance by saying that the Sheriff is empowered by statute to execute the sale and is doing so on behalf of the judgment debtor. As the joint tenant has the power to alienate an *aliquot* share, the sale by the Sheriff thus has the same effect.<sup>89</sup>

31 There are some practical ramifications in relation to the question whether a WSS severs a joint tenancy, and if so, when. One scenario is if a judgment debtor dies prior to the property being sold by the Sheriff. As correctly noted by the cases of *Peter Low* and *Chain Land Elevator Corp*, the statutory framework in Singapore suggests that the second view should be adopted (*ie*, that severance occurs when the WSS is registered). Regarding the "fine mess" concern in *Focal Finance*, a potential solution is the adoption of the idea of temporary severance. The present author is of the view that the idea of severance of a joint tenancy only occurring upon sale by the Sheriff should be rejected. According to Alvin See, the advantage of this position is that it "does not rely on any new fiction", but instead "locates the issue squarely within the recognised category of severance by alienation".<sup>90</sup> However, this analysis fails to consider the existing statutory framework in Singapore especially the provisions of the LTA and ROC. Order 47 r 4(1)(a) of the ROC provides that seizure shall be by registration of the WSS, and that upon registration, the interest of the judgment debtor in the land "shall be deemed to be seized

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86 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [104].

87 *Maimets v Williams* (1997) 101 OAC 151 (CA).

88 *Chan Shwe Ching v Leong Lai Yee* [2015] 5 SLR 295 at [13] and [20].

89 Alvin W L See, "Reconciling Joint Tenancies with Writs of Seizure and Sale" (2021) 85 Conv 45 at 51–52.

90 Alvin W L See, "Reconciling Joint Tenancies with Writs of Seizure and Sale" (2021) 85 Conv 45 at 52.



by the Sheriff”. It is quite strange to say that the Sheriff has seized the interest of the judgment debtor and yet the joint tenancy has not been severed. Further, See’s position does not consider s 293(4)(c) of the IRDA which provides:

... an execution against land or any interest in land 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 debtor in the land described in the writ of seizure and sale.

32 It is difficult to reconcile the position that severance only occurs at the time of Sherriff’s sale with this section in the IRDA which provides that the execution against any interest in land is completed when the WSS is registered. It is submitted that the LTA, ROC and IRDA should be interpreted harmoniously. Otherwise, we are faced with a situation where if the debtor becomes bankrupt, the execution is considered to be completed under the IRDA and yet the LTA and ROC regard the joint tenancy as being intact. Hence, the correct position based on a harmonious interpretation of the statutory framework in Singapore is that severance occurs when the WSS is registered under the LTA.

### III. The mystifying law and procedure of a Writ of Seizure and Sale

33 Even beyond the threshold issue of whether a joint tenancy is exigible to a WSS, there are mystifying questions surrounding the law and procedure of a WSS.

34 The procedural difficulties associated with the WSS are illustrated by the decision of the Court of Appeal in *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC*<sup>91</sup> (“*Singapore Air Charter*”). This case involved a dispute between two judgment creditors over the surplus of sale proceeds over a property. Both judgment creditors registered their respective WSSes against the property. The table below sets out the relevant timeline of the relevant steps taken by the parties to attach the disputed property in satisfaction of their judgment debts:<sup>92</sup>

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91 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [30].

92 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [10]–[12].

Date	Party	Type of instrument registered	Comments
19 April 2017	Singapore Air Charter Pte Ltd ("SAC")	Form 96 Order	This instrument was successfully registered under instrument number AOC IE/793086A.
19 April 2017	SAC	Form 83 Writ	<i>Nil.</i>
19 September 2017	SAC	Extension order	SAC's intention here was to extend its Form 96 Order. Registrar of Titles rejected SAC's registration of this extension order.
21 March 2018	SAC	Extension order	SAC's intention here was to extend its Form 96 Order. Registrar of Titles rejected SAC's registration of this extension order as well.
28 March 2018	Peter Low & Choo LLC ("PLC")	Form 96 Order	This instrument was successfully registered under instrument number IF/231537E.
5 April 2018	SAC	WSS Extension Order	SAC's intention here was to extend the Form 83 Writ. Rejected by Registrar on 30 July 2018.
Between 18 April 2018 and 19 December 2018	PLC	Multiple attempts to register a Form 83 Writ on the land-register	These registrations were all rejected by the registrar.
19 December 2018	SAC	WSS Extension Order	This registration was made six days after the property was sold.

35 In January 2019, PLC took out an originating summons in the High Court. It sought a declaration that it was entitled to the surplus proceeds because SAC's registration of its Form 96 Order (dated 19 April 2017 above) had lapsed. On appeal, Judith Prakash JA held that SAC indeed had no rights against the Property since SAC's WSS registration had lapsed. Consequently, SAC had no claim to the surplus proceeds. In other words, the property must be sold during the currency of the registration of the WSS. Otherwise, priority will be lost to a subsequent

registered WSS. If registration of the WSS lapses, the holder of the WSS would not be entitled to any of the surplus proceeds after a mortgagee sale. *Singapore Air Charter* is an important decision because the judgment contains valuable guidance in relation to the law and procedure of the WSS. Some of these issues will be explored below.

### A. Which is the correct form to register?

36 We now turn to the first difficulty. The governing statute is s 132(1) of the LTA,<sup>93</sup> which provides that “a writ of execution, or an order of court directing, appointing or empowering some person other than the proprietor to sell ... deal with or dispose of registered land” shall only affect the registered land if the writ or order is entered in the land-register.<sup>94</sup>

37 Thus, there are two distinct instruments referred to in s 132(1) of the LTA – a “writ of execution” and an “order of court directing, appointing or empowering some person other than the proprietor to sell”.<sup>95</sup> The confusion arises because s 132(1) of the LTA uses the term “writ of execution” instead of the term WSS. Further, the usual process of obtaining a WSS is to file an originating summons and seeking the necessary order of court.<sup>96</sup> Thus, the question is this: When a judgment creditor obtains a necessary court order attaching the property, is registration of the court order, a registration of the “writ of execution” or “order of court directing, appointing or empowering some person other than the proprietor to sell”? This is not a sterile debate but has significant practical ramifications. The registration of a “writ of execution” shall lapse after one year whereas the registration “order of court directing, appointing or empowering some person other than the proprietor to sell” is not subject to any time limitation.<sup>97</sup>

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93 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [30].

94 Land Titles Act (Cap 157, 2004 Rev Ed) s 132(1).

95 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [36]. This point will be significant for the purposes of assessing the duration of a registration, given that s 134(1) of the Land Titles Act (Cap 157, 2004 Rev Ed) only applies to writs.

96 See O 47 r 1(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), which says that “where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter ... that there are special circumstances which render it inexpedient to enforce the judgment or order; or that the application is unable from any cause to pay the money, then ... the Court may by order stay the execution of the judgment or order by writ of seizure and sale either absolutely or for such period and subject to such conditions as the Court thinks fit”.

97 Land Titles Act (Cap 157, 2004 Rev Ed) s 134(1).

38 Happily, this obscurity in the terminology was cleared up by Judith Prakash JA in *Singapore Air Charter*. Prakash JA reasoned that while a writ is essentially an order, the definition of “writ” under s 131 of the LTA only refers to an instrument linked to the process of levying execution over land. However, the definition of “order” does not limit the function of an order to any specific process.<sup>98</sup> In this regard, Prakash JA followed Chan Sek Keong JC’s ruling in the case of *Suttons International Ltd v The Management Corporation – Strata Title No 922*<sup>99</sup> that they were distinct, and “order of court” referred to s 132(1) of the LTA was “not intended to apply to execution proceedings”.<sup>100</sup> The crucial words are “order of court *directing, appointing or empowering some person other than the proprietor to sell*”. Similarly, Prakash JA noted that Baalman also envisaged that “order of court” in s 132(1) of the LTA had nothing to do with levying execution on land. Baalman writes that the “order of court” in s 132(1) of the LTA deals with a situation where the registered land was acquired by fraud and the wrongdoer had absconded. It was in that context that an order of court is issued to empower a court official to execute a transfer to the rightful owner.<sup>101</sup> Thus, a judgment creditor who registers his or her WSS is registering a “writ of execution” as per s 132(1) of the LTA. As explained above, this simple point has important ramifications in relation to the lapsing of registration.

39 What then is the relevant form to be registered pursuant to s 132(1) of the LTA for the judgment creditor to bind the judgment debtor’s land? To answer this question, one must turn to the ROC. Order 47 r 4 of the ROC provides that the judgment creditor must effect the seizure by “registering under the written law which governs the relevant immovable property”.<sup>102</sup>

40 Order 47 r 4(1)(a) of the ROC provides:

Where the property to be seized consists of immovable property or any interest therein, 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.

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98 This has been noted in *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [33].

99 [1987] SGHC 65.

100 *Suttons International Ltd v The Management Corporation – Strata Title No 922* [1987] SGHC 65 at [9].

101 John Baalman, *The Singapore Torrens System – Being a Commentary on the Land Titles Ordinance, 1956 of the State of Singapore* (The Government of the State of Singapore, 1961) at p 212.

102 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 47 r 4(1)(a).

41 Therefore, as a preliminary step a judgment creditor must register Form 96 with the with Singapore Land Authority. Form 96 must be registered within six months of the date when the court issued the order.<sup>103</sup> Form 96 is shown below:

96.

O. 47, r. 4 ORDER OF COURT FOR THE SEIZURE AND SALE IN RESPECT OF IMMOVABLE PROPERTY (Title as in action)

Before (Name and designation of Judicial Officer): (In open court/chambers)

Date of order:

Upon the application of and upon reading the affidavit of filed on , and upon hearing , the following orders are made:

- 1. The interest of in the immovable property specified in the Schedule herein be attached and taken in execution to satisfy the judgment of the abovenamed dated .
2. (State costs orders given by the Court.)

SCHEDULE

Table with 5 columns: \*CT/SSCT/SCT/Lease (subdivided into Vol\*\* and Fol\*\*), MK, TS, Whole or part lot (if part lot, to state approved new lot number or strata lot number), Property Address.

(\*Delete as appropriate)

(\*\*If title document is a lease, to cancel the Vol No. and Fol No. and simply state the Lease No.)

Note: This order shall, unless registered under any written law relating to such immovable property, remain in force for 6 months from the date hereof.

# This form requires sealing by the Court and the signature of the Registrar.

103 Land Titles Act (Cap 157, 2004 Rev Ed) s 132(5). Form 96 also says the same: "This Order shall, unless registered under any written law relating to such immovable property, remain in force for 6 months from the date hereof."

42 After registering Form 96, Order 47 r 4(1)(e)(i) of the ROC prescribes that the judgment creditor must “file a writ of seizure and sale in Form 83”. Form 83 is shown below:

83.

O. 45, r. 12 WRIT OF SEIZURE  
 O. 46, r. 4 AND SALE IN  
 O. 47, r. 4 RESPECT OF  
 IMMOVABLE  
 PROPERTY

(Title as in action)

To the Sheriff/bailiff,

Having seized the interest of (name of execution debtor) in the immovable property specified in the Schedule hereto pursuant to the Order of Court dated \_\_\_\_\_, you are directed to serve the Writ of Seizure and Sale together with the said Order of Court on (name of execution debtor), of \_\_\_\_\_ and, if the execution debtor cannot be found, affix a copy of the same on some conspicuous part of the immovable property known as \_\_\_\_\_, and thereafter, if necessary, to sell the said interest to satisfy the sum \$ \_\_\_\_\_ which is the sum outstanding payable to the said (name of execution creditor) pursuant to a judgment (or order as may be) dated \_\_\_\_\_ against the said (name of execution debtor).

SCHEDULE

*CT/SSCT/SCT/ Lease		MK	TS	Whole or part lot (if part lot, to state approved new lot number or strata lot number)	Property Address
Vol**	Fol**				

(\*Delete as appropriate)

\*\*If title document is a lease, to cancel the Vol No. and Fol No. and simply state the Lease No.)

This writ is issued by:

# This form requires sealing by the Court and the signature of the Registrar.

43 The difficulty in this area is that the terminology in the LTA and ROC does not appear to be in sync, resulting in a very confused and perplexing situation. The header of Form 96 reads “Order of Court for the Seizure and Sale in respect of Immovable Property” whereas Form 83 is titled “Writ of Seizure and Sale in respect of Immovable Property”. This has resulted in great confusion as to whether both Form 96 *and* Form 83 need to be registered with the Singapore Land Authority pursuant to s 132(1) of the LTA.

44 Fortunately, this confusion about the relevant forms to register has been swept away by Judith Prakash JA in *Singapore Air Charter*. According to *Singapore Air Charter*, the “writ of execution” referred to

in s 132(1) of the LTA had to be the Form 96 Order. In other words, *only* Form 96 needs to be registered pursuant to s 132(1) of the LTA. Form 83 *does not* need to be registered. In fact, the Registrar of Titles does not appear to have the power to register Form 83 if Form 96 is already registered. This is because according to s 132(6) of the LTA, where a writ has been registered, until its registration has been cancelled, a second or subsequent writ on the same judgment shall not be registered. As seen in the *Singapore Air Charter* case, the Registrar of Titles correctly rejected multiple attempts to register Form 83. Thus, judgment creditors should not attempt to register Form 83 once they have registered Form 96.

45 A close reading of the language of the forms suggests that Form 83 was a direction to the Sheriff *pursuant to* Form 96.<sup>104</sup> Besides, O 47 r 4(1)(a) of the ROC has made it clear that to effect the seizure of immovable property, the Form 96 Order was the one that has to be registered, not the Form 83.<sup>105</sup> Prakash JA said in *Singapore Air Charter*:<sup>106</sup>

Since it is only the registration of the Form 96 Order that effects seizure under O 47 r 4(1)(a), it must [have] ... been designed to be the 'writ of execution' referred to in s 132(1) of the LTA. The Form 83 Writ may be called a writ of seizure and sale, but its function is to direct the Sheriff to do certain things to bring the seizure of the immovable property to the notice of the judgment debtor and thereafter, to sell the property pursuant to the seizure.

46 A pictorial representation of the process is shown below:

Step 1: Judgment creditor must obtain a registrable instrument from the court in order to seize immovable property in question (O 47 r 4(1)(a) of the ROC). The relevant instrument is the Form 96 Order, and it must be registered within 6 month from obtaining the court order (see s 132(5) of the LTA and O 47 r 4(1)(f) of the ROC).

Step 2: Judgment creditor is to serve a Form 83 Writ on the Sheriff to authorize him to sell the judgment debtor's interest in the land. The Form 83 Writ is valid for only one year from its date of issue (O 47 r 6(1) of the ROC) and the Sheriff's power to execute registrable instruments pursuant to this Writ is only limited to this period.

104 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [42]–[43].

105 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [43].

106 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [44].



**A. How long does registration last and how does a judgment creditor extend the registration?**

47 A writ of execution only binds registered land if it is entered into the land register. According to s 134(1) of the LTA, registration of a writ lapses one year from the date of registration.<sup>107</sup> What this means is that the land shall cease to be bound one year from the date of the registration of the WSS. Thus, the judgment creditor must persuade the Sheriff to sell the land within this one-year period from the date of registration of Form 96.

48 However, even if the judgment creditor fails to effect a sale, he or she may register a fresh Form 96. There are certain complications to this renewal process. Specifically, under s 132(6) of the LTA, a subsequent writ can only be registered if the first registration has been cancelled in accordance with the LTA.<sup>108</sup> Thus, to register a fresh Form 96, the earlier registration must be cancelled. Also, under s 134(3) of the LTA, a judgment creditor cannot use a succession of writs issued on the same judgment to bind land for an *uninterrupted* period exceeding a year.<sup>109</sup> Thus, between the cancellation of a registered writ and the registration of a subsequent writ, there must be a period of at least a day.<sup>110</sup>

49 To summarise, a judgment creditor who has a WSS registration which is about to lapse must take the following steps. First, the judgment creditor must apply to court for an order renewing his or her Form 96 Order.<sup>111</sup> Second, the judgment creditor must cancel his or her earlier registration of Form 96 for at least a day before another Form 96 is registered. Finally, the order renewing the Form 96 Order may be registered as a fresh Form 96. This procedure poses great danger to the judgment creditor's priority. If there is another judgment creditor who has registered a Form 96, then the original judgment creditor will lose his or her priority upon the lapsing of his or her Form 96. In fact, this was what happened in *Singapore Air Charter*. Judith Prakash JA held that when the registration of the earlier Form 96 lapses, the judgment creditor has no claim to the surplus proceeds. However, if there is no intervening registration and the judgment creditor successfully re-registers Form 96

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107 Land Titles Act (Cap 157, 2004 Rev Ed) s 134(1). Also noted in *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [46].

108 Land Titles Act (Cap 157, 2004 Rev Ed) s 134(6).

109 Land Titles Act (Cap 157, 2004 Rev Ed) s 134(3).

110 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [49]. In other words, there cannot be an extension of the period of registration beyond a year.

111 This was what *Singapore Air Charter* did. See *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [47].

after the minimum period of one day between the old and new registration, then the judgment creditor will have another year to persuade the Sheriff to sell the property.

**B. *How does a judgment creditor effect a sale if there is a pre-existing mortgage?***

50 One of the stumbling blocks to the sale of the property is the fact that there is usually a pre-existing mortgage on the property. To determine whether it is worthwhile to effect a sale, the judgment creditor must find out whether there is sufficient equity in the sale proceeds of the property after paying off the mortgage sum. Due to banking secrecy obligations owed to the debtor, mortgagees will not divulge the outstanding sum to the creditor. Thus, the creditor should arrange for an examination of the judgment debtor and at the hearing demand that the debtor supply the mortgage statement and all sums owing to the mortgagee such as overdraft and credit card debt.<sup>112</sup>

51 Even if there is sufficient equity in the property after paying off the mortgage, there is the problem of the mortgagee refusing to consent to the sale. This difficulty is illustrated by the decision of *BYX v BYY*,<sup>113</sup> a case which concerned a woman and a man who were previously married. The woman resided at the property which was the subject matter of that case. The man owed the woman about S\$4.1m, a sum which arose from the ancillary divorce proceedings. The man's interest in the property was then ordered to be attached and taken in execution in satisfaction of that judgment debt. Consequently, a WSS was issued with respect to the property. However, the property was subject to a mortgage and the mortgagee bank did not give its consent for the Sheriff to proceed with the sale of the property. Pursuant to para 80(1)(c) of the Supreme Court Practice Directions, a judgment creditor who seeks to effect the sale of mortgaged immovable property that has been seized under a WSS must state that the mortgagee had consented to that sale. Paragraph 80(2) further states that the Sheriff is not required to proceed with the sale if the judgment creditor cannot do so. The woman applied to court for a court order for the Sheriff to proceed with the sale, on the basis that the sale is "necessary or expedient" pursuant to s 18(2) of the SCJA read with

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112 Order 48 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides that the court may order the judgment debtor to produce any books or documents in the possession of the judgment debtor relevant to the questions posed at the examination. Since most mortgages in Singapore are "all monies" mortgages, the mortgage will secure any debt owing to the mortgagee including overdraft and credit card facilities.

113 *BYX v BYY* [2020] 3 SLR 1074.

para 2 of the First Schedule.<sup>114</sup> Tan Puay Boon JC, in deciding whether it was necessary or expedient to order a sale, considered the following non-exhaustive factors, as required under para 2 of the First Schedule to the SCJA and O 31 r 1 of the ROC:<sup>115</sup>

- (i) whether the expected sale proceeds would be sufficient to redeem the mortgage;
- (ii) the potential prejudice the mortgagee and the execution creditor might face if a sale is granted and if it is not; and
- (iii) the potential prejudice that any third parties may face in each of the above scenarios.

52 On the facts of *BYX v BYY*, Tan JC held that it was necessary and expedient to order the sale of the property. Not only were the proceeds of sale likely sufficient to redeem the mortgage, considerable prejudice would be caused to the execution creditor and her children if a sale was not ordered because the husband's failure to pay the stipulated sum adversely affected the children's educational and living arrangements. Additionally, the woman had no other way to enforce the judgment sum and the husband had been evasive with respect to the payment. Finally, there was no indication that any third parties would be prejudiced if a sale of the property was ordered.<sup>116</sup>

53 Previously, it has been observed as *obiter dicta* by Pang JC in the High Court case of *Peter Low* that such a sale is not possible without the consent of the mortgagees.<sup>117</sup> However, the holding of *BYX v BYY* above has been affirmed by the Court of Appeal in *Singapore Air Charter*. As a result, where a mortgagee refuses to consent for the Sheriff to proceed with the sale of the property despite the judgment creditor possessing a valid WSS, the correct course of action is for the judgment creditor to apply for a court order for the Sheriff to do so.<sup>118</sup> In the appropriate circumstances, the court will sanction a sale despite the objections of the mortgagee especially if the sale proceeds are sufficient to discharge the mortgage sum.

54 An unresolved difficulty is this: Is the Sheriff empowered to sell the entire property or is the Sheriff merely authorised to sell the debtor-joint tenant's *aliquot* share? This is an important practical point because it is easier to sell the entire property as compared to selling the debtor-joint

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114 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [15].

115 *BYX v BYY* [2020] 3 SLR 1074 at [26].

116 *BYX v BYY* [2020] 3 SLR 1074 at [29]–[31].

117 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [114(b)].

118 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [64]–[66].

tenant's *aliquot* share. It is envisaged that there may not be a ready pool of buyers wishing to buy the debtor-joint tenant's *aliquot* share and become tenants in common with a perfect stranger. With this difficulty, it may not be possible for the Sheriff to carry out the sale within a period of a year.

55 Unfortunately, *BYX v BYY* did not answer this question because that case did not deal with a joint tenancy. Section 135(1) of the LTA suggests that the interest to be sold by the Sheriff is the debtor-joint tenant's *aliquot* share because the provision reads:

The interest in registered land which may be sold in execution under a writ *shall be the interest which belongs to the judgment debtor* at the date of the registration of the writ. [emphasis added]

56 Indeed, there is *dicta* by Pang JC in *Peter Low* that supports the view that the sale is merely confined to the debtor-joint tenant's *aliquot* share.<sup>119</sup> Pang JC observed that while the debtor-joint tenant's share is difficult to market to third parties and not likely to fetch a good price that did not mean the ability to sell the *aliquot* share was without value or utility. According to the learned judge, an application to sell may prevent dealings by the other "innocent" joint tenant so much so that the "innocent" tenant may settle the debt, buy over the debtor-joint tenant's share from the Sheriff or consent to the sale of the whole property by the Sheriff.<sup>120</sup>

57 With respect, there is a further possibility not considered by Pang JC in relation to the sale of debtor-joint tenant's *aliquot* share. If there is sufficient equity in the property and there are no third parties willing to purchase the debtor-joint tenant's *aliquot* share, the judgment creditor may consider, with full and frank disclosure to the Sheriff in order to ensure transparency, purchasing the debtor-joint tenant's *aliquot* share and becoming a tenant in common with the "innocent" joint tenant. Thereafter, the judgment creditor, as a tenant in common, may apply for a sale of the whole property pursuant to s 18(2) of the SCJA read with para 2 of the First Schedule. It should be noted that such applications for sale by a tenant in common are almost always allowed in Singapore. Generally, the court will allow such applications for sale by a tenant in common if it is necessary and expedient to do so, pursuant to s 18(2) read with para 2 of the First Schedule of the SCJA.<sup>121</sup> However, there are

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119 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [110]–[114].

120 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [114].

121 See the case of *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [57] for the relevant framework and principles as to when it is "necessary and expedient". In that case, a sale was allowed. See also *Abu Bakar v Jawahir* [1993] 1 SLR(R) 865; *Chiam Heng Luan v Chiam Heng Hsien* [2007] 4 SLR(R) 305 and *Wong Kim Wan v* (cont'd on the next page)

cost implications of bringing such an application and the risk that court may deny the request to sell the property because it might be seen as a backdoor route to sell the entire property.

58 If there is sufficient equity in the property and the debtor-joint tenant's *aliquot* share is sold at a deep discount due to its unmarketability, this option might be a risky but worthwhile avenue for the judgment creditor to pursue especially if the registration of the WSS is about to lapse.

59 A possible solution to problem of the unmarketability of debtor-joint tenant's *aliquot* share is for the judgment creditor to apply to court for the mortgagee to sell the entire property pursuant to s 30(2) of the Conveyancing and Law of Property Act<sup>122</sup> ("CLPA"). It should be noted that such an application is a prayer for the mortgagee to sell the *entire* mortgaged property and not just the debtor-joint tenant's *aliquot* share in the property. To succeed, the judgment creditor must persuade the court that it has *locus standi* pursuant to s 30(2) of the CLPA as a person entitled to the mortgage money or the right of redemption. Thus far, there is no case law which has allowed an application by a judgment creditor for the mortgagee to sell the property pursuant to s 30(2) of the CLPA in a situation where the debtor is a joint tenant.<sup>123</sup>

60 In summary, the following is the process in effecting a WSS. As the registration of the Form 96 Order only lasts a year, a judgment creditor must know that he or she only has a year to persuade the mortgagee or Sheriff to sell the relevant property. Thus, the judgment creditor should write to the mortgagee for the mortgagee to sell the property or consent to the sale of the property. If the mortgagee does not agree, the judgment creditor can nevertheless apply to court to compel the Sheriff to sell the property according to the framework in *BYX v BYY*. There is lingering uncertainty whether the Sheriff is empowered to sell the entire property or only the debtor-joint tenant's *aliquot* share. Further, the position is unsettled whether a judgment creditor may apply to court compelling the mortgagee to sell the entire property pursuant to s 30(2) of the CLPA.

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*Leong Ong Meng Jerome Matthew* [2010] SGHC 318. Cf. *Nora Chia v Muthukrishnan Christopher Pillay* [1998] SGHC 96 where a sale was denied.

122 Cap 61, 1994 Rev Ed. See also *BYX v BYY* [2020] 3 SLR 1074.

123 Law Reform Committee, Singapore Academy of Law, *Report of Civil Remedies* (December 2020) at para 1.58 (Chairman: Kannan Ramesh J) which recommends that the law be reformed to allow a judgment creditor to compel the mortgagee to sell the property.

### C. *Determining priorities*

61 Suppose a judgment creditor successfully effects a sale of the property by the mortgagee or convinces the Sheriff to do so. Who should be paid first if there is a surplus to the sale proceeds?

62 We first consider the priority of judgment creditors who have registered a WSS. According to *Singapore Air Charter*, the priority of WSSes registered against a judgment debtor's property rank in priority according to their respective dates of registration.<sup>124</sup>

63 What if there was a prior mortgage over the property? According to *Singapore Air Charter*, s 74(1) of the LTA provides for the application of the proceeds from the sale of the mortgaged property. First, the proceeds are applied to the payment of all costs and expenses incurred by the mortgagee who has exercised its power of sale. Next, it is applied in discharge of the mortgage money, interest and costs. Third, it is applied in payment of subsequent mortgages and charges. If there is a residue of the money received from the proceeds of sale, this is to be "paid to the person who appears from the land-register to be entitled to the mortgaged property in question".<sup>125</sup>

64 Prakash JA in *Singapore Air Charter* endorsed V K Rajah J in *United Overseas Bank v Chia Kin Tuck* holding that a judgment creditor who has a registered WSS is a "person who appears from the land-register to be entitled to the mortgaged property" in question.<sup>126</sup> Thus, if there is surplus from the sale proceeds after paying off the costs and expenses of the sale and mortgages and charges over the property, the holder of a registered WSS is entitled to that surplus.

65 If the sale is by the Sheriff instead of by the mortgagee, the issue of priority should also be determined by the date of registration of the WSS. In other words, a judgment creditor may have a claim over the surplus of the proceeds if the WSS was registered prior to the sale of the property, so long as that registration is valid (*ie*, the registration must not have lapsed) when the property is sold.<sup>127</sup> This is because the Sheriff is entitled to sell the interest in the land pursuant to a WSS and apply the proceeds in satisfaction of the judgment debt before paying the judgment debtor. However, it is also for this very reason that a judgment

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124 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [57], citing ss 132(1), 132(2) and 37(5) of the Land Titles Act (Cap 157, 2004 Rev Ed).

125 Land Titles Act (Cap 157, 2004 Rev Ed) s 74(1).

126 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [59]–[60], citing *United Overseas Bank Ltd v Chia Kin Tuck* [2006] 3 SLR(R) 322 at [10].

127 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [60]–[61].

creditor loses his or her entitlement when the registration lapses and the Sheriff's right to deal with the land ceases to exist.<sup>128</sup> If there are multiple judgment creditors who have registered a WSS against the judgment debtor's property, then their order of priority is dependent on the date of their registration.<sup>129</sup>

#### IV. Conclusion

66 In this article, the law and procedure in relation to the enforcement of a WSS has been unpacked and analysed. The current and predominant view emanating from the High Court cases suggests that a joint tenancy is exigible to a WSS. It is hard to disagree with the Singapore Academy of Law's Law Reform Committee that this area is ripe for clarification. This article has also elaborated on the proper procedure a judgment creditor should follow to prevent a lapse of priority. Given the time-sensitive nature of a WSS, it is suggested that judgment creditors should pay close attention to the relevant provisions in the ROC and proceed with due haste. Finally, this article has demonstrated that for such a simple question, there is much confusion due to the language in LTA and ROC and its corresponding forms which are incompatible with each other. The relevant provisions are in desperate need for reform to prevent this area of the law being a trap for the unwary.

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128 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] 2 SLR 1399 at [61].

129 See para 62 above.