IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1986] SGHC 9

OS 813/1985

Between

Supreme Holdings Ltd

… *Applicant*

And

Sheriff, Supreme Court of Singapore
Another

… *Respondent*

GROUNDS OF DECISION

Landlord and Tenant — Distress for rent — Levying distress

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Supreme Holdings Ltd v Sheriff, Supreme Court of Singapore and Another

[1986] SGHC 9

OS 813/1985
L P Thean J
14 March 1986

1 On 23 April 1985 the sheriff pursuant to two writs of seizure and sale taken out respectively by two execution creditors, namely, Carl Zeiss Pentax Co and Singer Sewing Machine Company, seized the movable property of Peter Chew`s found on or upon the premises, 9 Penang Lane Road, #02-07 to #02-12, Supreme House, Singapore 0923 (the said premises). At that time Peter Chew`s (the tenants) were the tenants of the applicants in respect of the said premises. Presumably the seizure came to the knowledge of the applicants, and on 25 April 1985 they applied for and obtained a writ of distress against the tenants under the Distress Act (Cap 20, 1970 Ed) for recovery of arrears of rent and service charge due from the tenants for six months from October 1984 to March 1985 amounting to $180,291 of which a sum of $115,765.80 represents the arrears of rent and $64,525.20 the arrears of service charge. The sheriff was notified of the writ of distress on 26 April 1985. Immediately following this, on 27 April 1985 Hin Seng another creditor of the tenants came on the scene; they presented a petition for the winding up of the tenants in Companies Winding Up Petition No 216 of 1985, and notice of the winding up petition was given to the sheriff. The movable property seized under the writs of seizure and sale were

eventually sold on 8 May 1985 and the net proceeds realised after deducting the costs of execution amounted to $72,890.50, which is presently in the hands of the sheriff. On 26 July 1985 a winding up order was made against the tenants, and the Official Receiver was appointed the liquidator of the tenants.

2 As the executions by the writs of seizure and sale had not been completed before the date of the commencement of the winding up of the tenants, the execution creditors were prevented by s 334 of the Companies Act (Cap 185, 1970 Ed) from enjoying the benefit of such executions. This position is clear and is beyond dispute. What is in dispute is to whom should the sheriff pay the net proceeds in his hands. The applicants as the landlords of the said premises who have taken out a writ of distress claim that under s 20(1) of the Distress Act the sheriff is obliged to pay the proceeds to them in priority to any other payment. In opposition, the Official Receiver and Liquidator of the tenants (the Liquidator) claims that s 335(2) of the Companies Act applies to the proceeds and the sheriff is obliged to pay the whole thereof to the liquidator. This stand of the liquidator has the support of the sheriff. As the sheriff refuses to pay the proceeds to the applicants, the latter took out this application for determining the competing claims of the applicants and the liquidator.

3 The case of the applicants as presented by Mr Tan on their behalf is this. First, a distress is not an execution within the meaning of ss 334 and 335 of the Companies Act and is therefore not caught by either of these sections. In support Mr Tan relies on the case of ***Re Bellaglade*** [1977] 1 All ER 319. In that case a distress warrant was taken out by a landlord on the goods of a company, which subsequently presented a petition for its own winding up. The company then moved for a stay of further proceedings under the distress warrant. Oliver J (as he then was) in refusing a stay, held (inter alia) that s 325(1) of the Companies

Act, 1948 of the United Kingdom (which corresponds to s 334(1) of our Companies Act) did not apply to a distress by a landlord. I do not think that this point is seriously in dispute; both Mr Yeoh on behalf of the sheriff and Miss Yap on behalf of the liquidator appear to have conceded this. Next, Mr Tan submits that s 260 of the Companies Act also does not apply, as the distress in this case had been put in force before the commencement of the winding up of the tenants. The provision of s 260 is as follows:

> *Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up by the Court shall be void.*

4 Mr Tan accepts that a distress is not `put in force` until the sheriff seizes and takes possession of the movable property of the tenants: see ***Re London & Devon Biscuit Co*** (1871) LR 12 Eq 190. In this case, however, he contends that there was a seizure and the seizure was made on 25 April 1985 prior to the commencement of the winding up of the tenants. His submission is founded on the following basis. As of that day, 25 April 1985 the movable property of the tenants was already seized by the sheriff under the two writs of seizure and sale. The writ of distress was applied for and obtained under O 47 r 3(1) of the Rules of Supreme Court 1970, and under O 47 r 3(2), where such writ of distress is issued, s 20(1) of the Distress Act applies; and under that section where any property liable to be seized under a writ of distress has already been seized under a writ of execution, it shall not be seized under the writ of distress so long as it remains under such seizure but the sheriff, upon being notified of a writ of distress, shall become liable to pay out of the proceeds of sale of the goods seized by him, in priority to any other payment, the arrears of rent due to the landlord (subject to the maximum amount stated in the proviso to that subsection). Under O 47 r 3(3), unless the writ of distress is issued for recovery of the arrears of rent, the movable property seized by the sheriff under execution

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shall be deemed not to be liable to be seized under the writ of distress and to be free from all claims in respect of rent and may be dealt with accordingly, and the landlord shall have no claim in respect of the property and to the proceeds of sale or any part thereof. This rule, according to Mr Tan by necessary implication means that if a writ of distress is taken out against the movable property of a tenant while such property is under seizure by the sheriff under a writ of execution the property is deemed to be seized under the writ of distress; since the property is alread y in the custody of the sheriff there is no need for a second seizure. Hence, as at 25 April 1985 upon the writ of distress being taken out, the movable property of the tenants was deemed to have been seized, and the distress had therefore been put in force prior to the commencement of winding up of the tenants.

5 Both Mr Yeoh and Miss Yap dispute such a construction of O 47 r 3(3). In particular, Mr Yeoh submits that the provision of O 47 r 3(3) does not logically give rise to the implication as contended by Mr Tan. I agree with him entirely on this point. First, at common law goods of a tenant which have been seized by the sheriff under a writ of execution are in custodia legis and cannot be seized by his landlord under a writ of distress: see ***Wharton v Naylor*** (1848) 12 QB 674; 116 ER 1023. Secondly, the construction sought by Mr Tan is not warranted by the provision of O 47 r 3(3) and is contrary to the express provision of s 20(1) of the Distress Act, the full text of which will be adverted to shortly. Suffice here to say that s 20(1) expressly provides that such movable property `shall not be seized under the writ of distress` so long as it remains under a seizure by the sheriff under a writ of execution; these words acknowledge the position at common law.

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6 In my view, no seizure under the writ of distress obtained by the applicants has taken place; the applicants could not cause the sheriff to effect such a seizure at the time as the movable property of the tenants was and remained under seizure pursuant to the two writs of seizure and sale. The distress therefore has never been put in force and s 260 of the Companies Act therefore has no relevance and does not arise for consideration. That unfortunately is not the end of the matter which turns out to be slightly more complicated; the complexity arises from s 20(1) of the Distress. Act and s 335(2) of the Companies Act, both of which appear to be applicable in the events that have occurred; and each appears to be in conflict with the other. Section 20(1) of the Distress Act provides as follows:

> *Where any property liable to be seized under a writ of distress has already been seized under a writ of execution issued by any court, it shall not be seized under the writ of distress so long as it remains under such seizure; but the officer in possession under the writ of execution shall be notified of the writ of distress, and shall thereupon be liable to pay out of the proceeds of sale of the goods seized by him, after payment thereout of the expenses of the sale, but in priority to any other payment the amount appearing to be due to the landlord:*
>
> *Provided that such payment shall not in any case exceed the amount due for the last six months` rent.*

7 And s 335(2) of the Companies Act provides as follows:

> *Subject to sub-s (3), where under an execution in respect of a judgment for a sum exceeding $100 the goods of a company are sold or money is paid in order to avoid sale, the bailiff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the balance for 14 days; and if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up and an order is made or a resolution is passed for the winding up, the bailiff shall pay the balance to the liquidator who shall be entitled to retain it as against the execution creditor.*

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8 In England where the goods of a tenant are seized by the sheriff under a writ of execution, s 1 of the Landlord and Tenant Act 1709 (the Statute of Anne) provides the landlord of such tenant with a special remedy to recover arrears of rent up to an amount of one year`s rent. The provisions of this section, so far as relevant, are as follows:

> *... No goods or chattels whatsoever lying or being in or upon any messuage lands or tenements which are or shall be leased for life or lives term of years at will or otherwise shall be liable to be taken by virtue of any execution on any pretence whatsoever unless the party at whose suit the said execution is sued out shall before the removal of such goods from off the said premises by virtue of such execution or extent pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution. Provided the said arrears of rent do not amount to more than one year`s rent and in case the said arrears shall exceed one year`s rent then the said party at whose suit such execution is sued out paying the said landlord or his bailiff one year`s rent may proceed to execute his judgment as he might have done before the making of this Act [and the sheriff or other officer is hereby impowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money].*

9 In ***Wharton v Naylor*** the court considered the effect of this section on the right of the landlord to distrain goods which were under seizure by the sheriff in execution, and Patterson J said, at p 678:

> *The statute says that no goods shall be liable to be taken by virtue of any execution unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the premises by virtue of such execution, pay to the landlord of the premises rent, not exceeding one year.*

10 These words cannot be taken literally; the true construction is given in ***Riseley v Ryle*** by Parke B: the meaning is, that the sheriff shall not remove the goods unless a year`s rent be first paid. The seizure is lawful prima facie: but, if the goods be removed without payment of the rent, after notice that it is due,

such removal renders the whole proceeding unlawful as regards the landlord, and subjects the sheriff to an action on the case at his suit.

11 He held further that the Act intended to give to the landlord a protection through the liability of the sheriff in lieu of his right of distress which is taken away by the seizure under a ***fieri facias*** .

12 The Statute of Anne forbids the removal of goods of the tenant from the premises unless the execution creditor pays off the arrears of rent (not exceeding one year`s rent) due to the landlord. The sheriff, however, does not incur any liability to the landlord for not keeping the goods unless he has been previously informed of the rent due. If the sheriff has been so informed before the goods are removed and he nevertheless does not keep the goods but sells them and allows them to be removed without paying the landlord, the sheriff will be liable to the landlord for wrongful removal: see ***Wharton v Naylor*** (supra) and ***Re Mackenzie*** [1899] 2 QB 566. If the Statute of Anne is strictly followed, it is not very practicable for this reason: if the execution creditor refuses to pay the arrears of rent due and the landlord insists on his right, there would arise a deadlock and the sheriff would not be in a position to proceed with the execution and would return ***nulla bona*** . In practice, however, this impasse is resolved by the sheriff selling the goods seized under execution, and if the landlord gives notice of the arrears of rent due before the sheriff parts with the proceeds, the sheriff will then pay the landlord out of the proceeds of sale the arrears of rent and after deducting his costs of execution will pay the balance to the execution creditor in or towards satisfaction of the judgment: see ***Re Mackenzie*** (supra).

13 The Statute of Anne is a United Kingdom Act passed prior to 1826 and was received in Singapore under the Second Charter of Justice 1826.

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Subsequently in 1876 the Distress Ordinance (XIV of 1876) of the Straits Settlement was enacted and sub-ss I and II of s 23 thereof are as follows:

> *I No personal property shall be removed from any premises under any writ from any Court, other than Writs of Extent in Crown Suits, till the claim for rent due to the landlord or lessor, or person entitled to receive the rent, is satisfied; provided that such claim shall not in any case exceed the amount due for six months` rent last due.*
>
> II If personal property, otherwise liable to distress for rent, shall at the time of the issue of any distress warrant, or thereafter before seizure by the bailiff under such warrant, be seized by the sheriff under any Writ from any Court other than Writs of Extent in Crown Suits, the bailiff shall not seize such personal property, but shall deliver a copy of such warrant of distress to the sheriff or his officer, and the sheriff shall, out of the first monies to arise by any sale of such personal property, after payment of the expenses of such sale, pay to the bailiff the amount mentioned in such warrant of distress, with the costs of such warrant.
>
> *Provided that, if the amount mentioned in such warrant of distress shall exceed the amount due for six months` rent last past, the sheriff shall pay to the bailiff the amount of such six months` rent and costs, and no more.*

14 Subsection I provided in substance the special remedy enjoyed by a landlord under s 1 of the Statute of Anne; sub-s II exempted the movable property of a tenant seized by the sheriff under a writ of execution from any seizure under a writ of distress taken out by a landlord - in effect acknowledged the position at common law - and imposed a personal obligation on the sheriff to pay to the landlord, after payment of expenses, the amount of arrears of rent mentioned in the warrant of distress but not exceeding the amount of last six months` arrears of rent. In view of sub-s I it is difficult to understand why sub-s II was enacted. It seems to me that following the practice developed in England, sub-s I would enable a landlord to recover the arrears of rent (subject to the limit stated therein) upon lodging his claim therefor with the sheriff and

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without applying for and obtaining a warrant of distress and proceeding under sub-s II; and by taking out a warrant of distress the landlord does not recover anything more than he would otherwise recover. With the presence of sub-s I sub-s II does not appear to serve any useful purpose.

15 Whatever might have been the view taken of these provisions at that time, they were preserved and slightly expanded when the Distress Ordinance was repealed in 1907 by the Repeal Ordinance (XXXII of 1907), and the Civil Procedure Code 1907 was enacted, which by ss 738 and 739 substantially re-enacted the two subsections of s 23 of the Distress Ordinance 1876. Sections 738 and 739 are as follows:

> *738 No moveable property shall be removed from any premises under any writ of execution from any Court, other than writs of extent in Crown Suits, till the claim for the rent due to the landlord, or lessor, or person entitled to receive the rent, is satisfied; provided that such claim shall not in any case exceed the amount due for the last six months` rent.*
>
> (739) If moveable property otherwise liable to distress for rent shall, at the time of the issue of any writ of distress, or thereafter before seizure under such writ, be seized under any writ of execution from any Court, other than writs of extent in Crown Suits, the officer charged with the levy of the distress shall not seize such moveable property, but shall, unless both writs are in the hands of the same officer, deliver a copy of the writ of distress to the sheriff or the officer in possession, who shall, out of the first moneys to arise by any sale of such moveable property, after payment of the expenses of such sale, pay to the officer charged with the levy of the distress the amount mentioned in such writ of distress with the costs of the same: provided that if the amount mentioned in such writ of distress shall exceed the amount due for six months` rent last past, the amount of six months` rent and costs, and no more, shall be paid on the distress.

16 The coexistence of these two sections continued until 1934 when the whole of the Civil Procedure Code was repealed by the Courts Ordinance No 17 of 1934, and in so far as the law of distress is concerned, the Distress

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Ordinance No 28 of 1934, was enacted which came into force on 1 January 1935. The latter re-enacted s 739 of the code in s 20(1), which is the present s 20(1) of the Distress Act, but omitted entirely s 738 of the Code. That omission was clearly deliberate and gave a sense and purpose to s 20(1). Re-enacting s 739 of the Code, the legislature must have perceived that with the presence of s 738, s 739 was otiose, and between the two sections had opted for the adoption of s 739 in preference to s 738, presumably on the ground that the latter, if strictly followed, was rather unworkable as shown by the practice that had developed in England in giving effect to s 1 of the Statute of Anne, and that s 739 would be adequate in providing a special remedy to a landlord who takes the initiative of obtaining a writ of distress upon seizure being made by the sheriff under a writ of execution of the movable property of his tenant.

17 It is of interest to note how the courts in England gave effect to s 1 of the Statute of Anne in the face of bankruptcy or liquidation of the tenant. In the case of ***Re Mackenzie*** the sheriff seized the goods of a debtor on 19 August 1898 under a writ of execution and the goods were subsequently sold on 14 September 1898. The debtor committed an act of bankruptcy on 15 September and bankruptcy petition was presented against the debtor on 16 September and the receiving order was made against the debtor on 10 October. On 15 October he was adjudicated a bankrupt. In the meanwhile, on 6 October the landlord gave notice to the sheriff of the arrears of rent due. On 22 October the sheriff, out of the proceeds of sale, paid the amount of arrears of rent to the landlord, and after deducting his costs of execution paid the balance to the trustee in bankruptcy. The trustee then claimed from the sheriff the amount paid to the landlord relying on s 11 of the Bankruptcy Act 1890, which is as follows:

> *(1) Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the section*

> *or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge.*
>
> (2) Where under an execution in respect of a judgment for a sum exceeding Â£20, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be to the trustee, who shall be entitled to retain the same as against the execution creditor.

18 The Court of Appeal held that the practice of the sheriff in selling the goods seized under execution and applying the proceeds in payment of the arrears of rent to landlord was not affected by the provisions of the Bankruptcy Acts 1883-1890. Lindley MR in delivering the judgment of the court said, at pp 576-577:

> *Section 11, cl 2, is the enactment which is relied upon in this case against the Sheriff. But this section has not, in our opinion, rendered it wrong for him to pay the landlord that which the sheriff had a right to pay him for his own indemnity, and that which the landlord had a right to have paid him in lieu of his right to sue on the statute of Anne. There is not a word in the clause which shews that the special case provided for by the statute of Anne was being dealt with; and the concluding words of the clause tend strongly to shew that it was not. The expression `goods of a debtor` is used; but there is nothing to shew that the enactment applies to goods of a debtor which are subject to the rights of persons other than the execution debtor and execution creditor, and to override such rights. The section deals with the rights of the execution creditor, the execution debtor, and the sheriff when he has no legal duties to third parties; but the section is limited to ordinary cases of execution. Goods which belong to a judgment debtor and are seized by the sheriff, but*

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> *which are impounded by the statute of Anne until the landlord is paid, are not `goods of a debtor` which have to be handed over by the sheriff to the trustee in bankruptcy under s 11. Nor are the proceeds of sale of such goods to be handed over free from the rights of the landlord or of the sheriff for his own indemnity. Even if the trustee in bankruptcy can require the sheriff to hand over the goods or proceeds, we see nothing to displace the right of the landlord under the statute of Anne to have those goods kept unremoved, or his right, sanctioned by long practice, to be paid out of the proceeds if they have been removed and sold contrary to the statute.*

19 In the case of ***Re British Salicyclates*** [1919] 2 Ch 155 the goods of the debtor were seized by the sheriff under a writ of ***fieri facias*** in execution of a judgment. Five days later a winding up petition was presented against the debtor and immediately thereafter the petitioning creditor applied by summons for a stay of the execution proceeding. That application was dismissed and the sheriff proceeded to sell the goods and notified the execution creditor of the claim for arrears of rent by the landlord. This claim was discharged by the execution creditor and after the sale the sheriff reimbursed the execution creditor out of the proceeds of sale the amount of rent paid to the landlord. The Liquidator sought to claim from the sheriff this amount of rent paid. Astbury J held that the obligation of the sheriff and the right of the landlord under the Statute of Anne were not affected by the Companies (Consolidation) Act 1908 and the sheriff was bound to pay the amount of arrears of rent to the landlord in order to avoid the consequence of a personal liability under the Statute of Anne. It is true that the Companies (Consolidation) Act 1908 did not have provisions similar to s 11(2) of the Bankruptcy Act 1890 (which was dealt with by Lindley MR in ***Re Mackenzie***). But the decision was not arrived at because of the absence of such a provision.

20 Thus the Statute of Anne provides to a landlord a special remedy for recovery of certain amount of arrears of rent where his tenants` goods are seized

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by the sheriff in execution. Section 20(1) of the Distress Act also provides the landlord with a special remedy. Unlike s 1 of the Statute of Anne or s 738 of the Civil Procedure Code, s 20(1) does not forbid the removal of the movable property of the tenant under seizure unless the arrears of rent of landlord (subject to a maximum amount) have been paid up. But it imposes an obligation on the sheriff upon being notified of the writ of distress to pay to the landlord out of the proceeds of sale of the movable property seized by him, after payment thereout of the expenses of the sale, in priority to any other payment, the amount of arrears of rent due to the landlord, subject to the maximum amount stated in the proviso. The words, `in priority to any other payment`, in s 20(1) are both explicit and wide. In my judgment, the obligation of the sheriff under s 20(1) in this case is not affected by the winding up proceedings of the tenants. The proceeds from the sale of the movable property of the tenants in his hands are not `free` from the right of the sheriff `for his own indemnity`. Section 335(2) of the Companies Act, save that it relates to winding up of a company, is otherwise in pari materia with s 11(2) of the Bankruptcy Act 1890 and, again, quoting the words of Lindley MR when he dealt with s 11(2) of the Bankruptcy Act, s 335(2) `deals with the rights of the execution creditor, the execution debtor and the sheriff when he has no legal duties to third parties; but the section is limited to ordinary cases of execution`.

21 The effect I give to s 20(1) of the Distress Act is consistent with a situation where movable property of a tenant is not under seizure by the sheriff in execution and his landlord has put in force a distress thereon for arrears of rent due from his tenant prior to the presentation of the winding up petition against the tenant - in such an event the landlord would be entitled to the proceeds of sale from the movable property distrained up to an amount due for the past twelve months` rent, unaffected by the operation of s 334 or s 335 of

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the Companies Act. If the distress is put in force after the winding up petition has been presented against the tenants, it is of course void: s 260 of the Companies Act. Equally, if an execution against a tenant`s movable property is put in force after the winding up petition against such debtor has been presented, the execution is void and the landlord would not be in a position to take out a writ of distress and avail himself of s 20(1) of the Distress Act, because in such a case `the execution is itself overridden and rendered void` by s 260 of the Companies Act: see the judgment of Lindley MR in ***Re Mackenzie*** at p 576.

22 I am aware that s 20(1) of the Distress Act thus applied would result in the applicants as the landlords having a priority over all the other unsecured creditors of the tenants. However, landlords have always enjoyed a special remedy provided by law for recovery of arrears of rent from their tenants as can be seen from the legislation on the right of distress. Unlike other creditors of the tenants, they do not have to initiate an action for recovery of certain amount of arrears of rent due; they are entitled to resort to the summary procedure of levying distress provided by law. It is significant that s 45(1) of the Bankruptcy Act (Cap 18) allows a landlord to distrain on the goods of his tenant for rent at any time either before or after the commencement of the bankruptcy, except that if the distress is levied after the commencement of bankruptcy it shall be available only for three months` rent accrued due prior to the date of the order for adjudication.

23 I therefore allow the application and declare that the applicants are entitled to the net proceeds of sale of the movable property of the tenants in the hands of the sheriff and order the net proceeds to be paid to the applicants.

24 ***Application allowed.***

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L P Thean J

Tan Bock Huat (JYP Chia & Co) for the applicants
Vincent Yeoh for the sheriff
Yap Siew Yong (Official Receiver's Office) for the Official Receiver

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