IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 237

Divorce (Transferred) No 4907 of 2008
(Summons No 2630 of 2019)

Between

BYX

… *Plaintiff*

And

BYY

… *Defendant*

GROUNDS OF DECISION

[Family Law] — [Judgment and orders] — [Enforcement]

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BYX
v
BYY

[2019] SGHC 237

High Court — Divorce (Transferred) No 4907 of 2008 (Summons No 2630 of 2019)
Tan Puay Boon JC
28 June, 30 July, 23 September 2019

7 October 2019

Tan Puay Boon JC:

Introduction

1 The plaintiff made an *ex parte* application for an order that the Sheriff proceed with the sale of immovable property solely owned by the defendant. This property is subject to a mortgage and was seized under a writ of seizure and sale ("the Property").

2 Having considered the submissions by the plaintiff and the young *amicus curiae*, Ms Tee Su Mien ("Ms Tee"), I granted the order sought. I now set out the grounds of decisions to clarify:

(a) whether an execution creditor who wishes to effect the sale of mortgaged immovable property that has been seized under a writ of seizure and sale is required to obtain the consent of the mortgagee, in

view of paras 80(1) and 80(2) of the *Supreme Court Practice Directions* (1 January 2013 release) ("Practice Directions"), reproduced in [11] below; and

(b) the considerations the court should take into account in an application for the sale to proceed in such circumstances.

Facts

3 The plaintiff and the defendant were previously married and have three children to the marriage ("the children"). Interim judgment was granted in 2009. The plaintiff and the children resided at the Property after the divorce.

4 A sum of $4,109,474.76 arising from the ancillary divorce proceedings is owed by the defendant to the plaintiff. On 29 August 2018, the plaintiff obtained an injunction against the defendant prohibiting him from, *inter alia*, disposing of and dealing with the Property ("the Injunction"). On 8 November 2018, I ordered that the defendant's interest in the Property was to be attached and taken in execution in satisfaction of the judgment debt owed to the plaintiff ("the Order").

5 The plaintiff registered the Order against the Property on 15 February 2019.[1] A writ of seizure and sale in respect of the Property was issued on 7 March 2019 ("the WSS").

[1] Plaintiff's affidavit dated 23 May 2019 ("Plaintiff's 2019 affidavit") at p 57.

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6 The plaintiff's solicitors wrote to the mortgagee bank on 13 March 2019 to seek the latter's consent for a sale of the Property.[2] In its letter dated 15 March 2019, the mortgagee bank stated that it did not consent to the WSS.[3] The mortgagee bank maintained in its letter dated 24 May 2019 that it was "entitled to, and does as a matter of practice, withhold consent to the sale of mortgaged properties pursuant to a Writ of Seizure and Sale by a [Judgment] Creditor".[4]

7 On 31 May 2019, the plaintiff's solicitors wrote to the mortgagee bank to invite it to file an affidavit in the present proceedings and to attend the upcoming hearing on 28 June 2019.[5] The mortgagee bank elected not to participate in these proceedings, but clarified by its letter dated 17 July 2019 that the issuing of the WSS and the grant of the Injunction both constituted events of default under its terms of lending. However, it would not take action against the defendant as the defendant is a "valued client" and his "repayment [of the mortgage loan] has otherwise been prompt".[6]

The parties' cases

8 The plaintiff made the present application for an order that the Sheriff proceed with the sale of the Property without the mortgagee's consent. I appointed Ms Tee to address the court on the issues of: (a) whether an execution creditor is required to obtain the consent of the mortgagee in order to effect the

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2 Plaintiff's 2019 affidavit at pp 45–46.

3 Plaintiff's 2019 affidavit at p 59.

4 Ong Xin Ying Samantha's Affidavit dated 13 June 2019 ("Samantha Ong's affidavit") at p 4.

5 Samantha Ong's affidavit at para 4 and p 5, para 3.

6 Kelvin Lee Ming Hui's affidavit dated 8 August 2019 at p 7.

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sale of immovable property subject to a mortgage and which has been seized under a writ of seizure and sale; and, if not, (b) what considerations the court should take into account in an application for the sale of the immovable property to proceed. Ms Tee was invited to take into consideration paras 80(1) and 80(2) of the Practice Directions and the court's power to order a sale under s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") read with para 2 of the First Schedule.

9 Ms Tee submitted that para 80(1) of the Practice Directions requires the execution creditor to first seek the mortgagee's consent for the sale of the mortgaged immovable property. Where such consent cannot be obtained, the court may still order the sale to proceed where it is necessary or expedient to do so. In the ordinary course, the determinative factor in this assessment is whether the proceeds of sale are sufficient to satisfy the mortgagee's interest in the immovable property.[7]

10 The plaintiff agreed with Ms Tee's submissions. The court's decision to order a sale under s 18(2) of the SCJA read with para 2 of the First Schedule and O 31 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") should take into account the facts of the case, the execution creditor's rights and remedies, and the interests of the mortgagee bank *vis-à-vis* those of the execution creditor.[8] Considering these factors in the present case, the sale of the Property should be ordered.[9]

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7 Young *amicus curiae*'s written submissions dated 5 September 2019 ("YACWS") at para 4.

8 Plaintiff's further submissions dated 22 August 2019 ("PFS") at paras 40–48.

9 PFS at paras 49–50.

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My decision

11 I was satisfied that it was necessary and expedient to order the sale of the Property under s 18(2) of the SCJA read with para 2 of the First Schedule and O 31 r 1 of the ROC.

12 As a preliminary matter, I considered this case not to fall within the jurisdiction of the Family Division of the High Court: see s 47(1) of the Family Justice Act 2014 (No 27 of 2014) ("FJA"). My decision, however, would have been the same even if I were wrong on this issue. The Family Division of the High Court, when exercising jurisdiction relating to family proceedings, has all the powers of the High Court in the exercise of its original civil jurisdiction, including those contained in para 2 of the First Schedule to the SCJA: s 22(2) of the FJA. My reasoning in relation to paras 80(1) and 80(2) of the Practice Directions and O 31 r 1 of the ROC would have been the same; these paragraphs and provisions are, respectively, *in pari materia* with paras 119(1) and 119(2) of the *Family Justice Court Practice Directions* (1 January 2015 release) and r 540 of the Family Justice Rules (S 813/2014).

Whether the consent of the mortgagee is required

13 I first considered whether an execution creditor who wishes to effect the sale of mortgaged immovable property that has been seized under a writ of seizure and sale is required to obtain the consent of the mortgagee. The requirement that the mortgagee's consent be obtained is implied in paras 80(1) and 80(2) of the Practice Directions, which state as follows:

> **80. Sale of immovable property**
>
> (1) If an execution creditor wishes to effect the sale of immovable property seized under a writ of seizure and sale, he shall file the requisite Request for sale electronic form to the

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> Sheriff through the Electronic Filing Service stating the following:
>
> …
>
> (c) whether the immovable property is subject to any mortgage or charge, and if so, *that the mortgagee or chargee consents to the sale*.
>
> …
>
> (2) The Sheriff shall not be required to proceed with the sale if the immovable property is subject to a mortgage or charge and the execution creditor is unable to produce the written consent of the mortgagee or chargee to the sale.
>
> [emphasis added]

14 Practice directions are essentially administrative directions and may not subdue the court's judicial powers: *Singapore Civil Procedure 2019* vol I (Chua Lee Ming J ed-in-chief) (Sweet & Maxwell, 2019) at para 1/0/2. However, while practice directions do not have the force of law, they are nevertheless directions from a court, and a court will not normally depart from such directions unless there is good reason for doing so: *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [88].

15 Ms Tee highlighted that para 80(2) appears to qualify O 46 r 22 of the ROC, which states that "[s]ubject to these Rules, the Sheriff *must* sell all property seized by him under a writ of execution or distress" [emphasis added]. Writs of execution or distress include writs of seizure and sale: O 46 r 1.[10] Ms Tee submitted that paras 80(1) and 80(2) of the Practice Directions should be interpreted as obliging an execution creditor to first seek the mortgagee's consent for the sale of the mortgaged immovable property. Where such consent is not granted, it remains open to the execution creditor to apply for a court order

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10 YACWS at paras 8–9.

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for the Sheriff to proceed with the sale regardless, on the basis that such sale is necessary or expedient.[11]

16 I agreed with Ms Tee's submissions. An execution creditor attempting to effect the sale of mortgaged immovable property that has been seized should generally seek the mortgagee's consent first, in line with para 80(1)(c) of the Practice Directions and absent good reasons for doing otherwise. As Ms Tee articulated, this requirement ensures that the mortgagee is given the option to exercise any available power of sale, thereby avoiding the potential scenario where a mortgagee and execution creditor seek to simultaneously exercise their powers of sale, as occurred in *United Overseas Bank Ltd v Chia Kin Tuck* [2006] 3 SLR(R) 322 ("*Chia Kin Tuck*"). No prejudice is suffered by the execution creditor, who would be entitled only to the surplus sale proceeds in the event that a mortgagee exercises his power of sale: see s 74(1) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA").[12] Where the mortgagee does not consent to the sale, para 80(2) of the Practice Directions provides that the Sheriff is "not … required to proceed with the sale", but the execution creditor may still apply to the court to order such sale.

17 My interpretation of paras 80(1) and 80(2) of the Practice Directions departs slightly from the High Court's observations in *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 ("*Peter Low*"). The High Court in *Peter Low* stated at [114(b)] that "a sale [of immovable property financed by mortgage loans] under a [writ of seizure and sale] is not possible without the mortgagees' consent". It suffices to note that the aforementioned statements

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11 YACWS at paras 12–13, 25–26.

12 YACWS at para 25; FS at para 38.

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were made by way of *obiter dicta* in proceedings relating to immovable property held under a joint tenancy and that the present issues were not before the High Court in *Peter Low*.

18 For completeness, I record the plaintiff and Ms Tee's observations that the language in para 80 of the Practice Directions can be refined to provide clearer guidance to execution creditors on the steps they should take if they wish to effect the sale of mortgaged immovable property seized under a writ of seizure and sale but are unable to obtain the mortgagee's consent to such sale and the mortgagee has no plans to sell the property.

The relevant considerations in an application for the sale of mortgaged immovable property where the mortgagee withholds consent to such sale

19 Having decided that the mortgagee's refusal to consent to the sale of the mortgaged property does not prevent the court from ordering a sale of the property, I turned to consider when a sale should be ordered in such circumstances.

20 Section 18(2) of the SCJA states that the High Court shall have the powers set out in the First Schedule. This includes the court's power to direct the sale of land where it appears necessary or expedient in any cause or matter relating to land, as provided by para 2 of the First Schedule: *Tan Poh Beng v Choo Lee Mei* [2014] 4 SLR 462 ("*Tan Poh Beng*") at [13]. Paragraph 2 of the First Schedule to the SCJA states:

> **Partition and sale in lieu of partition**
>
> 2. Power to partition land and to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part of it to be sold, and to give all necessary and consequential directions.

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21 Order 31 r 1 of the ROC states that the High Court has the power to order that any immovable property be sold where it appears "necessary or expedient" for the purposes of the cause or matter to do so (*Tan Poh Beng* at [14]):

> **Power to order sale of immovable property (O. 31, r. 1)**
>
> 1. Where in any cause or matter relating to any immovable property it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold, the Court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

22 The court's power to order a sale of land under the SCJA and the ROC is contingent on there being a cause of action creating a substantive legal basis to justify the exercise of that power: *Tan Poh Beng* at [19]. The plaintiff and Ms Tee observed that the court's power to direct a sale under these provisions is usually invoked in cases involving joint ownership where the court considers if land should be sold in lieu of partition: see, *eg*, *Abu Bakar v Jawahir and others* [1993] 1 SLR(R) 865; *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2016] 3 SLR 1222 ("*Su Emmanuel*").[13] The parties did not appear to have found reported cases where the court has invoked its power to order a sale in circumstances similar to the present case.

23 The plaintiff registered the WSS that attached the defendant's interest in the Property. Section 135(1) of the LTA did not confer on the plaintiff an interest in the Property; even after the WSS was registered, the Property and the interest in the Property remained with the defendant:[14] *Chia Kin Tuck* at [10],

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13 PFS at para 43; YACWS at paras 28–30.

14 PFS at para 12.

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[12] and [14]. However, s 135(1) allows the "interest in registered land" to be "sold in execution under a writ" as long as such interest "belongs to the judgment debtor at the date of the registration of the writ". The registration of the WSS conferred on the Sheriff the ministerial power to sell the Property to satisfy the defendant's judgment debt: s 132(4) of the LTA; *Chia Kin Tuck* at [14]. The WSS stated:

> Having attached the interest of [the defendant] in the immovable property specified in the Schedule hereto [*ie*, the Property] pursuant to [the Order], you are directed to serve this Writ of Seizure and Sale together with [the Order] on [the defendant] … and thereafter, if necessary, to sell the said interest to satisfy the sum of $4,109,474.76 which is the sum outstanding payable to [the plaintiff] …
>
> …

Since the present application concerned whether the Sheriff should proceed to sell the Property to satisfy the judgment debt, this was a case that involved a matter relating to land and immovable property within the meanings of para 2 of the First Schedule to the SCJA and O 31 r 1 of the ROC.

24 Ms Tee submitted that to decide whether to order a sale when the mortgagee has withheld its consent, the balancing exercise set out in *Su Emmanuel* at [57] could be adapted with the necessary modifications.[15] The principles identified at [57] were as follows:

> (a) In deciding whether it is necessary or expedient for a sale to be ordered in lieu of partition, the court conducts a balancing exercise of various factors, including (i) the state of the relationship between the parties (which would be indicative of whether they are likely to be able to co-operate in the future); (ii) the state of the property; and (iii) the prospect of the

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15 YACWS at para 28.

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> relationship between the parties deteriorating if a sale was not granted such that a "clean-break" would be preferable.
>
> (b) Regard should be had to the potential prejudice that the various co-owners might face in each of the possible scenarios, namely, if a sale is granted and if it is not granted.
>
> (c) A sale would not generally be ordered if to do so would violate a prior agreement between the co-owners concerning the manner in which the land may be disposed of.

I did not think that these factors, which are largely limited to the joint ownership context, were applicable to the present case.

25 The plaintiff and Ms Tee also referred to *Palk and another v Mortgage Services Funding plc* [1993] 2 All ER 481 ("*Palk*"), where the English Court of Appeal considered the court's power to direct a sale of mortgaged property under s 91(2) of the Law of Property Act 1925 (c 20) (UK). This provision allows a mortgagor to seek an order for sale of mortgaged property when faced with an action for redemption or foreclosure. The Court ordered the sale of the mortgaged property against the mortgagee's wishes notwithstanding that the proceeds of sale would not discharge the mortgage debt. The mortgagee's plan of action was to postpone the sale in the hope that the property market would improve. During this period, the interest on the mortgage debt would continue to accrue and would exceed the rental under the mortgagor's proposed letting, and the risk of increased loss to the mortgagee outweighed any prospect of gain the mortgagor might make. The Court held at 488f that the court in exercising its discretion to order a sale under s 91(2) should have due regard to the interests of all concerned. It was just and equitable to order a sale in these circumstances because otherwise unfairness and injustice would follow (at 488g).

26 Although the considerations in *Su Emmanuel* and *Palk* differ somewhat from the present case, I am of the view that the court should consider the

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interests of those affected in the round when exercising its discretion to order the sale of property. Any outcome that is reached should be fair and just. In general, where an execution creditor wishes to effect the sale of mortgaged immovable property that is seized under a writ of seizure and sale and cannot obtain the mortgagee's consent, the court should conduct a balancing exercise of the following non-exhaustive factors to decide if it is "necessary or expedient", as required under para 2 of the First Schedule to the SCJA and O 31 r 1 of the ROC, to order a sale of the property:[16]

> (a) whether the expected sale proceeds will be sufficient to redeem the mortgage;
>
> (b) the potential prejudice that the mortgagee and the execution creditor might face in each of the possible scenarios, namely, if a sale is granted and if a sale is not granted; and
>
> (c) the potential prejudice that any third parties (including the mortgagor) may face in each of the possible scenarios.

27 As regards the consideration at [26(c)], it is trite law that the Sheriff or bailiff cannot by seizure affect the rights of third persons to whom the property has been subject to while in the hands of the debtor: *Chia Kin Tuck* at [11]. The court would also be entitled to consider, for instance, the fact that a mortgagor-judgment debtor and his family members may face substantial prejudice if they reside at the property in question and are at risk of being evicted pursuant to a forced sale. Similarly, it would be relevant to the court that the judgment debt

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16 YACWS at paras 33 and 46; PFS at paras 45–48.

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is being enforced for the benefit of third parties like the parties' children in the present case. I note, however, that third party interests in this context would have to be considered in the light of the object of Part XIII of the LTA, which is to enable judgment creditors to obtain the fruits of their judgments against registered land: see *Chia Kin Tuck* at [13], citing 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 211.[17]

28 Applying this approach to the present case, I considered the following factors.

29 The evidence showed that the proceeds of sale were likely to be sufficient to redeem the mortgage. The forced sale value of the Property is $4,970,000.00 according to a valuation report dated 22 February 2019.[18] The Property's outstanding mortgage loan as at 17 June 2009 was $2,944,681.97.[19] While the plaintiff was unable to produce evidence of the present outstanding mortgage sum, this sum was likely to be lower than that in 2009, especially given the mortgagee bank's confirmation that the defendant has been "prompt" in servicing the mortgage (see above at [7]).

30 The prejudice that the plaintiff and the children would face if a sale was not ordered would be considerable. The sum presently owed to the plaintiff by the defendant is sizeable (being $4,108,474.76) and includes arrears for the

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17 PFS at para 11.

18 Plaintiff's 2019 affidavit at p 86.

19 Defendant's affidavit of assets and means dated 1 July 2009 at para 6(b)(ii) and p 127.

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children's maintenance. Of this sum, $4,062,751.32 has been outstanding since 7 August 2018.[20] I accepted that the defendant's failure to pay the sums owing has adversely affected the children's educational and living arrangements, as the plaintiff has been unable to make timely school fee payments as a result.[21] It also does not appear that the plaintiff has any other remedy available to her to enforce the judgment sum. The defendant has not been present in court proceedings since April 2018, presently lives overseas and has been evasive with regard to payment of the judgment sum.[22]

31 Finally, there was no indication that the mortgagee bank or any other third party would be prejudiced if a sale of the Property was ordered.

32 In the light of the above, I found that it was necessary and expedient to order the sale of the Property and so ordered.

Conclusion

33 For the reasons above, I granted the following orders:

(a) that the Sheriff proceed with the sale of the Property without the consent of the mortgagee bank; and

(b) liberty to apply.

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20 Plaintiff's affidavit dated 7 August 2018 in Summons No 3642 of 2018 at para 8.

21 Plaintiff's 2019 affidavit at paras 12–19.

22 Plaintiff's 2019 affidavit at para 26.

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34 I would like to record my appreciation to Ms Tee and counsel for the plaintiff for their helpful and comprehensive submissions which greatly assisted the deliberations of the court.

Tan Puay Boon
Judicial Commissioner

Lee Ming Hui Kelvin and Ong Xin Ying Samantha (WNLEX LLC) for the plaintiff;
The defendant absent;
Tee Su Mien (Rajah & Tann Singapore LLP) as young *amicus curiae*.

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