South East Enterprises (Singapore) Pte Ltd *v* Hean Nerng Holdings Pte Ltd and another [2013] SGCA 25

Case Number	: Civil Appeal No 74 of 2012
Decision Date	: 15 March 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Cheong Yuen Hee and Cheong Aik Chye (A C Cheong & Co) for the appellant; Daniel Koh Choon Guan and Dave Teng Dong Neng (Eldan Law LLP) for the first respondent; Chou Sean Yu, Lim Shiqi and Pereira Russell Si-Hao (WongPartnership LLP) for the second respondent.
Parties	: SOUTH EAST ENTERPRISES (SINGAPORE) PTE LTD — HEAN NERNG HOLDINGS PTE LTD — SAPUAN SANADI

CIVIL PROCEDURE – Judgments and orders

SHERIFFS AND BAILIFFS – Duties – Liabilities

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 3 SLR 864.]

15 March 2013 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 The appellant execution debtor, South East Enterprises (Singapore) Pte Ltd ("the Appellant"), commenced proceedings against the respondents for losses it allegedly suffered during the execution of a writ of seizure and sale against machinery belonging to it. The first respondent, Hean Nerng Holdings Pte Ltd ("the First Respondent"), was the execution creditor, and the second respondent, Mr Sapuan Sanadi ("the Second Respondent"), was the bailiff from the Subordinate Courts who had personal conduct of the execution process. The Appellant now appeals against the High Court's dismissal of its claim.

2 The appeal raises some knotty questions of law relating to the process of executing such writs. What are the duties of court bailiffs during the execution process and to whom are these owed? When, if at all, does common law liability arise? How far does such liability, if it exists, extend? Have court bailiffs in Singapore been conferred absolute statutory immunity from suit? Assuming court bailiffs have absolute statutory immunity from suit, can an execution creditor nevertheless be held liable for any instructions given by it? In analysing and responding to these questions, it is plain that a careful balance needs to be struck between protecting bailiffs and execution creditors from frivolous and potentially harassing claims and concurrently protecting the interests of debtors to ensure that they are not prejudiced by negligent, unfair or even malicious execution procedures carried out by misguided or overzealous execution creditors. This is a difficult task as bright lines cannot readily be drawn. This abstruseness has often prompted judicial disquiet; for instance, in *Wilson v South Kesteven District Council* [2001] 1 WLR 387 at 388, Simon Brown LJ lamented (albeit with some overstatement) that "[i]f ever clarity were needed in the law it is surely with regard to the seizure and sale of a debtor's goods".

The facts

The judgment debt

3 The First Respondent was in the business of renting out storage space at an open air warehouse at No 27 Jalan Buroh, Singapore 619483 ("the warehouse"). In February 2003, the Appellant entered into a warehouse service agreement with the First Respondent for the use of Bays A2 and A3 for the storage of two sets of machine parts. The first set of machine parts formed a plant for the manufacture of wooden hard and soft-boards ("hard and soft-board parts") and the second set of machine parts formed a plant for the manufacture of wooden particle boards ("particle board parts"). In March 2003, the Appellant contracted for the rental of additional space at Bay A4 of the warehouse.

4 The Appellant later fell into arrears in monthly rent which amounted to $27,794.00 by early February 2004. On 9 February 2004, the First Respondent commenced Magistrate's Case Suit No 3070 of 2004 against the Appellant to recover the sum and, on 5 March 2004, obtained judgment in default of appearance against the Appellant.

The writ of seizure and sale

5 On 19 March 2004, the First Respondent's solicitors issued Writ of Seizure and Sale No 2136 of 2004 ("the Writ") for the sum of $29,771.57 ("the judgment debt") to be executed against the Appellant's property in the warehouse. The material portion of the Writ read as follows:

> To the Bailiff,
>
> You are directed that you cause to be levied and made out of the *property liable to be seized under a Writ of Seizure and Sale which shall be identified by or on behalf of [the First Respondent]*, the Plaintiffs / Execution Creditors, as belonging to [the Appellant], the abovenamed Defendants / Execution Debtors now or late of 47 Beach Road, #02-07, Kheng Chiu Building, Singapore 189683, and having their place of business at No. 27 Jalan Buroh, Singapore 619483 *by seizure and if it be necessary by sale thereof $29,771.57* ($27,794.00 being the sum adjudged, [plus interests, costs and disbursements])… which [the First Respondent] recovered against [the Appellant] by a Judgment bearing the 5th day of March 2004.
>
> [emphasis added]

6 The Writ referred to both "47 Beach Road" and "27 Jalan Buroh" without specifying which was to be the place of execution. This error was compounded by a series of other procedural anomalies. In the Praecipe for Writ of Seizure and Sale bearing the same date, only the Appellant's "registered office" at 47 Beach Road was mentioned. Perhaps as a result of this, the Subordinate Courts Bailiff Section's ("the Bailiff Section") "General Notice to Execution Debtor(s)" dated 23 March 2004 to the Appellant and letter to the First Respondent dated 29 March 2004 referred to 47 Beach Road as the place of execution. The original date of execution was set at 28 April 2004. By a letter dated 5 April 2004 to the Bailiff Section, the First Respondent's solicitors clarified that the place of execution was to be 27 Jalan Buroh instead.

7 This was then followed by a second letter from the Bailiff Section to the First Respondent dated 29 April 2004 stating that the place and the amended date of execution were, respectively, 27 Jalan Buroh and 11 May 2004. By the same letter, the First Respondent was requested to report at the Bailiff Section in the morning of the date of execution to accompany the Second Respondent to

the place of execution and to bring along *inter alia* a typewritten letter of authority and signed indemnity in the prescribed form.

The seizure

8 On 11 May 2004, an authorised employee of the First Respondent, Mr Eugene Lim Chang Chye ("Eugene Lim"), met the Second Respondent at the Bailiff Section and handed the Second Respondent a letter of indemnity dated 11 May 2004 ("the Indemnity"). The Indemnity, which was addressed to "the Bailiff" and signed off by the First Respondent, read as follows:

> 1. I/We hereby confirm that on the appointed date for execution, the judgment debt remains unsatisfied to the extent of $29,771.57.
>
> 2. I/*We hereby authorize [Eugene Lim] to accompany the bailiff to point out the assets of the execution debtor, which are to be seized on our behalf at 27 Jalan Buroh*, Singapore 619483.
>
> 3. I/*We hereby indemnify you and keep you indemnified at all times hereinafter against all claims and payments for which you may in the course of such execution render yourself legally liable and against all actions, suits, proceedings*, *claims, demands, cost, expenses whatsoever which may be taken or made against you or incurred* or become payable by you in the course of such execution.
>
> [emphasis added]

9 Eugene Lim then accompanied the Second Respondent to the warehouse and, upon arrival, pointed out the machinery which was to be seized and which was so seized by the Second Respondent ("the seized items"). It bears mention that the Second Respondent was seizing machinery for the very first time. It is unclear what information Eugene Lim relied upon in assessing the value of the seized items. Indeed, from the record, it appears to us that he took no steps prior or subsequent to the seizure to assess the value of the seized items seized at his behest. The Second Respondent on his part asserts with alacrity that he entirely relied on Eugene Lim when he seized the items (see below at [35] and [82]).

10 After pasting seals on the seized items at Bays A2 and A3, the Second Respondent valued the seized items at $15,000 and noted this in the Notice of Seizure and Inventory (Form 94) ("Form 94"). There was also an "INVENTORY" annexed to Form 94, which the Second Respondent completed with the brief description "all machineries and parts of timber at Lot A2 to A3 (inside)". It transpired during cross-examination of the Second Respondent that this was an inaccurate description of the seized items, which should have been properly described as "machine for cutting timber". Notwithstanding this error, Eugene Lim signed the indemnities at the bottom of the inventory which provided as follows:

> All the above articles seized by the Bailiff were pointed out by me and I indemnify him against any damages for wrongful seizure.
>
> [Signed by Eugene Lim]

Signature of Execution Creditor

(or his representative)

11 The entire process of the seizure took about thirty minutes. Before leaving the warehouse, the Second Respondent left a copy of the Writ, Form 94 and a General Notice to Execution Debtors dated 11 May 2004 with Eugene Lim. It should be noted that this General Notice was not a document prescribed under the Rules of Court (Cap 322, R5 2004 Rev Ed). This General Notice to Execution Debtors read:

> TO: THE EXECUTION DEBTOR(S)
>
> AND ALL OTHERS WHOM IT MAY CONCERN
>
> …
>
> 2. A Writ of Seizure and Sale No : 2136 of 2004 has been issued against the Execution Debtor(s), and the Court Bailiff has been directed by the Execution Creditor(s) to execute the Writ at this address. ***The Execution Creditor(s)*** *or his representative who accompanies the bailiff*, ***will point out to the Bailiff the item(s) belonging to the Execution Debtor(s*** *), and the Bailiff will accordingly record and place the item(s) under seizure*.
>
> …
>
> *6. This action is initiated on the direction and indemnity of the Execution Creditor(s) as such all inquiries are to be directed to him/them or his/their solicitors at Tel No : 65323388-MARK .*
>
> [emphasis added in italics and bold italics]

The auction sale

12 Two weeks later, by a letter dated 26 May 2004, the Second Respondent appointed Kiong Chai Woon and Co Pte Ltd ("the Auctioneer") as the auctioneer to sell the seized items by public auction. Unfortunately, the Auctioneer failed to inspect the seized items prior to putting up the auction advertisement. Consequently, the error in the inventory annexed to Form 94 eventually found its way into the 9 June 2004 advertisement in The Straits Times which described the auction items as "Machineries and Parts of Timber (Lots A2 to A3)".

13 The auction took place on 11 June 2004. On the same day, before the auction, Eugene Lim handed the Second Respondent another letter of indemnity in the same terms as the one given on 11 May 2004. The auction was attended by 20 to 30 potential bidders who were given about half an hour to inspect the seized items before the start of the auction. There were at least four or five bids before the seized items were sold to the highest bidder, Kim Hock Corporation Pte Ltd ("Kim Hock Corporation"), for $51,500 as scrap metal. We should add that there do not appear to have been any instructions given to the Auctioneer by either of the Respondents to independently value the seized items or fix a reserve price before the commencement of the auction process.

14 Kim Hock Corporation shortly thereafter on-sold the machinery to a business associate, Mr Lau Swee Nguong of Hua Seng Sawmill Co Bhd ("Hua Seng Sawmill") in Sibu, Sarawak for $132,174. The seized items apparently remain unassembled at Hua Seng Sawmill's premises.

The parties' pleadings at the trial below

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15 At the trial below, the Appellant raised a montage of variegated assertions that the Second Respondent had executed the Writ negligently and in breach of numerous statutory duties, *viz*, (a) failure to provide adequate notice of seizure; (b) failure to sufficiently particularise the seized items; (c) excessive seizure; (d) failure to publish an adequate advertisement describing the true nature of the seized items; (e) failure to give adequate notice of sale; (f) sale of machinery which had not been seized pursuant to the writ of seizure and sale and (g) failure to sell at the best possible price. Its main complaints related to the alleged excessive seizure followed by undervalue sale of the seized items, which the Appellant asserted bore a market value of $1,224,294.50. It relied on two documents to support this claimed worth of the machine parts: (a) a contract dated 28 February 2001 providing that a Vietnamese company, Ngan Linh TNHH Company Ltd, was to buy the hard and soft-board parts for US$441,000 ("NL contract"); and (b) a "subject-to-contract" agreement dated 8 May 2004 providing that a Pakistani buyer, Best Chipboard Industries, was to pay US$295,000 for the particle board parts ("BC contract"). It also sought to make the First Respondent jointly and severally liable by arguing that the Second Respondent had acted as the First Respondent's agent during the seizure and sale.

16 The Second Respondent denied that there had been any breach on his part and argued that he was, in any event, immune under s 68(2) of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) ("Subordinate Courts Act"), which provides that:

> No officer of a subordinate court charged with the duty of executing any writ … shall be liable to be sued for the execution of or attempting to execute such writ … unless he knowingly acted in excess of the authority conferred upon him by such writ, summons, warrant, order, notice or other mandatory process of the court in question.

As for the First Respondent, it argued that even if the Second Respondent was held liable, no agency relationship existed between them so as to give rise to liability on its own part.

The decision below

17 The trial judge ("the Judge") dismissed the Appellant's claims, holding that the Second Respondent was not in breach of any common law or statutory duty. The Judge agreed with the Second Respondent that s 68(2) of the Subordinate Courts Act would in any event have shielded him from liability. In this regard, the Judge held that s 68(2) of the Subordinate Courts Act protected the bailiff from the consequences of any breach of his statutory as well as common law duties, and that such statutory immunity would be displaced only where there was actual knowledge or wilful blindness of excess of authority on the bailiff's part. The Judge found that the Second Respondent did not in fact act in excess of authority, let alone "*knowingly*" act in excess of authority [emphasis in original] (see *South East Enterprises (Singapore) Pte Ltd v Hean Nerng Holdings Pte Ltd and anor* [2012] 3 SLR 864 ("the Judgment") at [57]). The Judge then held that the First Respondent could not in any event be liable as no agency relationship arose between the First and Second Respondents.

The parties' arguments

The Appellant's submissions

18 The Appellant has, on appeal, abandoned most heads of its original claim against the Second Respondent for breaches of duty and has confined its submissions to that of excessive seizure. It made three primary submissions. First, that the Judge erred in finding that there was no excessive seizure, and should have placed weight on the fact that Hua Seng Sawmill subsequently bought the

seized items for S$132,174. Second, that s 68(2) of the Subordinate Courts Act did not exonerate the Second Respondent from the consequences of his breaches as it deals only with "excess of authority claims" and has nothing to do with common law claims. Third, that the Judge was wrong to conclude that the Second Respondent was not the First Respondent's agent in executing the Writ.

The Respondents' submissions

19 The First and Second Respondents' cases on appeal echo their submissions made at trial. The Second Respondent insists that he had not seized property worth well in excess of the judgment debt and, even if he had been negligent in that respect, he is protected under s 68(2) of the Subordinate Courts Act.

20 The First Respondent argues that an execution creditor only assumes responsibility for the bailiff's acts where the execution creditor has intervened in the bailiff's performance of a writ of execution, or has identified himself with the bailiff's wrongful acts. It argues that there was no evidence of such intervention or instructions to the Second Respondent, who had acted independently.

The issues before the court

21 The issues before the court are as follows:

(a) whether there has been an excessive seizure and whether the Second Respondent exercised a reasonable and honest discretion in choosing how much of the Appellant's property to be seized ("Issue 1");

(b) whether the Second Respondent was nonetheless protected under s 68(2) of the Subordinate Courts Act ("Issue 2"); and

(c) whether the First Respondent may be made liable for any excessive seizure by the Second Respondent ("Issue 3").

Our decision

Issue 1

The applicable legal principles

22 A bailiff may be sued at common law for wrongful execution, which may occur in any of three ways, *viz*, (a) where the execution is authorised by neither the judgment nor the writ (*eg*, where the execution is excessive, carried out at the wrong address or against the wrong person's goods); (b) where it is issued maliciously or without reasonable cause; and (c) where it is done in breach of common law powers or procedure laid down by the rules of court (see John Kruse, *The Law of Seizure of Goods: Debtor's Rights and Remedies* (Barry Rose Law Publishers, 2000) ("*Law of Seizure of Goods*") at pp 68–69).

23 For the present case, we are only concerned with one particular wrong, namely, excessive seizure. The bailiff has a duty to seize only such quantity of goods as would be reasonably sufficient to pay the amount, and where the bailiff seizes more, *prima facie*, he is a wrongdoer (*Gawler v Chaplin and ors* (1848) 154 ER 590 at 592, *Watson v Murray & Co* [1955] 2 QB 1 ("*Watson*") at 12, *Moore v Lambeth County Court Registrar and Others (No 2)* [1970] 1 QB 560 ("*Moore*") at 572). This

is also the position in Australia (see *Halsbury's Laws of Australia*, vol 20 (Butterworths, 1995) ("*Halsbury's Australia*") paras 325-9905 and 325-9915, and Bernard Cairns, *Australian Civil Procedure* (Lawbook Co, 9th Ed, 2011) at p 741).

24 We should add that in Singapore, the execution creditor or his representative is required to identify the property (other than real property) to be seized by the bailiff. This is mandated by Form 82 ("Writ of Seizure and Sale") of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"), and Form 88 in the previous Rules of Court (Cap 322, R 5, 2004 Rev Ed), which state that the property to be seized "shall be identified by or on behalf of [the execution creditor]". In other words, the property to be seized shall either be identified by the execution creditor, or by someone authorised by the execution creditor to identify the property to be seized on the execution creditor's behalf. This is a crucial step of the process in which the execution creditor has to ensure that only the appropriate amount of items owned by the judgment debtor are seized (see below at [79]).

25 Traditionally, liability for wrongful seizure seemed to be strict, and did not seem to be fault-based, *viz*, the wrong was not dependent on the conduct of the bailiff (see *Watson* at 12 and *Moore* at 570). In *Steel Linings Limited and anor v Bibby & Co* [1993] RA 27 ("*Steel Linings*") the English Court of Appeal introduced a refinement when it stated:

> It should be noted in this regard that to be proved excessive the value of the goods seized must be clearly disproportionate to the arrears and charges, taking into consideration the conditions under which a forced sale of the effects must take place; *to avoid an excessive distress all that is required is that the distrainor should exercise a reasonable and honest discretion in estimating what the goods will realise* at auction; he need not consider what value the ratepayer himself could have obtained for them or what they would be worth to a business successor. [emphasis added]

26 This introduced a defence to excessive seizure such that where the bailiff, when choosing how much of the judgment debtor's property to seize, exercised a reasonable and honest discretion in estimating what the goods will realise at auction, the bailiff will not be liable for excessive seizure. In our view, this measured approach strikes the desired balance between the need to protect the debtors from excessive seizure, and the need to protect court bailiffs from spurious litigation. We would add that the bailiff has the burden of showing that he exercised both a reasonable *and* honest discretion in estimating what the goods will realise at auction once the debtor proves that there has been an excessive seizure of its property. On the issue of the honest exercise of the discretion, we should point out that this is also relevant as a prerequisite to the statutory immunity (whenever a discretion is exercised) as a bailiff must not knowingly exceed his authority (see discussion on s 68 of the Subordinate Courts Act below at [44]–[56]).

27 We are of the view that this defence is also available to an execution creditor or his representative who identifies the items to be seized, and who would otherwise be liable for the bailiff's wrong.

28 Since the bailiff is confined to seizing sufficient goods to cover the debt, and is not necessarily entitled to all the goods on the premises, the seizure must *involve some process of* selecting and securing items (*Law of Seizure of Goods* at p 117). For example, as a general principle, while there is no basis for an excessive seizure claim, if there appears to be only one thing to seize, even if its value might considerably exceed the sum due, liability for excessive seizure may arise where the bailiff had the opportunity to seize fewer goods or goods of lesser value than *he actually seizes*. As Lord Ellenborough observed in *Field v Mitchell* [1806] 6 Esp 71 ("*Field*") at 72 (see, also, *Roden v Eyton (*1848) 6 CB 427 at 430–431, *Avenell v Croker and another* (1828) Mood & M 172 at 173–174,

and *Law of Seizure of Goods* at p 66):

> There is a distinction between the cases, where there is but one thing which can be distrained, and where there are many, and so the distress is divisible. *If there is but one thing which can be taken, so that it must be taken, or the party must go without his distress, for taking it no action lies, though it much exceeds the sum for which the distress is taken : but if there are several articles of some value, and there is much more taken than is sufficient to satisfy the rent and expen[s]es; this action is maintainable*, *and express malice is not necessary to the maintaining of the action, nor required to be proved* ; but it is not for every trifling excess that this action is maintainable, it must be disproportionate to some extent, and if disproportionate to an excess, the action is clearly maintainable. [emphasis added]

29 To succeed in an excessive seizure claim, the plaintiff must show that the seizure was obviously excessive or clearly disproportionate to the debt *(Moore* at 570 and 572, and *Steel Linings*), *eg*, where £100 of goods were seized for a debt of less than £1 *(Baker v Wicks* [1904] 1 KB 743 at 747–748), or where property worth about £87 was seized in satisfaction of a debt of at best £4 5s *(Moore* at 570). A trifling excess would not do (*Field* at 72). In assessing whether the value of the goods seized had been clearly disproportionate to the debt, the court should take into consideration the conditions under which a forced sale of the goods takes place (*Law of Seizure of Goods* at p 66 and *Steel Linings*).

The present facts

30 Two questions arise in this regard, *viz*, (a) whether there was excessive seizure; and (b) if there was an excessive seizure, whether the Second Respondent, when choosing how much of the Appellant's property to seize, exercised a reasonable and honest discretion in estimating what the goods will realise at auction to avoid excessive seizure.

(1) Excessive seizure

31 The Appellant's case at trial was that the seized items were worth $1,224,294.50, vastly in excess of the judgment debt. That valuation, which was based on the values of the NL contract and the BC contract (see [15] above), was rejected by the Judge for reasons set out in [95]–[99] of the Judgment, which we agree with. Those reasons need not be rehearsed here since the Appellant has not, on appeal, sought to persist with its original assertion that the seized items were worth $1,224,294.50. Instead, the main evidence on which Counsel for the Appellant, Mr Cheong Yuen Hee ("Mr Cheong"), relies in his written and oral submissions to prove excessive seizure was the resale price of $132,174 to Hua Seng Sawmill. Notwithstanding the earlier overstatement in the Appellant's case about the value of the seized items which the Judge rightly rejected, we are inclined to find that the sale and resale prices are in reality indicative of an excessive seizure by the Second Respondent for the following reasons.

32 First, we note that even if the sale price to Kim Hock Corporation reflected the true worth of the seized items –which we do not accept, given that the mis-description of the seized items may have attracted the wrong group of bidders –that figure of $51,500, was almost twice the amount of the judgment debt. Second, and as Mr Cheong rightly argued, the sale to Hua Seng Sawmill showed that, even as scrap metal, the seized items were worth at least $132,174, *ie*, 4.5 times the judgment debt. Mr Cheong's argument was plausibly supported by the sale invoice dated 30 July 2004, which described the seized items sold as "MACHINE *SCRAP* " [emphasis added]. Mr Lim Kim Hock of Kim Hock Corporation also testified that he had sold the seized items to Hua Seng Sawmill as scrap metal. This on-sale took place shortly after the auction in June and the seizure in May, and is cogent evidence of

the worth of the seized items during the material period. Significantly, even after a 20% discount is applied to reflect the forced sale value of the seized items (the First Respondent's expert valuer, Mr Robert Khan, testified that a 20% discount is typically applied to the market value to reflect the forced sale value), the resultant figure of $105,739.20 would still be about 3.5 times the judgment debt of $29,771.57, *ie*, clearly disproportionate to the judgment debt. In the circumstances, we are prepared to conclude that the seizure was obviously excessive and clearly disproportionate to the debt. Applying the 20% discount to take into account the forced sale value, the hypothetical bailiff could have seized items that would have a market value of $35,725.88 so as to satisfy the judgment debt. Although this figure is used for the purposes of calculating the loss, we emphasise that the Second Respondent was not required to seize items with a value that would coincide with this figure because a bailiff will only be liable for excessive seizure if the seizure was obviously excessive or clearly disproportionate to the debt (see above at [29]). The excessive seizure caused the Appellant a loss of $96,448.12, being the difference between the market value ($132,174) and the value of the items that should have been seized to satisfy the judgment debt ($35,725.88).

(2) Reasonable *and* honest discretion

33 We are of the view that the Second Respondent plainly did not exercise a reasonable discretion in estimating what the goods would realise at an auction when he chose how much of the Appellant's property to seize, so as to avoid excessive seizure. The one consistently disturbing thread in his testimony was his obvious confusion as to the nature and value of the items he was seizing, as well as the quantity of goods seized. When asked by the Judge whether he knew how much items were seized, he replied "I got no idea what item I seized". His lack of even a basic understanding of the nature and value of the seized items was starkly underscored during cross-examination, when he admitted that he was unable to describe the seized items in the inventory annexed to Form 94 and had to rely on Eugene Lim and some other workers who were also on the premises to pen the description:

> Q: Okay. Now, if it is machine to cut timber … Why did you describe it as, "All machineries and parts of timber"?
>
> A: Because on---on that list---because on---*the only conclusion given to me is, er, from the representative and from this, er, from this---this, er, peoples around* their---I mean the persons there.
>
> Q: Okay.
>
> A: But if I have to---thinking I---if I---*if I want to take myself, I cannot---I cannot describe the things, whether it's a machine or what*---because---that's why I have to confirm with the representative and the---this, er, people there.
>
> [emphasis added]

34 What we found troubling was the Second Respondent's failure to take even basic steps to ensure the accurate seizure of items in the face of his inexperience and lack of familiarity with the subject matter of the seizure. It bears emphasising that while a bailiff is not obliged to obtain independent valuation in every case, he must, at the very least, have a basic grasp of the nature and value of what he is seizing in order to avoid an excessive seizure. Surely, the Second Respondent could not have properly carried out a process of "selecting" the items to be seized when he had absolutely no idea what he was seizing and entirely relied on Eugene Lim. His own admission as to his unfamiliarity with the items he was seizing also rendered unconvincing his insistence that he had

independently appraised the items at Bays A2 and A3. On the contrary, the fact that the Second Respondent seized only some of the items in Bays A2 and A3 but not all of the items in Bays A2 and A3, coupled with his lack of a basic understanding of the nature and value of the seized items, only go to show that the seizure was an arbitrary process.

35 Further, we find persuasive the Appellant's contention that the Second Respondent had allowed himself to be entirely "directed" by Eugene Lim as he had appeared content to rely on the latter's vague description of the seized items, and had not attempted to even begin to seek more specific details to enable him to accurately complete the inventory annexed to Form 94:

> Q: … let's come back to you asked Eugene what are all these items? Okay, now *what did he tell you were these items?*
>
> A: *Some sort of machinery.*
>
> …
>
> Q: … Did you ask him to be more specific as to what type of machinery it is?
>
> A: And that he's---after he's told me that it's some sort of machineries, I will check and then look at him, he's not there.
>
> Q: … *Did you then go to see him wherever he was … to ask him again, what are these machinery parts?* …
>
> A: *I didn't ask for that.*
>
> [emphasis added]

36 This was highly unsatisfactory since the inventory annexed to Form 94 is absolutely vital for all parties involved in the execution process. It forms part of the notice of seizure and provides tangible evidence of *what debt* is being enforced and on *what goods* this enforcement has been effected (John Kruse, *Sources of Bailiff Law* (PP Publishing, 2012) ("*Sources of Bailiff Law*") at p 109). It *inter alia* protects the execution creditor by showing the items against which the debt is secured, enables a debtor to take court action if goods not included in the inventory were removed and sold, and enables third party claimants to the seized goods to initiate court action. *Vis-à-vis* the bailiff, the inventory also forms part of the evidence that a levy has taken place and serves to guide the bailiff during his subsequent removal of the goods for sale (*Sources of Bailiff Law* at p 110). In this regard, it is crucial that the stated inventory be precise and not vague. Regrettably, the Second Respondent's lackadaisical attitude in effecting the seizure was again reflected when he failed to draw Eugene Lim's attention to his description of the seized items in the inventory annexed to Form 94 (which, as mentioned at [10] above, was in error) despite his unfamiliarity with the subject of seizure.

37 Although not directly relevant to the issue of excessive seizure, we observe that the Second Respondent's conduct *vis-à-vis* the auction also left much to be desired. It transpired during cross-examination that he was unaware that the Auctioneer had not inspected the seized items before preparing the advertisement. Instead, he appeared quite content to assume that the necessary inspection had been carried out:

> Q: When [the Auctioneer] sent you the draft advertisement, did you ask him whether he has gone to the site to inspect the goods or not? Did you ask him?

A: No.

Q: Right. When you got the draft advertisement, you thought that the auctioneer had gone to the site, inspected and came to a---this---to an agreement with your description, so he put it on the---is that correct?

A: Yes.

38 We note the practice requirement that auctioneers are to inspect the goods before preparing the advertisement for auction. The Second Respondent did not check whether this inspection had been duly completed by the Auctioneer despite his knowledge of such a requirement:

Q: … before you did the seizure here, is it the practice that the Court requires the auctioneer to go down, inspect and then prepare the advertisement?

A: Actually by right, it's yes, but---but, mm, the Bailiff did not do that and then---and then suddenly the Chief Bailiff realised that, then they give instruction to inspect the---to inspects the item first.

Q: Okay. So what you are saying is actually the Bailiffs are supposed to do that but they had not been doing it and the Chief Bailiff realised it after this case---

A: Yah.

Q: ---and instructed the Bailiffs to comply with that requirement---

A: Yah.

39 This was an unsatisfactory state of affairs when viewed in the light of the fact that the Second Respondent had absolutely no idea precisely what he had seized and what the value of those items might have been. Common prudence would have required that he at least checked that the Auctioneer had inspected the seized items before adopting the description set out in the inventory annexed to Form 94.

40 In the circumstances, we are of the view that the Second Respondent *did not exercise a reasonable discretion in estimating what the goods would realise at auction* when he chose how much of the Appellant's property to seize, so as to avoid excessive seizure. Therefore, the defence to excessive seizure does not apply, and the Second Respondent is not exempt from liability for excessive seizure.

Issue 2

41 Counsel for the Second Respondent, Mr Chou Sean Yu ("Mr Chou"), accepts that the Second Respondent could have done more to find out about the nature and value of the seized items. However, he argues that s 68(2) of the Subordinate Courts Act nonetheless absolved the Second Respondent of any liability in this case.

42 Mr Cheong disagrees, arguing that s 68(2) of the Subordinate Courts Act deals only with "excess of authority claims" and does not deal with breach of common law duties. This argument is, however, difficult to follow, since excessive seizure is but one example of an unauthorised execution in excess of authority (*Halsbury's Australia* at para 325–9915 and *Cook v Palmer* (1827) 108 ER 623

(KB) at 624).

43 For easy reference, s 68 of the Subordinate Courts Act is set out in full:

> **Protection of judicial and other officers**
>
> 68.—(1) A judicial officer shall not be liable to be sued for any act done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.
>
> (2) *No officer of a subordinate court charged with the duty of executing any writ*, summons, warrant, order, notice or other mandatory process of the subordinate courts *shall be liable to be sued for the execution of or attempting to execute such writ*, summons, warrant, order, notice or other mandatory process, or in respect of any damage caused to any property in effecting or attempting to effect execution*, unless he knowingly acted in excess of the authority conferred upon him by such writ*, summons, warrant, order, notice or other mandatory process of the court in question.
>
> (3) An officer of a subordinate court shall not be deemed to have acted knowingly in excess of his authority merely by reason of the existence of a dispute as to the ownership of any property seized under any writ or order of execution.
>
> (4) No judicial officer, officer of a subordinate court or court-appointed mediator shall be liable to be sued for an act done by him for the purposes of any mediation or other alternative dispute resolution process conducted by him in a subordinate court, if the act —
>
> (*a*) was done in good faith; and
>
> (*b*) did not involve any fraud or wilful misconduct on his part.
>
> [emphasis added]

Scope of s 68(2) of the Subordinate Courts Act

44 In construing the scope of s 68(2) of the Subordinate Courts Act, consideration must be given to the "occupational hazard" faced by bailiffs of *inter alia* seizing goods not belonging to the execution debtor (Claire Sandbrook, *Enforcement of a Judgment* (Sweet & Maxwell, 11th Ed, 2011) at para 12–149). Protection of the bailiffs against such risks must however be also fairly balanced against the need to protect private rights affected by the bailiffs' actions (Balkin & Davis, *Law of Torts* (LexisNexis Butterworths, 4th Ed, 2009) at para 6.48). Against this backdrop, how far does s 68(2) of the Subordinate Courts Act extend? Does it cloak the Second Respondent with immunity from liability arising from his numerous lapses? Specifically, does it protect the Second Respondent from liability arising from his excessive seizure?

45 We are of the view that a proper reading of s 68(2) of the Subordinate Courts Act is that the protection extends to excessive seizure claims. Indeed, no liability would attach to a bailiff who seized excessively unless he had done so "knowingly", a finding which does not appear to be supported by the state of evidence here.

(1) Legislative history of s 68(2) Subordinate Courts Act

46 Historically, the relevant provisions for the protection of judicial and other officers were first set

out in ss 84 and 86 of the Straits Settlement Ordinance No 17 of 1934 ("the 1934 Ordinance") as follows:

Protection of Judicial and other officers

84.—(I) No Judge, District Judge, Assistant District Judge, Police Magistrate, Coroner, Justice of the Peace or other person acting judicially shall be liable to be sued in any Civil Court for any act done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

(2) No officer of any Court or other person bound to execute the lawful warrants or orders of any Judge, District Judge, Assistant District Judge, Police Magistrate, Coroner, Justice of the Peace or other person acting judicially shall be liable to be sued in any Civil Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

…

86. *No Sheriff, bailiff or other person authorised to execute the process of any Court shall be liable to an action for breach of duty for damages* ***beyond the amount of the loss which his breach of duty has occasioned*** .

[emphasis added in italics and bold italics]

47 Section 84 of the 1934 Ordinance was retained as s 105 of the Straits Settlement Ordinance 1955 (Cap 3) ("the 1955 Ordinance"), though s 86 of the 1934 Ordinance was left out of the 1955 Ordinance:

Protection of Judicial and other Officers

105.—(1) No Judge, District Judge, Magistrate, Coroner, Justice of the Peace or other person acting judicially shall be liable to be sued in any civil court for any act done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

(2) No officer of any court or other person bound to execute the lawful warrants or orders of any Judge, District Judge, Magistrate, Coroner, Justice of the Peace or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

48 A complete revamp of these provisions was eventually introduced by way of s 68 of the Subordinate Courts Act (Cap 14, 1970 Rev Ed) ("the 1970 Act"), which read as follows:

68.—(1) A judicial officer shall not be liable to be sued for any act done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

(2) ***No officer of a subordinate court charged with the duty of executing any writ,***

summons, warrant, order, notice or other mandatory process of the subordinate courts shall be liable *to be sued for the execution of or attempting to execute such writ, summons, warrant, order, notice or other mandatory process, or in respect of any damage caused to any property in effecting or attempting to effect execution* ***, unless he knowingly acted in excess of the authority*** *conferred upon him by such writ, summons, warrant, order, notice or other mandatory process of the court in question, and he shall not be deemed to have acted knowingly in excess of his authority* merely by reason of the existence of a dispute as to the ownership of any property seized under any writ or order of execution.

[emphasis added in italics and bold italics]

49 These provisions remain intact in the present edition of the Subordinate Courts Act, save that s 68(2) of the 1970 Act is now split into two sub-sections as ss 68(2) and 68(3) of the present Subordinate Courts Act. There is no Parliamentary guidance as to how this provision ought to be construed as the provision was not discussed in Parliament when the Subordinate Courts Bill was introduced in 1970. Some assistance may however be drawn from a comparison of analogous provisions abroad.

"for the execution of or attempting to execute such writ"

50 Inspiration for the drafting of ss 68(1) and 68(2) of the Subordinate Courts Act may have come from a similar provision in India's Judicial Officers' Protection Act 1850 ("the Indian Act"), which reads:

Non liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders

1. No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time in good faith, believed himself to have jurisdiction to do or order the act complained of;

and *no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.*

[emphasis added]

51 The first part of the Indian Act, which confers judicial immunity on judicial officers, is broadly similar to s 68(1) of the Subordinate Courts Act: to invoke the exemption, the judicial officer has to show that he had in good faith believed he had jurisdiction. The latter part of the Indian Act extends protection to court officers, such protection being derivative of or ancillary to the immunity conferred on judicial officers (Law Commission of India, *One Hundred and Fourth Report on the Judicial Officers' Protection Act, 1850* (10 October 1984) at para 1.2, and Abimbola A Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Clarendon Press, 1993) at pp 114–115), and is replicated in s 14(2) of the Malaysian Courts of Judicature Act 1964 ("the Malaysian Act"), which reads:

No officer of any court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil court *for the execution* of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same. [emphasis added]

52 This derivative immunity in s 14(2) of the Malaysian Act is however less broad, and only extends to the *act of executing* the order as opposed to the *manner of its execution*, with the consequence that an officer of court who carries out the execution negligently is *not* protected because the negligence relates to the manner of execution, rather than just the act of execution (*Wong Cheong Kai and ors v Hongkong & Shanghai Bank & anor* [1996] 4 CLJ 114 (HC Malaya, Ipoh) at 121).

53 Apart from s 14(2) of the Malaysian Act which provides protection "for the execution" of court orders, there is, additionally, s 14(3) of the Malaysian Act, which protects sheriffs and bailiffs in respect of damage caused "in effecting, or attempting to effect the execution":

> No sheriff, bailiff or other officer of the Court charged with the duty of executing any judgment, order or warrant of distress, or of attaching any property before judgment, shall be liable to be sued in any civil court *in respect of any property seized by him, or in respect of damage caused to any property in effecting, or attempting to effect the seizure*, unless it shall appear that he knowingly acted in excess of the authority conferred upon him by the writ, warrant or order in question, and he shall not be deemed to have acted knowingly in excess of his authority merely by reason of knowing of the existence of a dispute as to the ownership of the property so seized. [emphasis added]

54 On its face, "in effecting, or attempting to effect the seizure" in s 14(3) of the Malaysian Act embraces a wider range of situations than "the execution" referred to in s 14(2) of the Malaysian Act. This suggests that s 14(3) of the Malaysian Act may extend protection to the *manner of execution*, rather than just *the act of executing* the order. Since s 68(2) of the Subordinate Courts Act is similar to s 14(3) of the Malaysian Act as both provisions refer to "in effecting, or attempting to effect", rather than just "the execution", this supports the proposition that the bailiff's immunity under s 68(2) of the Subordinate Courts Act extends to the manner of the execution, rather than being merely confined to the act of executing. Since excessive seizure on the part of the bailiff relates to the manner of the execution, this lends support to Mr Chou's submission that s 68(2) of the Subordinate Courts Act protects bailiffs from liability arising from excessive seizure committed in the course of executing a writ.

55 Further, we find persuasive the contention that "the execution of or attempting to execute" and "in effecting or attempting to effect execution" in s 68 of the Subordinate Courts Act can be read widely to include a bailiff's excessive seizure relating to the manner of execution. Two Indian Supreme Court cases give some tangential guidance on this issue (see *Anowar Hussain v Ajoy Kumar Mukherjee and others* AIR 1965 SC 1651 and *Rachapudi Subba Rao v Advocate-General, AP* (1981) 2 SCR 320 ("*Rachapudi*")). They affirm that "jurisdiction" in the Indian Act encompassed the erroneous *exercise of* jurisdiction, although this was not explicitly set out in the Indian Act. As was astutely observed by the court in *Rachapudi* at 325–326:

> The expression "jurisdiction" in this Section has not been used in the limited sense of the term, as connoting the "power" to do or order to do the particular act complained of, but is used in a wide sense as meaning "generally the authority of the Judicial Officer to act in the matters". Therefore, if the judicial officer had the general authority to enter upon the enquiry into the cause, action, petition or other proceeding *in the course of which* ***the impugned act was done or ordered by him in his judicial capacity, the act, even if erroneous, will still be within his 'jurisdiction'*** , and the mere fact that it was erroneous will not put it beyond his "jurisdiction". *Error in the exercise of jurisdiction is not to be confused with lack of jurisdiction in entertaining the cause or proceeding*. It follows that if the judicial officer is found to have been acting in the discharge of his judicial duties, then, in order to exclude him from the protection of this statute,

the complainant has to establish that (1) the judicial officer complained against was acting without any jurisdiction whatsoever, and (2) he was acting without good faith in believing himself to have jurisdiction. [emphasis added in italics and bold italics]

56 Given the broad language of s 68(2) of the Subordinate Courts Act, which refers to "the execution of or attempting to execute such writ", and reading the provision expansively, we agree with the Judge that the protection provided under s 68(2) of the Subordinate Courts Act extends to excessive seizure claims *"unless [the bailiff] knowingly acted in excess of the authority"* [emphasis added]. Even if the bailiff exceeds his authority he cannot be held responsible unless it is established that he had knowledge that he was acting beyond his authority. It may be more difficult to establish such wilfulness than the absence of good faith prescribed in s 68(1) of the Subordinate Courts Act.

(2) The present facts

57 Flowing from the above analysis, a bailiff who would otherwise be liable for excessive seizure is protected by s 68(2) of the Subordinate Courts Act. The s 68(2) protection is only stripped where it could be said that the bailiff had knowingly seized in excess of the judgment debt.

58 On the present facts, the Second Respondent could by no measure be said to have "knowingly" caused such a state of affairs. Although he failed to take reasonable steps to find out the nature and true worth of the seized items, there was nothing in the "old and rusty" appearance of the seized items which might have alerted him to any particular need for a valuer to be appointed. Indeed, the old and rusty appearance was confirmed by several witnesses. In these circumstances, we are not prepared to find that there were sufficient facts suggesting to the Second Respondent that the seized items were in fact highly valuable in themselves. In the light of the foregoing, the Second Respondent is exempt from liability for excessive seizure, and the claim against the Second Respondent is dismissed.

59 There is of course an understandable discomfort with according such wide immunity to bailiffs since due consideration must also be given to the debtor's interests. As mentioned at [2] and [44] above, the protection of bailiffs must be balanced against the need to protect the interests of debtors. *In this regard, a "check" indeed exists by way of the potential liability of the execution creditor who oversees the seizure without adequately guiding the bailiff on the proper and accurate seizure of property.* We pause here to observe that the general practice and procedures observed by Subordinate Court bailiffs today are very different from those ascribed to the Second Respondent. Better safeguards to protect debtors have also been put in place. For instance, in addition to more rigorous recording procedures of seized items, digital records are also maintained. Every bailiff now utilises a digital camera to take photographs of seized items. This allows written records to be independently verified in the event of a dispute. Further, for cases involving the sale of unusual or more valuable items, an independent valuer will be appointed to make an assessment. Bailiffs are also now more rigorously trained and supervised, and there is closer oversight of their work by judicial officers to ensure that best practices are observed. Taking these developments into account, we are minded to sound a note of caution to future debtors and counsel who might be tempted to extend the ambit of the legal principles we have stated here on excessive seizures – it will be necessary to present a clear case supported by proper valuations (and not vague estimations) that the impugned seizure is plainly excessive.

Issue 3

60 This brings us to the third issue. Can the Appellant nevertheless recover against the First Respondent on the ground that the Second Respondent was the First Respondent's agent for the

purposes of the seizure and sale?

61 Before us, Counsel for the First Respondent, Mr Daniel Koh, rightly conceded that the protection extended to the Second Respondent under s 68(2) of the Subordinate Courts Act would not absolve the First Respondent from liability, if any arose by reason of agency or otherwise. This concession was rightly made, since the immunity under s 68(2) of the Subordinate Courts Act is narrowly focussed only on absolving the procedural conduct of the court officer concerned. There is no doubt that the Second Respondent, the actual doer of the wrongful act, did commit the tort. As soon as the tort was committed, a cause of action against both the First and Second Respondents vested in the Appellant (see P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) ("*Vicarious Liability*") at pp 8 and 307), and although the cause of action against the latter had been statutorily expunged by virtue of s 68(2) of the Subordinate Courts Act, the same cannot be said in relation to the former.

The role of the bailiff vis-à-vis the execution creditor

62 The Judge held, and the parties accept, that a bailiff is not typically the agent of the execution creditor. This was the position set out in *Curtis v Metro-Goldwyn-Meyer (Oriental) Inc* [1931] SSLR 42 ("*Curtis*"), where the Straits Settlements Supreme Court held that the sheriff acting under a valid writ of seizure and sale was in no sense the servant or agent of the execution creditor "who merely sets the Court in motion". That does not, however, mean that an agency relationship can never arise. By the following observation, the court in *Curtis* rightly left the door open for an execution creditor to be found liable where the execution creditor actively participates in the execution by the bailiff (at 51–52):

> If the execution-creditor does not mislead the sheriff, and *takes no such active part in the actual execution as to identify himself with any wrongful acts of the sheriff* or his officers or agents committed in the course of the execution of the writ, then he is not liable or responsible for such wrongful acts. [emphasis added]

(1) The position in England

63 The law as stated in *Curtis* is consistent with the English authorities. The default position is that the bailiff is not the execution creditor's agent, but a "public functionary" with much wider responsibilities to those who set him in motion as well as those against whom the writs are directed (*Hooper v Lane* [1857] 6 HLC 442 at 549–550, *In re A Debtor (No 2 of 1977)* [1979] 1 WLR 956 at 961). As aptly put by Greer LJ in *Williams v Williams & Nathan* [1937] 2 All ER 559 ("*Williams*") at 561A, it is "clear to demonstration" that a bailiff executing a judgment of the court acted on behalf of the court as an officer of the court, and not as agent of the judgment creditor (see, also, *Wilson v Tumman* (1843) 6 Man & G 236 ("*Wilson v Tumman*") at 243). This explains why the bailiff need only have regard to the execution creditor's instructions "so far as they are reasonable" (*In re Crook* (1894) 63 LJ QB 756 at 757), and why goods seized by him are held in custody of the law, and not in the execution creditor's possession (*Baylis v Bishop of London* [1913] 1 Ch 127 at 141).

64 An agency relationship can nonetheless arise exceptionally where it is shown that the execution creditor intervened to make the bailiff do something which is not legitimately covered by the writ (*Williams* at 561), *ie*, where the bailiff acts not under the writ, but on the execution creditor's directions falling outside the scope of the writ. Otherwise, the default position remains and the bailiff will be deemed to be acting on behalf of the court. Sir Evershed MR noted in *Barclays Bank Ltd v Roberts* [1954] 3 All ER 107 ("*Barclays Bank*") at 112 (see, also, observations by Jenkins LJ in *Barclays Bank* at 113, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 19th Ed, 2010)

("*Bowstead & Reynolds*") at p 504, fn 1164, and *Vicarious Liability* at p 136) that:

> *There is no question here, as it seems to me, such as was in the mind of Greer LJ, of the sheriff of his officers departing, at the instance of a judgment creditor, from the terms of the writ of execution. The sheriff's officers adhered throughout to the strict terms and command of the writ of possession and, having done so, must prima facie at any rate, on the authority of Williams v Williams & Nathan, be treated as having acted independently of the landlord and as officers of the court.* As a matter of principle, it seems to me impossible that the character and quality of their actions were entirely altered because they sought advice and then chose to act on that advice … They cannot, in my judgment, be converted into agents of the persons on whose behalf the advisors were acting … unless, at the very least, it were shown that the sheriff's officers made it plain that their subsequent actions were only undertaken on the basis of that other person assuming responsibility therefor. [emphasis added]

65 This appears to be nothing more than the expression of the general principle, as stated in *Bowstead & Reynolds* at para 8–176, that a person is liable for torts committed by another which he specifically instigates or authorises (see also *Law of Seizure of Goods* at p 71). As Tindal CJ explained in *Wilson v Tumman* at 244 (endorsed in *Morris v Salberg* (1889) LR QB 614 ("*Morris"*) at 620, *Woollen v Wright* (1862) 1 H & C 555 at 561–562):

> *If the [execution creditor] had directed the sheriff to take [the plaintiffs' goods], under a valid writ, requiring him to take the goods of another person than the [execution debtor], such previous direction would undoubtedly have made him a trespasser, on the principle that all who procure a trespass to be done are trespassers themselves, and the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff.* But where the sheriff, acting under a valid writ by the command of the Court and as the servant of the Court, seizes the wrong person's goods, a subsequent declaration by [the execution creditor], ratifying and approving the taking, cannot … alter the character of the original taking, and make it a wrongful taking by [the execution creditor]. [emphasis added]

Similar comments were made by Jessel MR in *Smith v Keal* (1882) 9 QBD 340 ("*Smith*") at 351:

> It is the sheriff's duty to levy execution on the goods of the judgment debtor. *If therefore the [judgment creditor's] solicitor interferes, and directs the sheriff to levy on the goods of another person, he is answerable on the same principle as any one else who directs a trespass.* Though the sheriff is an officer of the law he is liable if he commits a trespass, and any one who joins in the trespass is equally liable. … It is not the province of the [judgment creditor's] solicitor to interfere with the sheriff. The sheriff must ascertain himself whether the goods he seizes are the judgment debtor's goods. [emphasis added]

66 The "agency" referred to in this context therefore does not impose on the bailiff the usual duties of an agent, but operates only to make the execution creditor liable for the bailiff's misconduct (Tamara Buckwold, "From Sherwood Forest to Saskatchewan: The Role of the Sheriff in a Redesigned Judgment Enforcement System" (2003) 66 Sask L Rev 219 at fn 66). As noted in *Vicarious Liability* at p 136:

> It is to be noted, in the first place, that a sheriff, in executing a judgment for a court in the ordinary way is not an agent of the judgment creditor for whose acts the creditor can be held liable. If, for example, in executing a writ of *fi. fa.* the sheriff simply seizes the wrong person's goods the creditor is not liable. ***And though there are many cases in which the creditor has been held liable for a wrongful seizure they can all be explained as cases in which the***

creditor has given specific instructions to the sheriff as to the goods to be seized, or the place where they are to be found, etc. **In such circumstances *the creditor becomes liable on the ground that he has himself authorised the specific conduct which turns out to be tortious.*** These are not cases of vicarious liability, for it has been repeatedly said that the sheriff acts as an officer or agent of the court and not of the creditor in executing its judgments. [emphasis added in bold italics]

(2) The position in Australia

67 There are comparatively few Australian cases discussing the relationship between the bailiff and the execution creditor. The available authorities are however in line with the position in England, as set out from [63]–[65] above. It is, for instance, recognised that the bailiff is an officer of the court (*Halsbury's Australia* at para 325-9905 and *Owen v Daly* [1955] VLR 442 ("*Owen*") at 448–449) who is duty bound to act reasonably with due regard to the interests of both the judgment creditor and judgment debtor. As Dean J observed in *Owen* at 446 (endorsed in *Kousal Suncorp-Metway Limited* [2011] VSC 312 at [35] and *Zhipping Zhou v Ronald Geoffrey Kousal and ors* [2012] VSC 187 at [93]):

> It is, I think, clearly established that at common law a sheriff selling the chattels, including chattels real, of a judgment debtor is bound to act reasonably in the interests of the judgment creditor and of the judgment debtor in order to obtain a fair price, not necessarily the market value, for it is well recognized that compulsory sales under legal process rarely bring the full value of the property sold … *The duty of the sheriff to act reasonably with due regard to the interests of both sides* and his liability in damages if he fails to exercise reasonable care has been frequently stated. [emphasis added]

68 As with the position in England, a judgment creditor may nonetheless be exposed to liability in damages resulting from wrongful seizure if he or his solicitor gives misleading directions to the bailiff charged with the execution (*Halsbury's Australia* at para 3259–915). This principle was also recognised by Stone J in *Sparrow v Cornell* (1900) 2 WALR 78 ("*Sparrow*") at 79:

> It is true that in certain cases a direction by the solicitor on the writ, although it forms no portion of the writ, may involve the liability of his client. For instance, in this case *the endorsement on the writ that the execution debtor was a patent agent who resides in Perth, might have made the execution creditor liable in the event of the debtor not being such an agent, because the Sheriff might have been misled into seizing at the debtor's office*. [emphasis added]

(3) The adverse authorities

69 There are two cases which contradict the position that a bailiff is generally not an agent of the execution creditor. The Appellant has quite rightly refrained from relying on these authorities on appeal. However, for good measure, we shall briefly explain why these two cases are not authoritative.

70 The first case is *In re Caidan* [1942] 1 Ch 90 ("*Caidan*"), where the court held (at 96) that the bailiff is an agent of the person levying distress. It is important to note that *Caidan* was decided in the context of levying distress, which, unlike in Singapore, was a self-help remedy in England. This is a difference which matters when conceptualising the role of the bailiff *vis-à-vis* the person for whom the writ is executed. As Judith Prakash J explained with considerable clarity in *Ginsin Holdings Pte Ltd v Tan Mui Khoon (trading as Chan Eng Soon Service) and another* [1996] 3 SLR(R) 500 ("*Ginsin*"), distress in Singapore is obtained only after judicial intervention; a writ of distress has to be issued by

court order and it is the court bailiff who distrains the tenant's chattels pursuant to the writ (*Ginsin* at [7] and [14]). The seizure of the goods is not, therefore, directly effected by the landlord, but aided by the judicial interposition of the court bailiff (*Ginsin* at [17]).

71 In other words, writs of distress, like writs of seizure and sale, require judicial intervention in Singapore. The execution creditor merely "sets the court in motion". The bailiff derives authority from the writ, not the execution creditor. The manner in which the bailiff is expected to perform his function is subject to the Rules of Court and not defined by ad hoc agreement with the execution creditor. Viewed in this light, it becomes less intuitive to regard the court bailiff as the agent of the execution creditor. *Caidan* is therefore not useful for the purpose of defining the role of the bailiff in Singapore. As the Hong Kong court in *Au Tak Chen v Li Hon Ming* [1960] HKDCLR 247 held at 252–253:

> [I]t is abundantly clear that distress for arrears of rent cannot be levied except under a warrant of the Court, obtained under the provisions of the [Distress for Rent Ordinance (Cap. 7)].
>
> I am quite satisfied that the bailiff in the Colony is not, and cannot be said to be the agent of a landlord except under certain circumstances an example of which would be the case where the landlord himself is present at the time of the levy and personally directs the bailiff what property to seize. *The position of the bailiff in the levying of a distress by a landlord in England is different from that of a bailiff in the Colony having regard to the provisions of the Distress for Rent Ordinance (Cap. 7) whereunder the bailiff acts under a distress warrant issued by the Court and acts therefore as an officer of the Court*. [emphasis added]

72 The second case is *Heng Chyu Kee v Far East Square Pte Ltd* [2001] 3 SLR(R) 651 ("*Heng Chyu Kee*"), where the Singapore High Court observed that a bailiff's negligence in distraining property could expose the landlord to liability as the bailiff distaining movable property was deemed to be the landlord's agent (*Heng Chyu Kee* at [5]). However, the observation was strictly *obiter* –while the plaintiff rightly asserted that the writ of distress had been negligently executed, her claim failed because she did not prove her damages (*Heng Chyu Kee* at [14]). Further, as the judge quite rightly pointed out, the issue did not appear to have had been disputed in *Heng Chyu Kee* (at [25], [32] and [35] of the Judgment).

When will the creditor be liable for a bailiff's wrong?

73 As set out above (see [62]–[72]), the starting point is that a bailiff is not an agent of the execution creditor. However, the bailiff will be deemed to be an agent for the purpose of assigning liability to the execution creditor where the execution creditor takes an active part in the actual execution so as to identify himself with any wrongful act of the bailiff. In other words, the execution creditor who is found to be liable for the bailiff's wrong may be seen as a joint tortfeasor. The issue is then in what circumstances the execution creditor can be said to have played a sufficiently active part in the actual execution. Whether the execution creditor has played a sufficiently active part in the execution is in the final analysis always a question of fact, and clear evidence is required to establish this (*Smith* at 350, *Morris* at 622).

74 Plainly, where the execution creditor directs the bailiff to seize items of another person other than the debtor, the execution creditor is liable (see *Wilson v Tumman*, and *Smith*, quoted at [65] above). For example, the bailiff in *Chedin Mohamed Hashim v Teoh Ong Thor and Chew Chan Seng* [1950] 16 MLJ 238 ("*Chedin*") seized and sold two lighters which the execution creditor had personally pointed out. Significantly, the execution creditor informed the bailiff that the two lighters were the debtor's property, though this turned out to be false. The plaintiff, to whom the lighters had been mortgaged, successfully sued both the execution creditor and the purchaser for conversion. The

court in *Chedin* held as follows (at 239):

> The Bailiff gave evidence that the first defendant personally pointed out the two lighters in question and *informed him that they were the property of [the debtor]*.
>
> …
>
> ... In the present case the first defendant personally indicated the goods of plaintiff to the Sheriff and as they were not those of the execution debtor the sale was wrongful and passed no title.
>
> I find therefore that the sale of these tongkangs was wrongful and the plaintiff is entitled to damages against the defendants for their conversion.
>
> [emphasis added]

75 It is clear mere presence at the scene of execution, as in *Williams*, would not render the execution creditor liable for the wrongful acts of the bailiffs (Alastair Black, *Execution of a Judgment: including other methods of enforcement* (Oyez Publishing Limited, 6th Ed, 1979) ("*Execution of a Judgment*") at p 59). The debtor in *Williams* was wrongfully evicted by the bailiff because a portion of the house he occupied was controlled by statute. Greer LJ found that there was no evidence to show that any "special direction" (at 561D) had been given to the bailiff which might make him the execution creditor's agent. Although the execution creditor, who was present at the time of the eviction, did not tell the bailiff that part of the house was controlled, this was in Greer LJ's mind "quite different" (at 561H) from saying that the execution creditor had instructed the bailiff to execute the writ in an irregular manner.

76 However, where the execution creditor is present in a supervisory capacity and fails to intervene to correct any error in the goods seized, the creditor will be liable (*Execution of a Judgment* at 59 citing *Meredith v Flaxman* (1831) 5 Car & P 99 ("*Meredith*")). The plaintiff in *Meredith* claimed that the property seized by the bailiffs had belonged to him instead of the execution debtor. The plaintiff sought to make the defendant execution creditor liable for the wrongful seizure. Lord Lyndhurst CB instructed the jury as follows (*Meredith* at 101):

> *If a man employing an officer chooses to attend with the officer, who seizes, in his presence, the goods of a third person, under the execution he has sued out, he makes himself responsible for the officer's act;* but, *if he is not there, and does not personally interfere in the matter, he is not liable.* The questions, therefore, for your consideration will be, whether the goods said to have been transferred were the property of [the plaintiff] or of [the execution debtor]; and, if of [the execution debtor], then whether these particular articles, viz. the two pictures and the table, were the property of [the plaintiff], and were taken among the rest by the authority of [the execution creditor]; for, if they were, then he is liable. It will be for you to say, whether he was so acting as to identify himself with the particular goods taken. As it seems to me, he ought to have pointed out to the officers what was to be taken, and what not. He was there in communication with the officers, and it appears to me, that by this he has made himself responsible for their acts. *The question will be, whether these goods with the rest were taken by the direct authority of [the execution creditor]; for, if they were, then he will be liable; if not then these goods must share the same fate as the rest. If you think [the execution creditor] left it entirely to the officer and the broker to act according to their discretion, then he will not be responsible.* [emphasis added]

77 Obviously, the execution creditor may only be said to have procured the bailiff's tort where the bailiff has effectively relied on the execution creditor's instructions in the discharge of his statutory responsibilities. For example see, *Morris* at 617 and *Lee v Rumilly* (1891) 7 TLR 303 ("*Lee*"), where the execution creditors' solicitors wrongly endorsed on the writs statements that the debtor resided at certain addresses, which were in fact those of third parties whose goods were thus seized. As the bailiffs in both cases were misled by the solicitors' endorsements, the execution creditors were liable for trespass upon the third parties' goods. As long as misleading instructions, which in fact misled, were given, it did not matter that the execution creditor did not mean to mislead the bailiff.

7 8 *Morris* and *Lee* may be contrasted against *Hewitt v Spiers and Pond (Limited)* [1896] 13 TLR 64, where misleading instructions were given to the sheriff who was *not in fact misled*. Lord Esher MR held at 65 as follows:

> Here the solicitors [of the execution creditor] did put the endorsement on the writ. If the endorsement were such as might have misled the sheriff's officer, and he acted on it, the question whether the sheriff's officer was in fact misled would be for the jury. But it was proved in this case that the sheriff's officer twice abstained from acting on the endorsement and refused to levy. *The endorsement therefore did not mislead him into acting. … [T]he [creditors] were not liable by reason of the endorsement on the writ of fi. fa., because the sheriff's officer did not act upon it* … [emphasis added]

Similarly, no liability was attached to the execution creditor in *Sparrow* because the bailiff in that case had not in fact been misled. Stone J held at 79 as follows:

> To shew, however, that the Sheriff was not misled, we have only to look at the conduct of the Sheriff's officer when putting the writ into operation. He went in pursuance of that endorsement and seized goods at the office of the debtor, but refrained from seizing elsewhere until he had obtained further directions. It is clear, therefore, that the Sheriff was not misled into seizing at the residence of the execution debtor by reason of the direction on the writ.

79 We shall now turn to the specific wrong of excessive seizure by the bailiff. The issue to be addressed is when an execution creditor is considered to have taken an active part in the actual execution so as to identify himself with the bailiff's excessive seizure. As stated above at [24], in Singapore, the execution creditor or his representative is required to identify the property to be seized by the bailiff. This is a crucial step of the process in which the execution creditor has to take responsibility in identifying only the appropriate amount of items owned by the judgment debtor to be seized, and the execution creditor has thus assumed the risk of the bailiff's excessive seizure. *The bailiff who executes a writ is doing so on behalf of the court and not as an agent of the execution creditor. However, when the execution creditor takes an active part in the actual execution by identifying the items to be seized, or assumes the responsibility for identifying the property to be seized, the execution creditor assumes the risk of excessive seizure, and is hence liable for any excessive seizure.* Indeed, there are cogent reasons why an execution creditor should be held liable for the seizure of a disproportionate amount of property. If Mr Koh were correct it would mean that there would be a legal black hole in relation to legal liability for excessive seizures. It seems to us on the basis of the above discussion that the law has struck a sensible balance in apportioning responsibility for excessive seizures to the execution creditor by mandating that the execution creditor play an active part in the actual execution by taking responsibility of identifying how much items are to be seized.

80 Nevertheless, as stated above at [26] to [27], any harshness is mitigated by the fact that an execution creditor will not be liable for the bailiff's excessive seizure where the execution creditor

exercised a reasonable and honest discretion in estimating what the goods will realise at auction, so as to avoid an excessive seizure.

The present facts

81 We are of the view that, considering the totality of Eugene Lim's involvement in the Second Respondent's seizure of goods as the First Respondent's authorised representative, the First Respondent is liable for the bailiff's excessive seizure. It is crucial that Eugene Lim's presence at the warehouse be properly assessed in the context of the established facts including the contemporaneous documents pertaining to the seizure. Those documents unequivocally reveal the critical significance of his role at the warehouse.

82 There was first the Writ (see [5] above), which instructed the bailiff to seize the Appellant's property as was to be identified by the First Respondent. There was then the Indemnity (see [8] above), which acknowledged the extent of the debt, authorised Eugene Lim to point out the Appellant's assets to be seized on the First Respondent's behalf, and which indemnified the Second Respondent against all claims arising from the execution. The signing of the indemnity signifies a conscious assumption of risk. Most crucially, there was the inventory annexed to Form 94 (see [10] above), which erroneously described the seized items as "parts of timber" and Form 94 itself, which sets out the Second Respondent's wholly inaccurate and unjustifiable valuation of the seized item at $15,000. By signing off on the inventory annexed to Form 94 and assuming direct responsibility therein for "any wrongful seizure", Eugene Lim (on behalf of the First Respondent) must be taken to have also affirmed as appropriate for the purposes of satisfying the judgment debt both the quantity of the seized items and the valuation made by the Second Respondent in Form 94. The significance of Eugene Lim's endorsement of the same is better appreciated when one considers the Second Respondent's unqualified reliance on Eugene Lim to ensure that the seizure was in order, which we find that he must have been aware of:

> Q: … Why didn't you ask Eugene for assistance in describing what had been seized so that you can record that in the inventory instead?
>
> …
>
> A: Actually, I didn't---I didn't do that but I will ask only to---I ask him to sign. I hope the--- whatever I wrote is, er, right.
>
> Q: *So your understanding is that when he signs whatever you've written---*
>
> A: Mm.
>
> Q: *---then whatever you have written is right?*
>
> A: *Yah.*
>
> Q: *So you're asking him to confirm by signing?*
>
> A: *Yes, yah. Yes, I agree.* He didn't comment anything.
>
> [emphasis added]

83 In these circumstances, we are of the view that Eugene Lim, being the representative of the First Respondent, has taken an active part in the actual execution as to identify himself with the

bailiff's excessive seizure. Therefore, the First Respondent is liable for the bailiff's excessive seizure.

84 As stated above (at [26]–[27]), an execution creditor will not be liable for a bailiff excessive seizure if the execution creditor, when identifying the debtor's items to be seized, exercised a reasonable and honest discretion in estimating what the goods will realise at auction, so as to avoid excessive seizure. Based on the evidence of the Second Respondent, Eugene Lim pointed him to the Appellant's machinery in general at Bays A2 and A3, but was not by the Second Respondent's side when the actual seizure of the individual items was taking place so as to identify the exact items to be seized. When the Second Respondent sought Eugene Lim's signature on the inventory annexed to Form 94, he signed the inventory without checking the quantity or ascertaining the value of items seized, nor did he correct the mistake in the inventory list. In these circumstances, we are of the view that First Respondent did not exercise a reasonable discretion in estimating what the goods would realise at auction when he authorised how much of the judgment debtor's property was to be seized by the Second Respondent.

Conclusion

85 For the reasons above, we allow the appeal against the First Respondent. The First Respondent shall be liable to the Appellant for the sum of $96,448.12 less $19,523.45 (this sum is the balance sale proceeds which was refunded to the Appellant). Interest on this sum fixed at 3% per annum from the date of the filing of these proceedings to the date of this judgment of the due amount is to be paid to the Appellant.

86 The appeal against the Second Respondent is dismissed.

87 The Appellant shall be entitled to the costs of these proceedings here and below as against the First Respondent. We direct that, in the light of all the established facts and considering the significance of the legal issues raised in these proceedings which had not been authoritatively settled in the High Court earlier, these costs are to be taxed on the High Court scale. Despite the Appellant not succeeding against the Second Respondent, we direct that there be no costs as between them here and below. We think it was reasonable in the circumstances for it to have initiated these proceedings, considering the serious lapses attributable to the Second Respondent and the unsettled legal position in relation to his legal responsibility for same. The usual consequential orders are to follow.

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