Oversea-Chinese Banking Corp Ltd
v
Salim bin Said and other matters

[2017] SGHCR 07

High Court — Originating Summons 97 of 2009 (Summons No 648 of 2017); Originating Summons No 720 (Summons No 1304 of 2017) and Originating Summons No 723 of 2007 (Summons No 1305 of 2017)
Scott Tan AR
16 February; 27 March; 3, 12 April 2017

Civil procedure — Judgments and orders — Enforcement

12 May 2017 Judgment reserved.

Scott Tan AR:

Introduction

1 I have before me three *ex parte* applications for leave to issue writs of possession to enforce orders which were issued more than six years ago. Broadly summarised, the facts of these applications are as follows. The applicant–banks extended loans to the defendants on the security of mortgages over certain properties. The defendants defaulted and the applicants commenced mortgage actions under O 83 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"), successfully obtaining orders for the payment of the moneys secured by the mortgages as well as orders for the delivery of possession of the mortgaged premises. Shortly after these orders had been made, the parties

entered into negotiations and the applicants agreed to withhold enforcement of the orders provided the defendants made regular monthly instalment payments. The defendants failed to keep up with their monthly repayments and the applicants now seek possession of the mortgaged premises.

2 From the outset, I record my appreciation to counsel for their submissions, which I have found to be very helpful. As these applications feature similar facts and engage the same legal issue – namely, the principles governing the exercise of the court's discretion to grant leave for execution to be levied on a judgment or order six years after it has been issued – I have decided to give my judgment for all three in a single written decision.

The history of O 46 r 2(1)(*a*)

3 Order 46 r 2(1)(*a*) of the Rules ("O 46 r 2(1)(*a*)") provides that a writ of execution to enforce a judgment or order may not be issued without the leave of the Court where "6 years or more have lapsed since the date of the judgment or order." It has existed in its present form since the passage of the Rules of the Supreme Court 1970 (S 274/1970) ("1970 Rules"). However, the history of the provision stretches back yet further still, and is deeply intertwined with the development of the modern law of limitation (see, generally, the decisions of the House of Lords in *Lowsley and another v Forbes (trading as LE Design Services)* [1999] 1 AC 329 ("*Lowsley*") and the English Court of Appeal in *W T Lamb & Sons v Rider* [1948] 2 KB 331 ("*W T Lamb*"). In order to understand the circumstances under which the court's discretion should be exercised, it seems to me that it would be useful to examine some of this history.

4 In the earliest days of the common law, there was no limitation period for the enforcement of judgments. However, there was a presumption that a

judgment was satisfied once a year and a day had elapsed without any execution being issued on it (erstwhile referred to as the "year and a day rule"). Once this period had passed, a plaintiff who desired to enforce the judgment had two options open to him: he could either (a) sue on the judgment by an action of debt or (b) he could obtain a writ of *scire facias* to revive the judgment and enable execution to be issued upon it. (The precise juridical nature of a writ of *scire facias* is not absolutely clear, but it suffices to note for present purposes that it enables execution to be issued on a judgment: see *Ridgeway Motors (Isleworth) Ltd v Ltd* [2005] 1 WLR 2871 ("*Ridgeway Motors*") at [13] *per* Mummery LJ.) Until 1833, there was no time limit for applying for a writ of *scire facias*: If the judgment had been issued less than seven years ago, the plaintiff would be entitled sue on the writ of *scire facias* as a matter of course; if the judgment was over 20 years old, the writ would be issued with a "rule to show cause" – that is, an order to the defendant calling upon him to attend before the court to show cause why the plaintiff should not have the benefit of the judgment (see *Lowsley* at 335D *per* Lord Lloyd of Berwick).

5 This changed with the passage of two important pieces of legislation in the middle of the 19th century. The first was the Real Property Limitation Act 1833 (c 27) (UK), s 40 of which provided that "no action or suit or other proceeding shall be brought" to recover any money secured by, among other things, a judgment unless part-payment or some other acknowledgement of the debt had been made in the interim. The limitation period was later reduced from 20 years to 12 years pursuant to s 8 of the Real Property Limitation Act 1874 (c 57) (UK) but the wording of the provision remained unchanged. This provision eventually found its way into the s 2(4) of the Limitation Act 1939 (c 21) (UK) ("UK LA 1939"), which provided simply that an action "shall not be brought upon any judgment after the expiration of 12 years from the date on

which the judgment became enforceable". Following the recommendations of the UK Law Reform Committee, this was reduced to six years, to bring it in line with the limitation periods for other causes of action (see UK Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (Cmnd 6923) ("UK LRC Report") at paras 4.12–4.16). The limitation period for actions on a judgment in the UK continues to be 6 years: see s 24(1) of the Limitation Act 1980 (c 58) (UK) ("UK LA 1980").

6 Section 2(4) of the UK LA 1939 found its way into our laws *via* the passage of the Limitation Ordinance 1959 (Ordinance No 57 of 1959), which repealed and re-enacted the law regulating the limitation of actions and arbitrations in Singapore. In the explanatory statement to the Limitation Bill 1959 (Bill No 18 of 1959), it was stated that it had been drafted to give effect to the UK LA 1939. Section 6(3) of the Limitation Ordinance 1959, which is *in pari materia* with s 2(4) of the UK LA 1939, has not changed since then. The limitation period for actions on a judgment in Singapore continues to be 12 years today (see s 6(3) of the Limitation Act (Cap 163, 1996 Rev Ed) ("LA")).

7 The second statute of note was the Common Law Procedure Act 1852 (c 76) (UK) ("CLPA 1852"). Section 128 of the CLPA 1852 abolished the year and day rule and provided that execution could be issued within six years of a judgment without any need for the revival of the judgment through the issuance of a writ of *scire facias*. Section 129 provided that where it was necessary to apply for a revival of the judgment (for instance, after the lapse of six years), a plaintiff could do one of two things. (a) he could elect to sue on the judgment out of a "writ of revivor" (the successor to the writ of *scire facias*) or (b) he could choose to "apply to the court or a judge for leave to enter a suggestion upon the roll to the effect that it manifestly appears to the court that such party is entitled to have execution of the judgment and to issue execution thereupon".

If the latter course was taken, leave would be granted if it appeared to the court that the party was "entitled to have execution of the judgment and to issue execution thereupon", and such leave would be accompanied by a rule to show cause. The availability of these as alternative options was underscored by the proviso to s 130, which expressly provided that a plaintiff who had been denied leave to issue execution on a judgment was nevertheless still entitled to proceed by suing out of a writ of revivor.

8 This position in the CLPA 1852 was simplified but largely preserved following the passage of the Judicature Acts. Order 42 rr 18 and 19 of the Rules of the Supreme Court, which were set out in Schedule 1 to the Supreme Court of Judicature (1873) Amendment Act 1875 (c 77) (UK) (I shall refer to this as well as its legislative successors as the "UK RSC"), provided as follows:

> 18 As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.
>
> 19 Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly. And such court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect …

9 In the Straits Settlements, these provisions were reproduced as ss 353 and 354 of the Civil Procedure Ordinance 1878 (Ordinance No V of 1878). They were then preserved, largely unchanged, for nearly a hundred years. They next appeared as ss 590 and 591 of the Civil Procedure Code of 1907 (Ordinance No 31 of 1907) and then as O 40 rr 20 and 21 of the Civil Procedure Rules of the Supreme Court 1934 (S 2941/1934). Finally, they were consolidated into a single provision: O 46 r 2 of the 1970 Rules, which as noted at [3] above simply provided that a writ of execution to enforce a judgment or order may not issue

without the leave of the court in certain cases, one of which was where six years or more had lapsed since the date of the judgment or order.

10 For a long time, it was not clear how these two rules – the mandatory and absolute bar against the bringing of any action on a judgment provided for in the limitation acts and the discretionary bar against the issuance of execution after six years had elapsed which was found in the procedural statutes – interacted. In the old case of *Farrell v Gleeson* (1844) 11 C & F 702, the court held that the issuance of a writ of *scire facias* had the effect of creating a new right and was therefore caught by the limitation period set in the Real Property Limitation Act 1833. This was also affirmed in *Watson v Birch* (1847) 15 Sim 523, where the court held that upon the lapse of 20 years from the judgment (the limitation period then in force), "no proceeding whatever" (including, presumably, any proceedings in respect of enforcement) should be taken on a judgment (at 524). However, this issue was not tested after the passage of the CLPA 1852 or the UK RSC. In *Jay v Johnstone* [1893] 1 QB 189, the English Court of Appeal held that the statutory time-bar was not restricted only to judgments which created charges upon land, but to all judgments more generally (at 190 *per* Lindley LJ). However, the court did not consider whether the time bar on the bringing of an action upon a judgment applied to attempts to levy execution on judgments which had already been obtained.

11 This question was squarely addressed in *W T Lamb*. In that case, the plaintiffs contended that the rule (contained in the UK RSC) that leave was required before execution could be levied on a judgment or order issued six years or more ago was *ultra vires* s 2(4) of the UK LA 1939, which gave plaintiffs up to 12 years to bring an action on a judgment. The English Court of Appeal gave short shrift to this argument, holding that it rested on a basic confusion of substantive law of limitation with the procedural law on the

enforcement of judgments. Scott LJ held that s 2(4) of the UK LA 1939 was concerned only with the "substantive right to sue for and obtain an judgment and with that alone"; by contrast, the UK RSC (and the CLPA 1852 before it) was "concerned, and concerned alone, with procedural machinery for enforcing a judgment when obtained" (at 338). Execution, he explained at 337, was "essentially a matter of *procedure*—machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgment or orders" [emphasis added]. Thus, the fact that a court had the power to deny a plaintiff access to its enforcement machinery did not in any way impinge on the plaintiff's *substantive* right (granted under s 2(4) of the UK LA 1939) to "sue on the judgment at any time within the statutory limit of time" (at 337). In support of this, he pointed to legislative history, much of which has already been set out in this judgment, which he said showed that "the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it" (*ibid*).

12 *W T Lamb* was followed by the English High Court in *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 1 QB 278 and by the English Court of Appeal in *National Westminster Bank plc v Powney and others* [1991] Ch 339 ("*Powney*"). In the latter case, the court held that the fact that the limitation period for actions upon a judgment had expired did not bar the plaintiff from making an application for the issuance of a fresh warrant of possession. Since then, *W T Lamb* has been held to represent the law on the subject (see, generally, the UK LRC Report at para 4.14). In *Lowsley*, the result (though not the reasoning) in *W T Lamb* was reluctantly endorsed by the House of Lords. Lord Lloyd, who delivered the leading speech, opined that *W T Lamb* had been wrongly decided (at 339C–F), but held that since it had been so widely accepted to be correct (not least by Parliament, which endorsed it legislatively)

it was no longer open for the House of Lords to reverse it (at 342A–B).

13 This is also the position taken in Singapore, where applications to enforce judgments are not subject to the statutory time bar set out in s 6(3) of the LA (see the decision of the Singapore High Court in *Teh Siew Hua v Tan Kim Chiong* [2010] 4 SLR 123 at [28] and [29] and the cases cited therein). In *Desert Palace Inc (trading as Caesars Palace) v Poh Soon Kiat* [2009] 1 SLR(R) 71 ("*Desert Palace*"), Chan Seng Onn J said (at [68]):

> I recognise the existence of O 46 r 2 where a writ of execution (which includes a writ of seizure and sale, a writ of possession and a writ of delivery) to enforce a domestic judgment or order may not be issued without the permission of the court where six years or more has elapsed but this does not mean that a time bar of six years has thereby been created. … *Although there is no time bar, the court should nevertheless, for* ***good administration of justice****, monitor enforcement of its judgments by way of a writ of execution if more than six years had elapsed, which I believe is the rationale for O 46. Order 46 r 2* ***balances the need to allow time for unhindered execution on a judgment by the judgment creditor and the need to see that the judgment creditor does not sit on his hands*** *and make no real effort to search for the assets of the judgment debtor and use the appropriate enforcement measures to satisfy his judgment debt. The requirement for the court's discretionary leave as prescribed under O 46 is more a* ***procedural and monitoring measure*** *than a substantive mandatory measure to extinguish execution on a judgment* the moment six years or more has elapsed since the date of the judgment. In any event, if such a substantive mandatory measure amounting to a statutory time bar was intended, then it should more appropriately be made by amending the LA than by inserting it as a rule within the Rules of Court. [emphasis added in italics and bold italics]

14 The upshot of all this is that even though O 46 r 2(1)(*a*) might *look* like a limitation period, it is not and should not be treated like one. It does not have the effect of extinguishing a plaintiff's *substantive* rights; instead, it is a *procedural* section that restricts access to the enforcement machinery of the court. This point is underscored by the fact that the dismissal of an application

for leave does not preclude the making of a fresh application, although any later application must be founded on new material if it is to succeed (see *W T Lamb* at 334). In *Ridgeway Motors*, Mummery LJ opined that there are good policy reasons to distinguish fresh actions on a judgment from enforcement proceedings. Limitation statutes are intended to achieve three main objectives: (a) prevent stale claims, (b) relieve defendants from the uncertainty of potential claims, and (c) remove the injustice of increasing difficulties of proof created by the passage of time. These considerations, he observed, generally do not apply where execution is concerned (presumably since the defendant has already been adjudged to be liable and there are no issues of proof): at [31].

15 That said, it is clear that leave will not be granted as a matter of right. O 46 r 3(2)(*b*) of the Rules specifies that the judgment creditor who is applying for leave must explain the reasons for the delay in enforcing the judgment or order. The reason for this, as Chan J explains at [68] of *Desert Palace*, is that the court needs to balance two competing imperatives: (a) allowing plaintiffs sufficient time to realise the fruits of their litigation (which favours a more liberal policy towards the grant of leave) and (b) ensuring that plaintiffs get on with the process of enforcement (which favours a more restrictive approach towards the grant of leave in order to incentivise plaintiffs to take "appropriate" and timely measures to satisfy their judgment debts). With this in mind, I now turn to consider how this balance has been struck in the decided cases.

The case law on the exercise of discretion

16 The starting point of my inquiry is the decision of the Court of Appeal in *Ambank (M) Bhd v Yong Kim Yoong Raymond* [2009] 2 SLR(R) 659 ("*Raymond Yong*"). The plaintiff in that case was a bank that had obtained judgment against the defendant in Malaysia, which it then registered in

Singapore. 12 years after the registration of the judgment, the plaintiff instituted bankruptcy proceedings in Singapore against the defendant and the issue before the court was whether the plaintiff (which had not yet obtained leave to issue execution on the registered judgment under O 46 r 2(1)(*a*)) had a debt which was "enforceable by execution in Singapore" within the meaning of s 61(1)(*d*) of the Bankruptcy Act (Cap 20, 2000 Rev Ed). Thus presented, it can be seen that the case was not about how the court's discretion to grant leave to issue execution on a judgment after six years should be exercised. However, V K Rajah JA, who delivered the judgment of the court, discussed O 46 r 2(1)(*a*) at length and distilled the following two propositions from the cases:

> (a) First, he said that it was "settled practice" in the English courts that leave to enforce a judgment beyond the six-year period would not be granted unless it was "*demonstrably just* to do so" [emphasis in original] (at [43], citing [25] of the decision of the English High Court in *Duer v Frazer* [2001] 1 WLR 919 ("*Duer*")).
>
> (b) Secondly, he explained that whether such leave would be granted would depend on the facts, but the general principle was that the "burden… rests ultimately on the judgment creditor to show that the circumstances of his or her case takes it out of the ordinary (at [47], citing the decision of the English Court of Appeal in *Dipika Patel v Sarbjit Singh* [2002] EWCA Civ 1938 ("*Patel*") at [21]).

17 Given the reliance placed on by the court on these two English cases, it will be helpful to examine them in detail. I begin with *Duer*. In that case, the claimant obtained judgment in German proceedings in 1982 and registered the judgment in England shortly afterwards. The claimant then took steps to try to enforce the judgment but was largely unsuccessful. In 1989, she discovered that

the defendant was living in the Caribbean but took no further steps to enforce the judgment. It was only in April 1997 that she wrote to the defendant to demand payment of the judgment sum; and she only applied for leave to issue execution on the judgment two years later, in 1999. Leave was granted by a Master but rescinded on appeal. After going through the authorities on when the court's discretion should be exercised, Evan Lombes J said (at [25]):

> It seems to me that these two passages from judgments [from *Powney* and *BP Properties*] in the Court of Appeal … are support for the proposition that *the* ***court would not, in general, extend time beyond the six years save where it is demonstrably just to do so***. The burden of demonstrating this should, in my judgment, rest on the judgment creditor. Each case must turn on its own facts but, in the absence of very special circumstances such as were present in *National Westminster Bank plc v Powney* [1991] Ch 339, *the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for any delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice* to the judgment debtor. [emphasis added in italics and bold italics]

18 The two passages referred to in the extract were from *Powney* (at 363B *per* Slade LJ) and the decision of the English Court of Appeal in *BP Properties Ltd v Buckler* [1987] 2 EGLR 168 ("*BP Properties*") (at 171 *per* Dillon LJ). Both made the same point: namely, that after six years, the right to sue on a judgment would be time-barred under s 24(1) of the UK LA 1980 and a court would not give leave to issue execution when the right to sue on the judgment was already time-barred. This principle of law was approved of by our Court of Appeal in *Tan Kim Seng v Ibrahim Victor Adam* [2004] 1 SLR(R) 181 at [29] (citing *Halsbury's Law of England, Vol 28* (4th Ed, Reissue, 1997) at para 916).

19 This "general rule" was applied in *Patel*. I set out the facts of that case in greater detail slightly later in this judgment but it suffices to note for present purposes that it concerned an application for leave to issue execution on a judgment after 10 years. After a brief review of the authorities, Peter Gibson LJ held that "ordinarily after six years permission will not be given" (at [21]). He gave two reasons for this. The first was the point made in *Duer*, namely, that the limitation period for actions on a judgment would have expired after six years. The second was that while O 46 r 4(2) of the UK RSC (then contained in Schedule 1 to the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) and still in force) required a judgment creditor to explain his delay, there was no corresponding requirement for the judgment debtor to give evidence of the prejudice which he might have suffered as a result of the delay in enforcement. For this reason, he opined that the court ought to start from the position that "the lapse of six years may, and will ordinarily, in itself justify refusing the judgment creditor permission to issue the writ" unless he could show that the "circumstances of the case takes it out of the ordinary" (at [21]). Peter Gibson LJ gave the example of a case where a judgment debtor was impecunious but subsequently wins the lottery. In such a case, he said, the judgment creditor could justify the grant of leave by explaining that he had made a considered decision to hold off from enforcement because the judgment debtor was "not worth powder and shot" but changed his mind following the reversal in the latter's financial fortunes (*ibid*).

20 For my part, I am not sure if this general rule (that execution will not normally be allowed after 6 years) should apply in Singapore, because the limitation period for actions on a judgment here is 12 years and not six: see [5]–[6] above. I note that in the State of Victoria, where the limitation period for actions upon a judgment is 15 years (see s 5(4) of the Limitation Act 1958 (Vic)

and leave is likewise required to issue execution on a judgment after six years (see r 68.02(4)(b) of the Supreme Court (General Civil Procedure) Rule 1996 (Vic)), there is no presumption that execution will not be allowed after 6 years. Instead, the position is that the court will grant leave for execution to be issued if the judgment creditor has satisfactorily explained the delay and the court, having regard to such matters as where there had been any abandonment of rights or indifference on the part of the judgment creditor, considers that leave should be granted (see *Dennehy v Reasonable Endeavours Pty Ltd* [2001] VSC 447 at [11]). Indeed, there is some suggestion that a more liberal approach might apply in Singapore. In *Desert Palace*, Chan J stressed (albeit in a slightly different context) that a judgment was "no longer a claim but an order of court to be obeyed" and that "for good public policy reasons, the court should lean in favour of assisting the winning party" (at [67]). In my view, therefore, the requirement that the judgment creditor must show that the circumstances of his case are "out of the ordinary" (see [16(b)] above) should be interpreted not in the context of any "general rule" against the grant of leave after six years but as a reiteration that the judgment creditor bears the burden of providing cogent reasons for his failure to enforce the judgment within the usual time: see O 46 r 3((2)(*b*) of the Rules.

21 As I noted at [15] above, the Rules make it clear that leave will not be granted as a matter of right and the onus lies on the judgment creditor to demonstrate that it is "demonstrably just", having regard to all the circumstances of the case, for leave to be granted. In this context, there is a need to balance the right of the judgment creditor in realising the fruits of his litigation against the legitimate interest of the judgment debtor not to be vexed by stale claims or misled by the judgment creditor's inaction (see [14] above). As the English High Court stressed in *The Society of Lloyd's v Jean Pierre*

Longtin [2005] EWHC 2491 (Comm) ("*Longtin*"), the exercise of discretion "must be directed to doing justice between the parties having regard to all the circumstances of the case" (at [22] *per* Morison J).

22 In deciding leave should be granted, the following closely inter-related factors, which I have distilled from the cases, should be taken into account:

(a) First, the adequacy of the reason(s) given for the delay (both the delay in enforcing the judgment as well as any delay in applying for leave once time had run out). It is implied that these reasons must be "acceptable" and in the absence of such explanation, leave will not be granted (see Jeffrey Pinsler SC, *Singapore Court Practice 2017*, Vol 2 (LexisNexis, 2017) at para 46/2/1A). It is logical that, all other things being equal, the greater the length of the delay, the more cogent and compelling the explanation must be. The court will not fill in gaps in the judgment creditor's account by speculation or supposition (see *Patel* at [25]). However, it is not the case that the presence of *any* period of unexplained delay will preclude the grant of leave; instead, matters must be looked at in the round (see *Longtin* at [23]).

(b) Second, whether the judgment debtor will suffer any prejudice As pointed out by Evan Lombes J, the longer the time taken to enforce a judgment, the greater the possibility that the judgment debtor would have suffered prejudice (see *Duer* at [25]). The facts of *Duer* illustrate this point. By the time the application was brought, the judgment debtor had destroyed all the papers relating to the proceedings and had resettled in a different country. He was also 73 and in ill health. Evan Lombes J noted that it would now be much more onerous for him to comply with

any orders for execution than it would have been when the judgment was first obtained (at [30]–[31]).

(c) Third, the diligence displayed by the judgment creditor in recovering the judgment debt. To use the words of Peter Gibson LJ in *Patel*, the policy of O 46 r 2(1)(*a*) is that a judgment creditor "has to get on with enforcing his judgment" and cannot be indolent (at [19]). Diligence is often closely linked with the other factors listed here – for instance, if a judgment creditor were reasonably diligent in seeking to enforce his judgment, it would normally be difficult for the judgment debtor to establish any prejudice from the delay in enforcement.

(d) Last, the court should consider whether the judgment debtor has been obstructive. If enforcement has been stymied by the judgment debtor's efforts to evade enforcement, then the interests of justice would quite clearly lie in favour of the grant of leave. As Chan J warned, the law should not incentivise (and in fact should dissuade) a judgment debtor to frustrate the process of enforcement lest a "mockery" be made of the execution process (see *Desert Palace* at [65]).

23 Order 46 r 3(1) of the Rules provides that an application may be made *ex parte*. However, the court retains the power to order that it proceed on an *inter partes* basis if it considers that there is "any issue or question, a decision on which is necessary to determine the rights of the parties" (see O 46 r 3(2) of the Rules). With these points in mind, I turn to the present applications.

Summons No 648 of 2017

24 Oversea-Chinese Banking Corporation Limited ("OCBC") is a Singapore bank. The background to its application in Summons No 648 of 2017

("SUM 648/2017") is set out in two affidavits sworn by Ms Chai Lai Sim Cherie, Assistant Vice President of Collections at OCBC. In 2003, OCBC extended a term loan in the sum of $122,400 to Mr Salim bin Said. This loan was secured by a mortgage over Mr Salim's rights and interest in an apartment located in West Coast Road, Singapore. Mr Salim defaulted on the repayments of the loan and in 2008 OCBC commenced Originating Summons No 97 of 2009 ("OS 97") seeking an order of payment of the outstanding sum of approximately $110,000 due under the mortgage as well as an order that Mr Salim deliver possession of the premises to OCBC. These orders were granted in terms on 25 February 2009.

25 Little is said about what happened afterwards. In Ms Chai's first affidavit, she deposed that Mr Salim "made representations to [OCBC] and requested … for [an] indulgence and time to settle [OCBC's] claim". Nothing was said about the nature of these representations, the terms on which the request had been granted, or even when they were made. All that is recorded is that OCBC "acceded to [Mr Salim's] request and withheld enforcing the order" and that Mr Salim had "failed to honour his promises to make the payments" (though it was not said when this happened). During the first hearing of this matter, I drew these points to the attention of Mr Zikri Muzammil (counsel for OCBC) and directed that a supplementary affidavit be filed to address the matters stated in this paragraph.

26 In her second affidavit, which was filed pursuant to my direction, Ms Chai explained that an indulgence had been given to Mr Salim on account of the fact that he needed a place to stay, but that this was subject to the condition that he made "certain monthly repayments to the Plaintiffs". According to her, Mr Salim was able to keep up with these repayments "until around 15 July 2014" but, for reasons which were not explained, "intermittently failed to keep

to the monthly repayments". Some two and a half years later, on 10 October 2016, OCBC wrote to Mr Salim informing him that unless he paid the outstanding sum of about $87,500 or delivered vacant possession of his flat immediately, action would be taken to enforce the order obtained in 2009 against him. Ms Chai does not specifically explain what happened in the months afterwards but it appears that Mr Salim did not meet either condition and this was why OCBC took out SUM 648/2017 on 13 February 2017.

27 While it is well-established that the giving of the judgment debtor an opportunity to make payment in instalments is an acceptable explanation for a delay in execution (see, generally, the decision of the Federal Court of Malaysia in *Tio Chee Hing v Chung Khiaw Bank Ltd* [1981] 1 MLJ 227 and *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 ("*Foo See Moi*")), this only addresses the *initial* delay in enforcement. As I pointed out to Mr Zikri during the hearing, at the time Mr Salim purportedly failed to keep up with his repayments (15 July 2014), six years had not yet elapsed and OCBC was still entitled to issue a fresh writ as of right. However, it did not do so. It was not explained why it did not; nor was it explained why OCBC then took nearly 2 years to send him a letter of demand (on 10 October 2016) nor why, in the face of Mr Salim's failure to make immediate payment, it took OCBC a further 4 months after sending that letter of demand to file the present application. These omissions, in my view, were fatal to its application.

28 *Patel* is instructive. In that case, the claimant had obtained default judgment against the defendant in September 1992. On 30 September 1994, she successfully applied for a certificate of judgment allowing her to enforce her judgment in the English High Court. No further action was taken until May 2002, when she applied for leave to issue execution. In her supporting affidavit, she explained that she had been unable to enforce her judgment because the

defendant had left the UK and his precise whereabouts were not known to her at the time (though she knew that he was working in Germany). She then went on to state that the defendant's residence was now known to her (though she did not explain how, or when, she had come to know this) and also that she now knew that he had funds to satisfy the judgment debt. In support of this latter point, she annexed a letter sent to her by the defendant dated October 2001 in which the defendant accused her of harassment and said he had the financial means to commence defamation proceedings against her (and would, if she did not desist). The claimant's application for leave was allowed at first instance by the High Court but it was reversed by the English Court of Appeal.

29 Peter Gibson LJ accepted that the fact that the defendant had moved to Germany rendered enforcement proceedings more difficult, but he did not consider this to be a sufficient explanation for the delay for it was always possible (as the judge below had noted) for her to have instructed foreign counsel. Instead, the claimant had (as her counsel very frankly conceded) "done nothing at all" even after discovering that the defendant was in Germany (at [25]). The High Court judge was alive to the possibility that she could have sought to enforce her judgment overseas but explained it away by saying that instructing foreign counsel "could have been an intimidating prospect", without explaining what he meant by this. Peter Gibson J rejected this analysis, holding that the judge was "merely speculating as to difficulties that might have been" – this, he said, was impermissible since the burden was on the claimant to justify her delay and it was clear that she had not done so. Furthermore, he held that the "inadequacies of [her] evidence do not stop there" (at [26]). He noted that the claimant had not explained when she first knew that the defendant had returned to the country but concluded that she must have known at least from October 2001 (when the defendant sent her a cease and desist letter), which was

more than six months before she took out the present application. This delay of some seven months, he held, was "wholly unexplained" (at [26]). In conclusion, he found that the "inadequate witness statement of [the claimant] in itself disentitled her from obtaining permission" to enforce the judgment (at [27]).

30 By analogy with *Patel*, I would also hold that the reasons put forward to explain the delay were inadequate. When I pressed him on the reasons for the delay in enforcement after 15 July 2014, Mr Zikri very fairly conceded that he could not offer any. I clarify that I do not mean any of this to be taken as criticism of the way in which OCBC (or its solicitors) has conducted its affairs. However, the law requires a judgment creditor who desires leave to be granted to give satisfactory reasons for the delay and it seems to me that, despite having been given two opportunities to do so, the explanation which was proffered was wanting. For this reason, I dismiss SUM 648/2017. As I noted at [14] above, this does not preclude OCBC from making a fresh application for leave, although the authorities are clear that any subsequent application must be supported by fresh evidence if it is to succeed.

Summonses 1304 and 1305 of 2017

31 I turn to Summonses Nos 1304 and 1305 of 2017 ("SUMs 1304 and 1305"). On 27 April 2004, Standard Chartered Bank (Singapore) Limited ("Standard Chartered") extended banking facilities to Mr Sim Chock Oo and Mdm Tay Soon Lee which were secured by a mortgage over property located in Kaki Bukit Road, Singapore. Slightly over a week later, on 5 May 2004, Standard Chartered granted banking facilities to Fikdtec Pte Ltd ("Fidktec"), which was also secured by, among other things, a mortgage over commercial property (also located in Kaki Bukit). In January 2007, Mr Sim, Mdm Tay, and Fikdtec (collectively, "the defendants") defaulted on their repayments. Standard

Chartered commenced Originating Summons No 720 of 2007 against Mr Sim and Mdm Tay and Originating Summons No 723 of 2007 against Fikdtec and Mdm Tay. It sought orders for immediate payment of the outstanding sums owed as well as orders for the delivery of possession of the mortgaged premises. Both applications were granted in terms on 13 June 2007 and writs of possession for both properties were issued on 19 July 2007.

32 However, enforcement proceedings were aborted as the parties came to a settlement. In September 2008, the defendants again fell into arrears and Standard Chartered commenced enforcement proceedings on 17 September 2008. These were again aborted on 7 October 2008 after fresh repayment arrangements were agreed to. Sometime later, the defendants once again fell behind in their repayments and fresh enforcement proceedings were taken out on 10 June 2011, but these, too, were aborted after yet another agreement was reached. On 22 March 2017, Standard Chartered commenced SUMs 1304 and 1305 seeking leave to enforce the orders it obtained in 2007. The affidavits filed in support of both applications was largely identical. After setting out the events between 2007 and 2011, the following was deposed to:

> Accordingly, in view of the repeated defaults and failure by the Defendants to adhere to instalment repayment arrangements, which have been granted to the Defendants time and again, [Standard Chartered] intends to enforce the Order of Court against the Defendants.

33 As I pointed out to Mr Mitchell Yeo, counsel for Standard Chartered, there was a gap of some six years between 10 June 2011 – when the latest writs of execution referred to in the supporting affidavits were issued – and 22 March 2017 – when the present summonses were taken out – that was completely unexplained. The references in the quoted paragraph to the defendants' "repeated defaults" and to their failure to "adhere to the instalment repayment

arrangements" could be a description of the state of affairs as they stood in 2011, and it is not clear if it represents the state of play as at 2017. Even though it was implied (though not expressly stated) that there was a further event of default after this, it was not clear when this default had occurred. It was also not clear what steps (if any) Standard Chartered had taken to enforce its rights and whether (if no such steps had been taken) the defendants had been prejudiced by the delay in the enforcement of the judgment. Mr Yeo sought and was granted leave to file supplementary affidavits to address these points.

34 These supplemental affidavits were duly filed two weeks later. The deponent of both affidavits was Mr Kumar Makesh, an attorney with Standard Chartered. In addition to setting out a detailed record of the parties' dealings from 2007 to the present day, his affidavits also exhibted a comprehensive record of the correspondence exchanged during the material time and a detailed breakdown of the repayments made by the defendants during the same period. For present purposes, I need only focus on the period between 2011 and 2017 (though I should state that the supplemental affidavits also provided a great deal of clarity on the nature of the parties' dealings between 2007 and 2011):

(a) On 10 June 2011, a writ of possession was issued and execution was scheduled for 4 July 2011. In the month that followed, a flurry of emails were exchanged between the defendants and Standard Chartered during which execution of the writ was twice delayed to afford the defendants a chance to make payment of the arrears.

(b) On 7 July 2011 Standard Chartered informed the defendants that as a "gesture of goodwill and final indulgence", enforcement would be withheld provided that the defendants paid a total of: (i) $15,100 in respect of Mr Sim and Mdm Tay's account and (ii) $9,500 in respect of

Fidktec's account by 25 July 2011. It appears that a large part (though not the whole) of these sums were paid at the appointed time.

(c) Between July 2011 and January 2017, the defendants made fairly regular monthly repayments, though the repayments tapered off with time (save for a surge in 2015). In the year 2012, approximately $42,250 and $47,300 had been paid in respect of Mr Sim and Mdm Tay's account and Fikdtec's accounts respectively. In 2013, these figures dipped to $35,800 and $37,500; in 2014, these figures were $32,800 and $34,700. In 2015, the figures recovered to $36,900 and $38,850. However, in 2016 the figures dropped considerably to approximately $28,000 and $32,500, which meant that only about an average of $1,400 was being paid each month – less than half of the sum of about $3,000 which Mr Kumar deposed was a commercially acceptable rate of repayment. Furthermore, payments had become more erratic and intermittent. For instance, no payments were made in the months of February, June, August, and October 2016 (though shortfalls in some months were partially offset by larger repayments in other months).

(d) In April, July, and October 2016 as well as January 2017, Standard Chartered wrote to the defendants demanding that they surrender possession of the mortgaged properties failing which legal proceedings would be taken out against them.

35 From the above, several points are evident. First, Standard Chartered has at all times acted promptly and diligently in the enforcement of its rights. Secondly, it would have been evident to the defendants at all times that Standard Chartered remained intent on enforcing their rights against them. This was made clear in every piece of correspondence sent by Standard Chartered's solicitors,

which ended with a caveat that the bank would not hesitate to take out legal proceedings to enforce its interests if the need arose. At no point could it be said that the defendants were at any illusions that enforcement proceedings would not be taken out nor would it be open for the defendants to argue that they had been misled into changing their position detrimentally as a result of inaction on the part of Standard Chartered. Thirdly, any delay in the enforcement of the orders of court were occasioned by the requests made by the defendants for additional time to make repayments of their arrears. Having regard to these points, it seems to me that this is a case in which leave ought to be granted.

36 The facts of *Foo See Moi* are apposite. In that case, the appellant-bank had obtained final judgment in the sum of about RM675,000 with interest in July 1970. After judgment had been obtained, the parties entered into settlement negotiations and the defendant proposed that he pay RM$850,000 in full settlement of the arrears, of which RM$700,000 was to be paid immediately and the remainder of RM$150,000 to be paid by instalments. This was accepted by the bank sometime in the middle of 1975, which was well within the six year window. RM800,000 was paid timeously but in November 1975 the defendant wrote to the bank to ask for "a little bit more time" to make payment of the remaining sum of RM50,000. The bank granted this extension (and many others besides), but continued to press the defendant for payment when payment was not forthcoming. Finally, despairing that it would receive the balance, the bank rescinded the agreement on May 1978 and filed an application for leave to levy execution in December 1978. This was refused at first instance but allowed on appeal. After setting out the facts, the Federal Court concluded quite shortly that "if there had been any delay … it had been occasioned only by the grace asked for by the defendant and given to him at his request by the bank" (at 20I) and granted the application for leave.

37 By analogy, it seems to me that this is likewise a case in which the judgment creditor had acted appropriately and expeditiously throughout and any delay in enforcement came about only because of the defendants' request for more time. The only point on which Standard Chartered may be faulted, if at all, was the period between January 2015 (which was the first letter Standard Chartered sent after a long hiatus) and March 2017, when the present summonses were taken out. However, it is plain from Mr Kumar's affidavit (especially the accounts annexed therein) that the reason why action was only taken in 2017 was because that was when repayments had fallen to an unacceptably low level. The repayments made in 2015 and 2016, while below the commercial ideal, were still at a fairly reasonable level (and, as I noted at [34(c)] above, there was a surge in 2015, presumably in response to Standard Chartered's letter of demand), but this cannot be said for the payments in 2017. I am mindful that latitude should be given to judgment creditors to decide how best they wish to enforce their rights and to adopt positions which seem to them to be most expedient (see, generally, *Longtin* at [23]). In this case, Standard Chartered had made a reasonable commercial decision based on the options available to it and I see no basis for me to gainsay it. I therefore grant an order in terms of SUM 1304/2017 and SUM 1305/2017.

Conclusion

38 In closing, it remains for me to once again record my appreciation to counsel for their very helpful submissions.

Scott Tan
Assistant Registrar

Zikri Muzammil (Hin Tat Augustine & Partners) for the plaintiff in OS 97 of 2009;
Mitchell Yeo (Rajah & Tann LLP) for the plaintiff in OS 720 and 723 of 2007.
