# United Overseas Bank Ltd v Chia Kin Tuck
# [2006] SGHC 87

**Case Number** : OS 1648/2005, RA 18/2006

**Decision Date** : 25 May 2006

**Tribunal/Court** : High Court

**Coram** : V K Rajah J

**Counsel Name(s)** : Kannan Ramesh and Kanyakumari d/o Veerasamy (Tan Kok Quan Partnership) for the plaintiff; Koh Tien Hua (Harry Elias Partnership) for the defendant

**Parties** : United Overseas Bank Ltd — Chia Kin Tuck

*Debt and Recovery – Priority – Whether judgment creditor's writ of seizure and sale against mortgaged property creating security interest having priority over mortgagee's power of sale of mortgaged property where such power of sale arising after judgment creditor's writ of seizure and sale against mortgaged property registered – Sections 73, 135 Land Titles Act (Cap 157, 2004 Rev Ed)*

25 May 2006

**V K Rajah J:**

1 The plaintiff granted Mdm Chua Lan ("the mortgagor") banking facilities of $1.3m secured by a legal mortgage over 2 Pebble Lane, Singapore 437551 ("the mortgaged property").

2 On 22 April 2005, soon after the mortgagor defaulted on her loan obligations, the plaintiff demanded payment of the entire outstanding amount. On 13 May 2005, notice of the plaintiff's intention to exercise its statutory power of entry into possession of the mortgaged property pursuant to s 75(2) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA") was served on the mortgagor. On 9 June 2005, vacant possession of the mortgaged property was voluntarily surrendered by the mortgagor to the plaintiff. The very next day, on 10 June 2005, the mortgagor was adjudged a bankrupt.

3 When the plaintiff attempted to sell the mortgaged property *qua* mortgagee, it was challenged by the defendant, a judgment creditor of the mortgagor who had registered a writ of seizure and sale ("WSS") on 22 February 2005. The WSS was registered against the mortgaged property on 10 March 2005 by the defendant, pursuant to a judgment dated 4 January 2005 ("the Judgment"). The Judgment requires that the mortgagor, *inter alia*, pay a sum of $1m to the defendant. As a result of the defendant's objections, the plaintiff did not proceed with an auction scheduled for 31 August 2005.

4 The aborted auction sale prompted a flurry of correspondence between the defendant, the plaintiff, the bailiff of the Subordinate Courts ("the bailiff") and the official assignee (on behalf of the bankrupt), culminating in a contretemps, the essence of which turned upon whether the plaintiff, the official assignee or the bailiff ought to conduct the sale of the mortgaged property. The defendant initially maintained that the official assignee ought to assume responsibility for the sale of the mortgaged property. The official assignee, however, declined the invitation, drawing the defendant's attention to s 76(3) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("BA"); the official assignee thus took the position that a secured creditor has an unfettered right to deal with secured property upon the bankruptcy of the debtor.

5 The defendant, however, disagreed with the official assignee's stance. He steadfastly

maintained that he had a prior right to conduct the sale of the mortgaged property *vis-à -vis* the plaintiff *qua* mortgagee.

6 To surmount this impasse the plaintiff commenced the instant proceedings seeking, *inter alia*, a declaration acknowledging its prior right to conduct the sale of the mortgaged property notwithstanding the registration of the WSS. The application was heard on 12 January 2006 by an assistant registrar. She granted the plaintiff the relief it sought, including an indemnity against any losses sustained by the plaintiff as a consequence of the defendant's conduct in procuring the issuance of a notice of seizure of the mortgaged property on 17 August 2005. The indemnity was intended to cover any losses between the date of the aborted auction (31 August 2005) and the date the bailiff returned possession of the property to the plaintiff. In her brief grounds recorded in the notes of evidence, the assistant registrar observed:

> … I am mystified as to why the defendant has been so insistent on being the one to sell the property, when he concedes that the bank has priority to the proceeds. He makes allusions to some possibility of unfair preference or sale at an undervalue, but does not go so far as to allege this against the bank, and indeed, such an allegation would be completely unsubstantiated.

7 The defendant appealed against the decision of the assistant registrar. The appeal was heard by me on 6 March 2006. Once again, the defendant attacked neither the validity nor the enforceability of the mortgage. No cogent allegations were made; nor was any concrete evidence adduced indicating that the plaintiff would breach obligations *qua* mortgagee should it have carriage of the sale. The principal argument raised was that the defendant had priority, given that the WSS was registered prior to the mortgagor's debt falling due to the plaintiff. While acknowledging that the plaintiff had a prior right to the sale proceeds from the mortgaged property, counsel for the defendant nevertheless adamantly insisted that there was a real and valid distinction between the right to sell the mortgaged property and the right to retain sale proceeds. I dismissed the defendant's appeal but varied the direction by the assistant registrar requiring that the defendant pay interest. The defendant now appeals against the whole of my decision.

8 To explain my grounds of decision, I begin by examining a judgment creditor's interest in a property that has been bound by a registered WSS.

**The interest of an execution creditor**

9 The procurement of a monetary judgment, unless expressly provided by statute, does not create any property rights (ambulatory or otherwise), let alone any security rights. It merely presages a process that could culminate in the issuance of a WSS. Pending execution against specific property, the monetary judgment merely operates *in personam*. A judgment creditor cannot, on the basis of the judgment alone, lodge a caveat against property belonging to the judgment debtor as no "interest in land" within the meaning of s 115 of the LTA exists. To attach or bind the property of a judgment debtor, the judgment creditor must obtain a WSS.

10 Even when a WSS against specific property is issued, this does not have the effect of creating a security interest. The interest or property in the subject goods or land continues to reside in the judgment debtor pending sale; notwithstanding, the judgment debtor may in certain situations be constrained from further dealings once attachment is effected.

11 It is trite law that the Sheriff or the bailiff cannot by seizure affect the rights of third persons to whom the property has been subject to while in the hands of the debtor. Prof Jeffrey Pinsler, at p 1088 of *Singapore Court Practice 2005* (LexisNexis, 2005), cites Sproule Ag CJ in *Johore K A R S T*

*Arunasalam Chettiar v Abdul Rahman bin Sulieman* [1933] MLJ 48 as accurately summarising the rights of a judgment creditor thus:

> A judgment creditor can only attach what his debtor has and his rights are merely to stand in the shoes of the defendant with no added equities in his favour.

**The statutory scheme for execution under the LTA**

12 Part XIII of the LTA provides a comprehensive scheme by detailing the modalities for execution levied against registered land and by including the formulae for determining priorities between competing interests. While a judgment creditor can only assume the precise residual interest that the judgment debtor has in the property, the LTA provides a statutory mechanism by which a judgment debtor can be restricted from further effective dealings of the subject property. Registration is made an essential prerequisite to "bind or affect" the land: see s 132(1) of the LTA. It bears reiteration that the common law position in relation to the interest(s) of a judgment creditor is not altered by the LTA and further that the registration of a WSS does not create a proprietary interest in the subject property. That a purchaser from the Sheriff or the bailiff can only obtain the judgment debtor's (proprietor's) interest subject to any earlier interests that have been created and notified on the relevant land title folio is now settled law: see, for example, *National Bank of Australasia v Morrow* (1887) 13 VLR 2 at 8 and *Bank of China v First National Bank of Boston* [1992] 1 SLR 441 at 451, [29]. This general legal principle is statutorily embedded in s 135(1) of the LTA. It would be helpful to reproduce s 135 of the LTA in its entirety:

> (1) *The interest in registered land which may be sold in execution under a writ shall be the interest which belongs to the judgment debtor at the date of the registration of the writ*.
>
> (2) For the purpose of determining the interest in land which belongs to a judgment debtor —
>
> (*a*) any interest in that land purported to be created subsequent to the date of the registration of the writ; and
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> (*b*) any interest in that land created prior to the date of the registration of the writ, and not notified in the land-register nor protected by caveat at least 3 clear days before the date of the sale,
>
> shall be void against a purchaser of the land at the sale in execution under the writ.
>
> (3) Land shall not be sold in an execution under a writ until the expiration of 30 days from the date of the registration of the writ.
>
> [emphasis added]

13 John Baalman, the draftsman of the Land Titles Ordinance, 1956 (No 21 of 1956) (as the LTA was originally called) pithily summarises the statutory scheme at pp 211 and 212 of his authoritative commentary, *The Singapore Torrens System* (The Government of the State of Singapore, 1961):

> The object of Part [XIII] is to enable judgment creditors and other successful litigants to obtain the fruits of their judgments against registered land. … The writ or other process is required to be recorded on the land-register, not only to enable the court official to execute registrable instruments, but also to acquaint any prospective purchaser that the land is burdened with a

judgment.

Under the common law a writ of execution is said to "bind" the property of the judgment debtor from the time of its delivery to the Sheriff. Under this Ordinance a writ or order of court does not bind or affect registered land until a memorial of it has been entered on the land-register. The binding does not operate to create a proprietary charge on the land; it merely ties the hands of the proprietor, and for a given time it prevents him from dealing with the land to the prejudice of the judgment creditor; *Bond* v *McClay* [1903] Q.S.R.1; *Holmes* v. *Tutton* (1885) 24 L.J.Q.B. 346, 351; Halsbury 2nd Ed. Vol. 14 p. 50. Although the land is "bound", the general ownership still remains in the judgment debtor until it has been sold; *In re Clarke* [1898] 1 Ch. 366, 339.

…

The combined effect of ss. 103–108 [the equivalent of ss 132–136 LTA] in so far as they relate to execution against registered land, may be summarized as follows: —

1. A writ of execution may be registered if it is lodged at the Land Registry within six months of its date of issue—[s 132(4)].

2. Until a writ is so registered the Sheriff cannot sell the land nor execute a registrable transfer.

3. A writ binds land for a period of six months from the date of its registration. Upon the expiration of that period—

(*a*) the Sheriff's power to execute a registrable transfer pursuant to a sale under that writ is extinguished—[s 134(1)] and

(*b*) the registration of the writ can be cancelled—[s 134(2)].

4. Within the binding period of six months the Sheriff may transfer to a purchaser the interest of the judgment debtor as shown in the land-register at the date of registration of the writ—[s 135]. The transfer may be lodged without the duplicate instrument of title—[s 136].

5. A transfer executed by the Sheriff during the binding period of six months may be registered after that period has elapsed, provided that the registration of the writ has not been cancelled—[s 134(3)].

6. A dealing by the judgment debtor may be lodged within the binding period of six months, but it will be held in abeyance until the registration of the writ has been cancelled—[s 133(1)]. Any such dealing could be overreached by a transfer from the Sheriff, but a pending transfer would have priority over, and would prevent the registration of, a renewal of the writ or of a second writ on the same judgment—[s 133(2)].

7. The renewal of a writ, or a second or subsequent writ on the same judgment, may be registered only if—

(*a*) the registration of the earlier writ has been cancelled—[s 132(3)]; and

(*b*) there is no dealing by the judgment debtor awaiting registration—[s 133(2)].

8. Land ceases to be bound by a writ when the registration lapses—[s 134]; or is

withdrawn by the judgment creditor—[s 136(1)]; or when the writ is satisfied by the judgment debtor—[s 136(2)].

14 In summary, until a WSS is registered it cannot bind or affect the subject property nor can it constitute effective notice to third parties. Registration of a WSS is also necessary to confer on a judgment creditor priority *vis-à-vis* other competing execution creditors. Registration does not, however, make the judgment creditor a registered proprietor. Even after registration, the general property and interest in the property remains with the debtor until the execution sale takes place. The Sheriff or the bailiff himself has no interest in the property and is merely conferred the ministerial power to transfer the proprietor's interest subject to any existing notified interests to a purchaser. The Sheriff/bailiff can do this as he is statutorily deemed to be able to act as a registered proprietor to effect the sale and execute an instrument of transfer.

**The defendant's rights after registration of the WSS**

15 It is plain that by registering the WSS the defendant merely stepped into the shoes of the mortgagor. He cannot claim to have any priority whatsoever over the plaintiff. The fact that the plaintiff's power of sale arose only after the WSS was registered did not affect or fetter the exercise of its rights *vis-à-vis* the defendant/judgment creditor as the latter cannot claim or assert to be in a better position than the mortgagor/judgment debtor. In the absence of any provisions to the contrary, it is incontrovertible that a mortgagee can, upon the mortgagor's default, exercise its powers without the consent of and/or further reference to the mortgagor.

16 While it is axiomatic that the plaintiff as a mortgagee has statutory and common law obligations to ensure that the market value of the property is realised, these obligations do not create or impose a requirement on it to
co-operate with a subsequent encumbrancer such as the defendant and/or to seek his consent in order to exercise its power of sale.

17 The defendant can only legitimately claim to have an interest in any surplus sale proceeds after the plaintiff's claim is satisfied: see s 74 of the LTA. While conceptually the defendant can claim a statutory right to sell the property, such a sale must plainly be subject to the plaintiff's prior mortgage. Generally speaking, it would be meaningless for a judgment creditor to exercise such an arid right without the consent or co-operation of a prior mortgagor or other encumbrancer unless there is a substantial surplus of sale proceeds. In this case, as it is abundantly clear that the amount due to the plaintiff far exceeds the current market value of the mortgaged property, the exercise of such a right would be a meaningless and pointless exercise in futility. I am puzzled as to why counsel for the defendant has persisted in tilting at such a patently illusory windmill.

**Conclusion**

18 I have no hesitation in concluding that the defendant's feeble attempts to prevent the plaintiff's sale of the mortgaged property are entirely without merit. Counsel for the defendant never attempted in the course of the appeal to impugn either the mortgage or the plaintiff's right to exercise its power of sale. As a result, I see no reason to interfere with the assistant's registrar's judgment, save for her award of interest to the plaintiff purportedly stemming from the defendant's efforts to obstruct and delay the plaintiff's attempts to sell the mortgaged property.

19 After upholding the assistant registrar's order and dismissing the appeal with costs, it struck me upon further research that these proceedings may actually not have been necessary. Neither counsel who appeared before me seemed to be either cognisant of or familiar with the relevant

provisions of the LTA dealing with the priorities and rights of mortgagees and judgment creditors. Section 73 of the LTA is pertinent:

> (1) The Registrar shall register in the manner prescribed by section 37 any transfer in the approved form by a mortgagee or chargee made in exercise of a power of sale, without being concerned to inquire whether default has occurred, or whether notice has been given, or whether the power was otherwise properly or regularly exercised.
>
> ( 2 ) *Upon registration of such a transfer, the interest of the mortgagor or chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of —*
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> (*a*) that mortgage or charge;
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> (*b*) any mortgage or charge registered subsequent thereto;
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> (*c*) any lease registered subsequent to the mortgage or charge mentioned in paragraph (*a*) and which is not binding on the transferor; and
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> (*d*) *any interest which is registered or notified subsequent to the mortgage or charge mentioned in paragraph (a) (including any interest claimed under a caveat) and which is not binding on the transferor*.
>
> [emphasis added]

John Baalman incisively points out in his treatise ([14] *supra*) at p 137:

> Although the mortgagee has only a charge on the land, he is enabled by [s 73(2)] to pass to a purchaser the mortgagor's estate. *The result is much the same as that of a sale by a common law mortgagee. It extinguishes all subsequent encumbrances to which the land may have been subject*. At common law—
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> > "The effect of a sale under the power is to destroy the equity to redeem, and this means that the rights of the mortgagor and all subsequent encumbrances are defeated, and their only remedy is against the purchase money in the hands of the vendor according to their priorities."
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> *South Eastern Railway Co.* v. *Jortin* (1857) 6 H.L.C. 425; cited by *Herring*, C.J., in *Reg.* v. *Registrar of Titles*, *E. P. Watson* [1952] V.L.R. 470, 476. It will be seen that the effects under common law and under this Ordinance are virtually equal. *Registration of a transfer by the mortgagee automatically cancels the proprietary interests of subsequent encumbrances, and leaves them to their rights under[s 74]*. Whether or not the Registrar actually cancels the memorials of registration of these subsequent interests, is immaterial.
>
> [emphasis added]

20 The plaintiff was entitled as of right to proceed with a sale of the mortgaged property. Once it was contractually entitled to exercise its power of sale, it was under no obligation to procure the consent or approval of the defendant, even though the latter had lodged a prior WSS. A purchaser from the plaintiff *qua* mortgagee would be entitled to lodge a transfer that would effectively take precedence over the defendant's WSS pursuant to the provisions of s 73(2) of the LTA. Any rights

that the defendant might have as a judgment creditor would then be converted into an interest in the surplus sale proceeds (if any): see s 105(2)(*c*) of the BA which deems execution to be completed upon registration of the WSS. As the plaintiff could quite easily have proceeded to exercise its power of sale in spite of the unreasonable stance taken by defendant, the assistant registrar erred in awarding it damages. In the circumstances, para 5 of the assistant registrar's order directing that the plaintiff be indemnified against consequential losses should also be deleted. Though this point was not argued before me, I am now inclined to the view that the plaintiff is not in fact entitled to such an indemnity.

21 One final observation needs to be highlighted: It struck me somewhat to my chagrin that a significant number of counsel who appear in court inexplicably fail or neglect to familiarise themselves with the relevant provisions of the LTA notwithstanding that the legal controversy involves registered land. Copious and unnecessary references are usually made to English authorities. This is most unfortunate. Valuable time and significant legal costs would be saved if counsel diligently attempt to understand the intent and purport of the applicable provisions of the LTA. Counsel should appreciate that in matters involving registered land, English case law and authorities are often only of penumbral assistance, if any. Given that the LTA was inspired by and modelled upon the Australian Torrens System, counsel will find it far more profitable to refer to John Baalman's several treatises as well as to other relevant legal material from Australia and New Zealand, rather than rely on English authorities. Regrettably, this did not happen in this case.