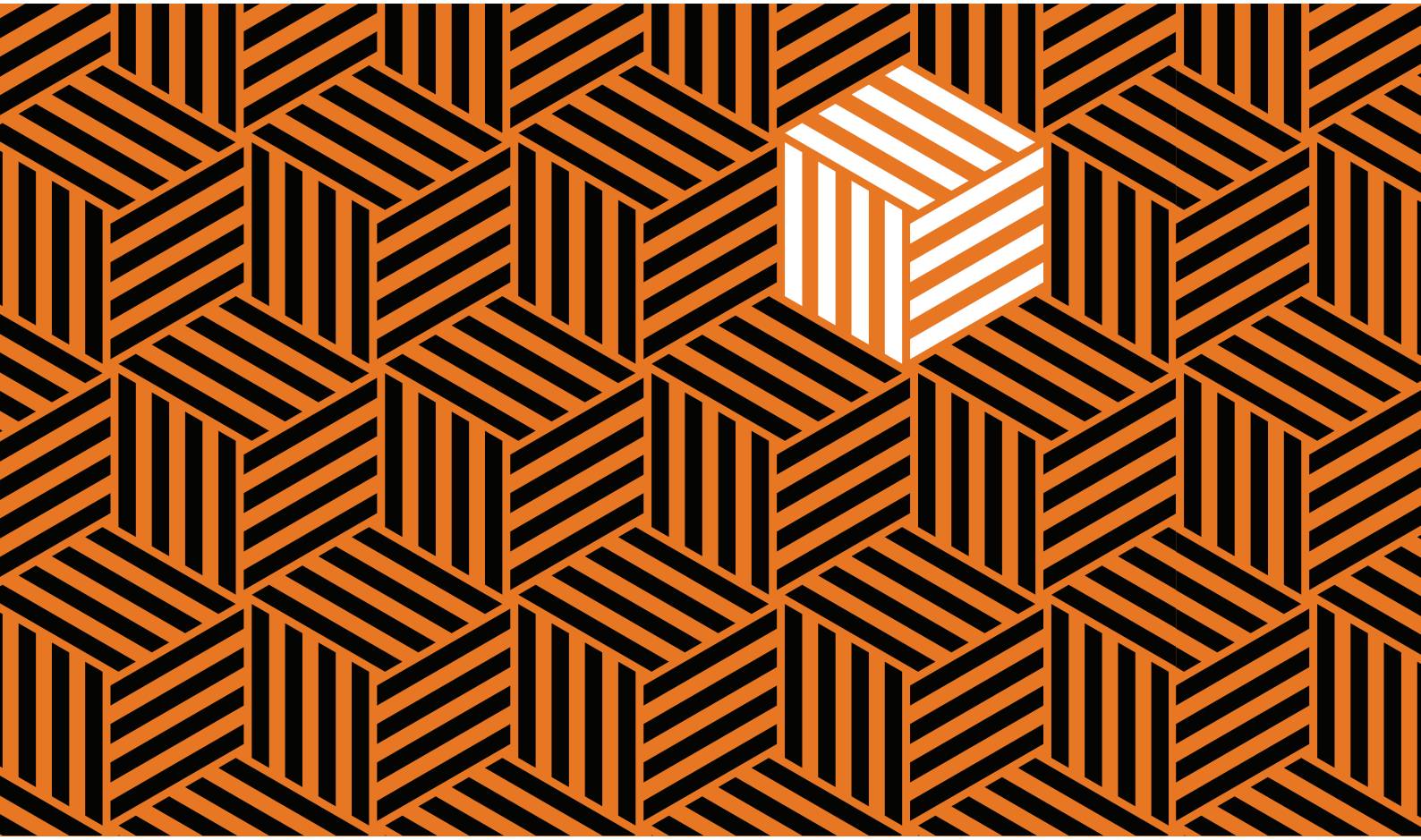
Singapore Academy of Law
Law Reform Committee

Report on Civil Remedies

December 2020



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An electronic copy of this report may be accessed from the Singapore Academy of Law website: https://www.sal.org.sg/Resources-Tools/Law-Reform/Law-Reform-e-Archive.

National Library Board, Singapore Cataloguing in Publication Data

Names: Singapore Academy of Law. Law Reform Committee.
Title: Report on civil remedies / Singapore Academy of Law, Law Reform Committee.
Description: Singapore : Singapore Academy of Law, [2020]
Identifiers: OCN 1227015495 | ISBN 978-981-14-9356-0 (softcover) | ISBN 978-981-14-9357-7 (e-book)
Subjects: LCSH: Debtor and creditor–Singapore. | Remedies (Law)–Singapore.
Classification: DDC 346.5957077–dc23

ISBN 978-981-14-9356-0 (softcover)
978-981-14-9357-7 (e-book)

About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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EXECUTIVE SUMMARY

1 The Subcommittee commenced work to review the existing available enforcement remedies. In its review of the various enforcement remedies provided under the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ('**ROC**'), the Subcommittee took into account the following issues:

(1) the challenges and obstacles encountered by judgment creditors when attempting to enforce judgments against assets of judgment debtors in Singapore;

(2) how the various enforcement remedies available in civil proceedings in Singapore, primarily under the ROC, compare with the remedies available in Australia, Canada, Hong Kong and the United Kingdom; and

(3) how the current available enforcement remedies may be used against other types of assets including club memberships and financial products that have been invested by judgment debtors.

Particularly, the enforcement remedies in the jurisdictions mentioned in subparagraph (2) have been evaluated by the Subcommittee for their utility in enforcing against assets of judgment debtors in Singapore.

2 In summary, the primary reason for proposing reforms to these remedies is to address the gaps or limitations presently experienced by judgment creditors when attempting to enforce judgments and taking into account the interests/rights of judgment debtors and affected third parties. The proposed reforms were conceived before, and generally do not take into account, the report of the Civil Justice Commission ('**CJC**') on amendments to the ROC. The CJC's proposed reforms for enforcement of judgments and orders aim to simplify and consolidate the existing Orders 45 to 50 of the ROC. The proposal is to do away with Orders 45 to 50 and consolidate these under Chapter 17 of the draft new Rules of Court. The proposed reforms set out herein have not been adapted to these draft new Rules, but those proposed reforms are consistent with or can, with appropriate adjustments, be made applicable to Chapter 17 of the draft new Rules of Court. If these proposed reforms are accepted, relevant changes may need to be made to Chapter 17 to take the reforms into account.

A WRITS OF SEIZURE AND SALE OF IMMOVABLE PROPERTY

3 The practitioners in the Subcommittee have experienced difficulties when attempting to enforce a judgment debt against immovable property co-owned by the judgment debtor with other persons, unless the judgment is against all the co-owners. This is the case even where the judgment debtor may hold the legal and beneficial interests in the immovable property. In contexts where the co-ownership is in the form of a joint

tenancy, the judgment creditor is not in a position to enforce unless the joint interest is severed. Furthermore, there is some uncertainty as to whether the sale of the whole co-owned immovable property is allowed, as opposed to merely the sale of the judgment debtor's share as a tenant-in-common (whether severed from a joint tenancy, or as originally held). Finally, difficulties are often encountered where there is a subsisting registered mortgage over the property.

4 The Subcommittee recommends as follows:

(1) Amending the Land Titles Act and the ROC to clarify that a judgment debtor's interest as a joint tenant in immovable property is exigible to execution. This may be done by reforming the present Writ of Seizure and Sale regime.

(2) The court should be given a discretion to order a sale of the judgment debtor's interest in a mortgaged immovable property (whether subject to or free from the mortgage), notwithstanding the objection from the prior mortgagee.

B GARNISHEE PROCEEDINGS OVER JOINT BANK ACCOUNTS

5 The Subcommittee recommends that the ROC should be reformed to allow a judgment creditor to garnish a bank account jointly owned by a judgment debtor and other persons to satisfy the judgment debt. These reforms can be implemented by providing for this remedy in primary legislation and making necessary amendments to Chapter 17 of the draft new Rules of Court.

6 In particular, the Subcommittee recommends as follows:

(1) There be reform in primary legislation to provide that the Court has the discretion to garnish monies in joint accounts or assets held jointly by the judgment debtor and others. It is proposed that appropriate amendment be made to Section 3 of the Civil Law Act.

(2) With reform in primary legislation giving the court the discretion to garnish joint accounts on terms as it deems appropriate, the procedure on how such attachment can be made would necessitate amendments to the ROC to expressly provide for a process on how assets or moneys held jointly by a judgment debtor with other(s) may be attached/garnished/seized.

- In the case of joint bank accounts for garnishee proceedings, for expediency and to safeguard the interests of the joint account holders, it would be worthwhile to consider including express provisions stating that a judgment debtor who is a joint account holder, or to whom money is otherwise owed jointly

with another person, is presumed to be entitled to an equal share of the joint account, or other joint obligation, unless an interested person proves otherwise.

- The equal share would be calculated by dividing the amount of the joint account, or other joint obligation, by the number of joint account holders. This would be consistent with the position in Rule 79.09 of the Nova Scotia Civil Procedure Rules.
- Having regard to rule 2(4)(k) of the proposed Chapter 17 of the draft new Rules of Court, one may say that it would not be necessary to expressly state the presumption of equal share, as it is envisaged under the draft new Rules that the judgment creditor must provide evidence that the deposit belongs to the judgment debtor. Notwithstanding, it is recommended that some consideration be given to adopting Rule 79.09 of the Nova Scotia Civil Procedure Rules, which would to a certain extent serve to balance the interests of all parties concerned.

(3) A bank or financial institution to whom a garnishee order is delivered must not honour a demand on a joint account of which the judgment debtor is one of the joint account holders up to the limit specified in the garnishee order to show cause until the interest of the judgment debtor is established in the garnishee application. This is necessary to ensure the monies in the joint account are still intact at the time of the final determination of the garnishee application.

(4) The amendment should also require the garnishee order to show cause (or the Enforcement Order under the proposed Chapter 17 of the draft new Rules of Court) to be served on all joint account holders. This would give the joint account holders a chance to dispute their portion of the monies in the account.

(5) After the garnishee order to show cause (or the Enforcement Order under the proposed Chapter 17) has been served on all parties, a person may bring an application for an order estimating the maximum interest of a judgment debtor in a joint account and permitting some or all demands to be honoured against the balance. This would give the judgment creditor, judgment debtor or the joint bank account holder the chance to increase or decrease the amount that the judgment debtor is presumed to be entitled to in the joint bank account.

(6) The judgment creditor has the burden to establish, on a balance of probabilities, the judgment debtor's portion of the funds during the show cause hearing. This does not increase

the administrative costs of the banks or require them to conduct a fact-finding exercise to determine the judgment debtor's portion of the funds.

(7) No changes are proposed to deal with costs. Based on the current state of the law, the costs of the garnishee application are paid out of the garnished funds if the judgment creditor is successful in the application. If the judgment creditor is unsuccessful, he or she would have to pay the costs of the judgment debtor, the bank and any joint account holder. This discourages frivolous applications, as judgment creditors will only file applications if they have clear and compelling evidence on the judgment debtors' proportions of the monies.

C EXAMINATION OF JUDGMENT DEBTORS

7 The Subcommittee is of the view that the ambit and scope of the procedure for examination of judgment debtors may need to be extended to allow for examination of individuals other than the judgment debtor, who: (a) the judgment creditor has reasonable grounds to believe have information concerning the judgment debtor's property; or (b) are, or recently were, in possession of such property or records related thereto.

8 Currently, save for an examination of the individual judgment debtor or the director of a judgment debtor that is a corporation, there is no avenue to apply to examine any other individuals who may provide useful information on the assets and liabilities of the judgment debtor.

D INTERIM RELIEF IN AID OF FOREIGN COURT PROCEEDINGS

9 The Subcommittee has considered whether reform of the law is necessary to facilitate interim measures being granted by the courts. In particular, the Subcommittee considered whether statutory reforms should be effected to enable the Singapore courts to grant free-standing Mareva injunctions in support of foreign proceedings against foreign or domestic defendants.

10 The Subcommittee is of the view that further reflection is necessary before any such reforms are decided upon, not least because they entail wide-ranging policy considerations. These include whether:

- such reforms could lead to the Singapore Courts being perceived as merely a venue for satellite litigation emanating from substantive main proceedings elsewhere (taking into account, however, that other centres for multijurisdictional disputes where such relief is presently available do not appear to have seen material adverse effects therefrom); and
- recent amendments to the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), which expand the

scope of judgments covered by reciprocal arrangements beyond final money judgments to include interim injunctions, indicate that it should be for the Minister of Law to enter into bilateral or multilateral treaties to provide for such reciprocal arrangements with various jurisdictions (as opposed to the courts exercising their discretion on an *ad hoc* basis).

11 If such statutory reforms were considered appropriate, the Subcommittee considers that they could take the form of amendments to section 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed), as follows (new text in italics):

> A Mandatory Order or an injunction may be granted or a receiver appointed by an ~~interlocutory~~ order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made. *For the avoidance of doubt, and subject to subsections* [*x*] *to* [*y*] *the court shall have the same power to grant a Mandatory Order or an injunction, or appoint a receiver as it has for the purpose of and in relation to an action or a matter in the court notwithstanding that proceedings have been commenced in another jurisdiction.*

12 Such language would mirror equivalent provisions in the International Arbitration Act (Cap 143A, 2002 Rev Ed)(section 12A(2)), which enable the Singapore courts to order free-standing interim injunctions in support of foreign or Singapore seated arbitrations. Further provisions could also be included to guide the Singapore court's discretion, drawing on equivalent provisions in the United Kingdom and Hong Kong, as well as the International Arbitration Act (together with any necessary consequential amendments to the ROC).

CHAPTER 1

WRITS OF SEIZURE AND SALE OF IMMOVABLE PROPERTY

1.1 The procedure governing a writ of seizure and sale ('**WSS**') is found in Order 47 of the Rules of Court ('**ROC**'),[1] and also in Order 46, which governs writs of execution generally. In the experience of practitioners on the Subcommittee, parties typically experience difficulties in proceeding with this mode of enforcement against immovable property where:

(1) there is a subsisting mortgage registered prior to the WSS; or

(2) the interest in immovable property is co-owned.

A POSITION IN SINGAPORE

1 Subsisting Mortgage Registered Prior to the Writ of Seizure and Sale

1.2 In the instance of a subsisting mortgage that has been registered prior to the WSS, the difficulty stems from the practicality of proceeding with a sale of the immovable property where it is still encumbered by the subsisting mortgage. This is despite section 135 of the Land Titles Act ('**LTA**'),[2] which expressly allows for the sale of the judgment debtor's interest in the land. While the judgment creditor recognises the mortgagee's prior rights over the property, he or she is practically left without any remedy unless the prior registered mortgagee is prepared to call an event of default under the mortgage and effect a mortgagee sale. As was noted by Pang Khang Chau JC (as he then was) in *Peter Low LLC v Higgins, Danial Patrick*,[3] a sale under a WSS is not possible without the mortgagees' consent, although no reasons were given as to why this is so.

1.3 According to the practitioners in the Subcommittee, the registered mortgagees will usually not give consent and/or may not trigger an Event of Default arising from the WSS until they deem it necessary to do so when the realisable value of the mortgaged property is likely to be insufficient to settle the liability owed to them. In addition, prior to the recent decision in *Singapore Air Charter v Peter Low*,[4] practitioners in the Subcommittee had observed difficulties in procuring a mortgagee, after selling the immovable property, to pay the surplus proceeds of sale to the judgment creditor with a registered WSS, instead of to the judgment debtor. The ambiguity lies in section 74 of the LTA (see also section 26(3) of the Conveyancing and Law

1 Cap 322, R 5, 2014 Rev Ed ('**ROC**').
2 Cap 157, 2004 Rev Ed.
3 [2018] SGHC 59, [2018] 4 SLR 1003 at 1044, [114(b)], HC.
4 *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC and another* [2020] SGCA 99

of Property Act ('**CLPA**'),[5] a similar provision) which merely states that "the residue of the money so received shall be paid to the person who appears from the land-register to be entitled to the mortgaged property", and it was not clear that the judgment creditor under a WSS was such a person. This ambiguity should now be resolved following *Singapore Air Charter v Peter Low*, which states (at [60]) that a judgment creditor with a registered WSS prior to the mortgagee sale is a person who appears from the land-register to be entitled to the mortgaged property. Where the judgment creditor executing the judgment is unable to produce the written consent of the mortgagee or chargee, paragraph 80(2) of the Supreme Court Practice Directions[6] also permits the Sheriff to elect not to proceed with the sale.

1.4 In *BYX v BYY*,[7] Tan Puay Boon JC distinguished *Peter Low LLC v Higgins, Danial Patrick* in granting an *ex-parte* application for an order to sell immovable property owned by the defendant, notwithstanding the objection of the mortgagee. Tan JC held that although paragraph 80(2) of the Supreme Court Practice Directions permitted the Sheriff to elect not to proceed with the sale, an execution creditor could still apply to Court to approve the sale against the mortgagee's wishes. Tan JC noted that the case of *Peter Low LLC v Higgins, Danial Patrick* dealt with immovable property held under a joint tenancy, and on the facts involving a case of a property wholly owned by the judgment debtor, the judgment creditor could apply for an order for sale even over the mortgagee's lack of consent. The power to order a sale would be exercised where this was necessary or expedient to do so, and ordinarily the determinative factor would be whether the proceeds of sale were sufficient to discharge the mortgagee's interest in full. Other relevant factors included the potential prejudice to the mortgagee (if the sale were ordered) and the execution creditor (if the sale were not ordered), and any potential prejudice to third parties.

1.5 The reason why a jointly held immovable property may not be sold under a WSS against the mortgagee's wishes, while a wholly held immovable property could, remains unclear. It is noted that *BYX v BYY* is a decision of the High Court and it appeared that the defendant was absent from, and the mortgagee had elected not to participate in, the proceedings. It remains to be seen whether another High Court, or the Court of Appeal in a suitable case, would uphold the reasoning in *BYX v BYY*.

2 Execution of Judgment Against Co-owned Immovable Property

1.6 As for execution of a judgment debt against co-owned property, there has been a series of cases on whether a judgment debtor's interest in an immovable property as a joint tenant can be made subject to a WSS, where no severance of the judgment debtor's portion of the immovable

5 Cap 61, 1994 Rev Ed.
6 *Supreme Court Practice Directions* (2010 Rev Ed).
7 [2019] SGHC 237, [2020] 3 SLR 1074, HC.

property has yet occurred. The High Court has been divided, with *Malayan Banking Bhd v Focal Finance Ltd*[8] and *Chan Lung Kien v Chan Shwe Ching*[9] deciding in the negative, and *Chan Yat Chun v Sng Jin Chye*,[10] *Chan Shwe Ching v Leong Lai Yee*,[11] *Peter Low LLC v Higgins, Danial Patrick*[12] *Ong Boon Hwee v Cheah Ng Soo*[13] and *Chain Land Elevator Corp v FB Industries Pte Ltd*[14] holding in favour of seizure of the judgment debtor's interest. The Court of Appeal acknowledged in *Chan Lung Kien v Chan Shwe Ching*[15] that "there are High Court authorities which go both ways",[16] but ultimately declined to opine on the issue as it had not been brought on appeal.

1.7 Beyond this, there are additional issues as to what the effect of issuing such a WSS is:[17]

(1) Would there be a severance, whether such a severance is temporary or permanent, and when? This has implications in situations where an interest in immovable property is held by A and B as joint tenants at law, a WSS is issued against A's interest as the judgment debtor, and A subsequently passes on. If severance does not occur prior to the sale of the land, B will enjoy the whole lease by virtue of her right of survivorship, thereby defeating the judgment creditor's WSS.

(2) How would such a severance interact with the present rules on presumed resulting trusts and common intention constructive trusts, in ascertaining the relative shares of co-owners who hold as joint tenants at law?

(3) Is there a power for the court to order the sale of the whole co-owned immovable property and not merely the judgment debtor's share as a tenant-in-common (whether as severed from a joint tenancy, or as originally held at law or in equity)?[18]

1.8 If the issues highlighted are to be answered in the negative and a WSS cannot be enforced against co-owned immovable property as a whole, there may potentially be unfairness to the judgment creditor in situations

8 [1998] 3 SLR(R) 1008, HC.
9 [2018] 4 SLR 208, HC.
10 [2016] SGHCR 4, HC.
11 [2015] 5 SLR 295, HC.
12 Above, n 3.
13 [2019] SGHC 65, [2019] 4 SLR 1392, HC.
14 [2020] SGHC 2, HC.
15 [2018] SGCA 24, [2018] 2 SLR 84, CA.
16 *Id* at [13].
17 These issues were fully raised in *Peter Low LLC v Higgins, Danial Patrick*, above, n 3 at [69].
18 This was answered in the affirmative in *Chan Swee Ching v Leong Lai Yee* [2015] 5 SLR 295, HC at [22], but in the negative in *Chan Lung Kien v Chan Swee Ching* [2018] 4 SLR 208 at [37] – [39] and *Peter Low LLC v Higgins, Danial Patrick* [2018] SGHC 59, HC at [111].

where the judgment debtor may be substantially or wholly entitled to the beneficial interest in the property in equity, usually because the judgment debtor has paid most, if not all, of the purchase price. Conversely, however, there may also be inequity in allowing the seizure and sale of the whole of a co-owned immovable property where one or more co-owner is not a judgment debtor.

1.9 Moving along a slightly different tangent, there is local case authority on what is to be done when a Mareva injunction[19] is sought against co-owned immovable property. In *Lee Kuan Yew v Tang Liang Hong*,[20] the plaintiff had sought to obtain a pre-judgment Mareva injunction over an immovable property that was allegedly beneficially owned by the defendant, Mr Tang, but which had been registered in the name of his spouse, Mrs Tang. The High Court ordered that Mrs Tang be joined as a co-defendant, and ultimately ordered a Mareva injunction to be issued. In doing so, the Court was influenced by the authority of *TSB Private Bank International SA v Chabra*.[21]

1.10 The cases, however, should be treated with caution, and their propositions should not be easily extended to the situation where judgment has been entered for the plaintiff. It should be considered that the Mareva injunctions obtained in those cases were granted as *preventive* measures against the dissipation of assets prior to the actual disposition of the claims. However, the attachment of the beneficial interest under a WSS is *dispositive*.

1.11 There is one helpful point that does, however, arise out of *Lee Kuan Yew v Tang Liang Hong*, namely that the Court only granted the Mareva injunction under circumstances where it was satisfied that the injunction would "cause no damage or any injustice"[22] to Mrs Tang. It is also useful to observe that on the specific facts of that case, the property concerned, while registered in Mrs Tang's name, had been paid for by Mr Tang. Mrs Tang, the registered owner, never had any independent income. The case shows that even at the interlocutory stage, a fairly high threshold has to be crossed before measures which affect a property owner who is not party to the proceedings can be applied. Naturally, while a judgment debtor ought not to be able to escape paying his or her dues by virtue of co-owning property with a non-party, caution needs to be exercised to ensure that a non-party is not dispossessed of immovable property without legal cause. The Subcommittee has proceeded with that consideration firmly in mind.

19 That is, an injunction to prevent a real risk of the defendant dissipating his/her assets.

20 [1997] 1 SLR(R) 248 at 251, [6], HC.

21 [1992] 1 WLR 231, HC (England & Wales).

22 *Lee Kuan Yew v Tang Liang Hong*, above, n 20 at 252, [7].

B POSITION IN OTHER JURISDICTIONS

1.12 The Subcommittee's survey of the legal position in Australia, Canada, Hong Kong and the United Kingdom is set out below.

1.13 Regarding the joint ownership issue, all jurisdictions surveyed recognise that a judgment debtor's beneficial interest in a property as a joint tenant may be taken in execution by a judgment creditor (whether by a writ of execution or by a charging order, followed by a sale of the judgment debtor's severed interest). There is no consensus as to when such a joint tenancy is severed (at the point of sale or earlier), and it is unclear whether such a severance is permanent or temporary. There is also no consensus as to whether a judgment creditor may seek a sale of the whole co-owned property, as opposed to merely the judgment debtor's interest.

1.14 Where a charging order is employed, the order can be registered against the title of the legal owner(s) of the immovable property. The charging order takes effect subject to any pre-existing legal charges, and courts often have the discretion whether to make the charging orders final, and there is a further discretion as to whether to order a sale of the immovable property on the application of the beneficiary of the charging order.

1.15 Regarding the impact of a pre-existing mortgage, the problem arose in Canada but was resolved in favour of judgment creditors. In the UK, this issue is typically dealt with by way of a charging order, which allows the judgment creditor to claim the residue of the judgment debtor's interest in the event of a foreclosure and mortgagee sale. The judgment creditor may request an order for sale following a charging order, and the court may order the sale of the property free from any prior security. The judgment creditor must apply the proceeds of the sale of the property to discharge such prior securities.

1 Australia

(A) Co-ownership of Immovable Property

1.16 In Australia, the procedures for execution of judgment vary across the different states. However, the consistent view is that the judgment debtor's interest in the immovable property as a joint tenant can be taken in execution. [23] Judicial support for this view can be found in several cases:

23 Anthony P Moore, Scott Grattan & Lynden Griggs, *Bradbook, MacCallum and Moore's Australian Real Property Law* (6th ed) (Pyrmont, NSW: Thomson Reuters (Professional) Australia, 2016) at 610; Brendan Edgeworth, *Butt's Land Law* (7th ed) (Pyrmont, NSW: Thomson Reuters (Professional) Australia, 2017) at 271.

Wright v Gibbons,[24] *Mitrovic v Koren*,[25] *Guthrie v ANZ Banking Group*,[26] *Director of Public Prosecutions (Vic) v Le*,[27] and *Boyd v Thorn*.[28] Although some commentaries describe this as a form of severance effected by a court order,[29] execution does not usually entail the court making an order for severance.

1.17 This indirectly raises the question of when, in the absence of a court order, severance of the property occurs. In *Wright v Gibbons*, Dixon J said: "Execution on a judgment for debt against one joint tenant bound his aliquot share and continued to do so in the hands of the survivor if the execution debtor afterwards died".[30] While this assumes that the severance occurred prior to the first joint tenant's death, no specific point in time was identified.

1.18 However, in *Mitrovic v Koren* it was suggested that severance occurs at the time of sale. Gowans J said: "The effect of the sheriff's sale and transfer would be to bring about a severance of the joint interest, at all events in equity, into interests of tenants in common in equal shares".[31] If this is right, then the issue of temporary severance does not arise. If the interest taken in execution is sold by the sheriff, the interest now belongs to the third-party purchaser, who holds it as a tenant in common. Thereafter, repayment by the debtor does not undo the severance. On the other hand, if the debtor repays the debt prior to the sale, the power of sale is extinguished and the property remains held under a joint tenancy.

(B) Subsisting Mortgage Registered Prior to the Writ of Seizure and Sale

1.19 Although Australian laws relating to execution of judgment and mortgagee sale are not dissimilar to those of Singapore, the potential conflict between a judgment creditor and a mortgagee does not appear to have arisen for consideration. It would seem that, in the Australian Capital Territory, a sale of the judgment debtor's interest in the property is permissible, and the sale will be subject to the mortgage.

1.20 Some support for this can be gleaned from the Australian Capital Territory Court Procedure Rules 2006, which provide that if land is to be sold under a seizure and sale order, the enforcement officer must search the title of the land for any encumbrances, make inquiries about the outstanding value of any encumbrances and must take the value of any

24 (1949) 78 CLR 313 at 331 *per* Dixon J, HC (Australia).
25 [1971] VR 479 at 481 *per* Gowans J, SC (Victoria, Australia).
26 (1991) 23 NSWLR 672 at 680 *per* Meagher JA, CA (New South Wales, Australia).
27 (2007) 232 CLR 562 at 589 *per* Kirby & Crennan JJ, HC (Australia).
28 [2017] NSWCA 210 at [78] *per* Leeming JA, CA (New South Wales, Australia).
29 Brendan Edgeworth [*et al*], *Sackville & Neave: Australian Property Law* (10th ed) (Chatswood, NSW: LexisNexis Butterworths, 2016) at 636.
30 *Wright*, above, n 24 at 331.
31 *Mitrovic*, above, n 25 at 481.

encumbrances into account in setting the reserve price of the property. On application by the enforcement officer, the court may also make any order it considers appropriate in aid of the sale of the land under the seizure and sale order, including an order for the disclosure of the amount owing under an encumbrance on the land.[32]

(C) Charging Order

1.21 In Australia, the types of property against which charging orders may be used differs from state to state. For example, in South Australia, charging orders may be used in relation to all property of the judgment debtor, including land.[33] On the other hand, in New South Wales, section 126(1) of the Civil Procedure Act 2005,[34] which deals with charging orders, only covers money in bank accounts, shares and some other forms of intangible property:

> (1) This section applies to the following kinds of property in relation to a judgment debtor (referred to in this Division as *security interests*):
>
> (a) stock and shares in a public company,
>
> (b) money on deposit in a financial institution, being:
>
> (i) money held in the judgment debtor's name in the judgment debtor's own right, or
>
> (ii) money held in the name of some other person in trust for the judgment debtor,
>
> (c) any equitable interest in property.

1.22 When granted, the charging order operates to charge the security interest in favour of the judgment creditor to the extent necessary to satisfy the judgment, and to restrain the chargee from dealing with the security interest otherwise than in accordance with the directions of the judgment creditor.[35] The judgment creditor may not commence proceedings to take the benefit of a charge arising under a charging order until after the expiration of three months from the date of the order.[36]

32 Court Procedures Rules 2006, r 2218(5), (6) and (7) (Australian Capital Territory, Australia).

33 Enforcement of Judgments Act 1991 S8 (South Australia, Australia), *Linke v TT Builders Pty Ltd (No 2)* [2015] FCA 704 at [9], [12]. Notably, South Australia also allows for a separate enforcement regime under a warrant of sale authorising seizure and sale of a judgment debtor's real or personal property to satisfy a monetary judgment, see Enforcement of Judgments Act 1991 S7 (South Australia, Australia).

34 2005 No 28 (New South Wales, Australia).

35 *Id*, s 126(2).

36 *Id*, s 126(4).

1.23 It should be noted that there is some uncertainty as to whether a charge over immovable property severs a joint tenancy.[37] In *Lyons v Lyons*,[38] it was held that a mortgage of Torrens system land by a joint tenant did not of itself sever the joint tenancy. This is because a mortgage of Torrens system land acts as a charge over the land and does not effect a transfer of any estate in the land. As such, since there is no alienation on the part of any joint tenant in granting a mortgage over his interest, there is no severance of the joint tenancy. If this reasoning is extended to charging orders, it would seem that the making of a charging order would not result in a severance of a joint tenancy of an interest in immovable property. A similar view was also taken in *Guthrie v ANZ Banking Group*,[39] where it was suggested that a charge or an equitable mortgage would not sever a joint tenancy by the granting of that security interest.

2 Canada

(A) Co-ownership of Immovable Property

1.24 On the point of whether a judgment debtor's beneficial interest in a property as a joint tenant may be disposed of by a judgment creditor in satisfaction of the judgment debt, the position in Canada is essentially the same as that in Australia. There is sufficient judicial support for the view that a joint tenant has an interest that can be taken in execution (whether by a writ of execution or by a charging order): see *Re Craig*,[40] *Toronto Hospital for Consumptives v Toronto*,[41] *Power v Grace*,[42] *Re Young*,[43] and *Maroukis v Maroukis*.[44] In the province of Ontario, this legal position has been codified in the Execution Act,[45] section 9(1): "The sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, […] including any interest of the execution debtor in lands held in joint tenancy".

1.25 On the issue of when severance occurs, in *Power v Grace* Riddel JA said:[46]

> [W]here a writ under which an interest in land may be taken by the sheriff has been placed in his hands against a joint-tenant, and the joint-tenant dies before execution, the other joint-tenant surviving holds it discharged

37 Brendan Edgeworth [*et al*], *Sackville & Neave: Australian Property Law* (10th ed) (Chatswood, NSW: LexisNexis Butterworths, 2016) at 631.
38 [1967] VR 169, SC (Victoria, Australia).
39 (1991) 23 NSWLR 672 at 680 *per* Meagher JA, CA (New South Wales, Australia).
40 [1929] 1 DLR 142, SC (Ontario, Canada).
41 (1930) 38 OWN 196, CA (Ontario, Canada).
42 [1932] 2 DLR 793, CA (Ontario, Canada).
43 (1968) 70 DLR (2d) 594, CA (British Columbia, Canada).
44 [1984] 2 SCR 137, SC (Canada).
45 RSO 1990, c E24 (Ontario, Canada).
46 *Power v Grace*, above, n 42 at 794.

> of the execution. *Lord Abergavenny's Case* (1607) 6 Co. Rep. 78[b], 79a.[47] This law has never been doubted; and the sole question for decision is whether the delivery of the writ to the sheriff is "execution."

In answering in the negative, the learned judge explained:

> Restating in tabular form, the principles upon which I proceed:
>
> (1) At the Common Law, a joint-tenancy is not affected by the delivery of a writ which may be effective against land, to the sheriff.
>
> (2) Even after such delivery, the death of the joint-tenant before the "execution" of the writ at once terminates the joint-tenancy in favour of the other joint-tenant; delivery is not any part of "execution."
>
> (3) Our statute does not expressly or by necessary implication change the Common Law in that regard – the implication, if any, being the other way. The result is that the Common Law is still in force, and the joint-tenancy was dissolved on the death of the mother.

More recently, in the decision of *Royal & SunAlliance Insurance Co v Muir*, it was held that commencement of the execution process, such as advertising the land for sale, would suffice for severance to arise. Actual sale of the land was not necessary for severance to occur.[48] It remains open as to whether temporary severance exists in Ontario as such, given that severance does not occur only at the time of sale. The issue on when severance occurs has proved problematic in Ontario, where no step may be taken to sell the land until four months after the writ was filed with the sheriff. The sale of land itself can only be carried out six months after the writ was filed with the sheriff.[49] This has the effect of placing the judgment creditor at risk for such a period, as the judgment debtor (who is a joint tenant) may die before steps taken for the sale or the sale itself occurs, causing the judgment creditor to lose the right to enforce the judgment against the judgment debtor's interest in the land.[50]

1.26 Beyond the above issues, in the decision of *Ferrier v Civiero*, the Ontario Court of Appeal held that the sheriff is only entitled to sell the judgment debtor's interest in land, and is unable to sell the entire land as a whole.[51] This is because under the Ontario Partition Act, only a person with an interest in land may seek a partition of the land or sale in lieu of partition. A sheriff however has no such interest and neither does he have the right to possession. As such, for a judgment creditor to effectively realise property seized from a judgment debtor who is a co-owner, a two-step process is needed, for example a party buying the seized interest first,

47 (1607) 6 Co Rep 78b, 77 ER 373, Ct of Common Pleas (England & Wales).
48 2011 ONSC 2273 (Ontario, Canada), at [27].
49 RRO 1990, reg 194, r 60.07(17) (Ontario, Canada).
50 Report on the Enforcement of Judgment Debts and Related Matters, Ontario Law Reform Commission Part III (1981), at 25, in the context of the earlier RRO 1970, reg 545 (Ontario, Canada).
51 2001 CarswellOnt 1717 (Ontario, Canada), at [4]–[5].

and applying for a partition or sale in lieu of partition in the future. In this case, additional costs and risk will be incurred, given that the right to partition is not automatic and is discretionary.[52]

(B) Subsisting Mortgage Registered Prior to the Writ of Seizure and Sale

1.27 In Canada, judgment creditors seeking execution by way of WSS also face difficulty when the property is encumbered with a prior mortgage. In Ontario, the ability of the sheriff to sell such a property notwithstanding the existence of the mortgage is provided for in section 28(2) of the Execution Act.[53] However, as subsections (3) and (4) provide, the sale will be subject to the mortgage. Thus, the sheriff would require a mortgage discharge statement so that he or she knows of the mortgagee's interest in the property (i.e. the outstanding debt owed to the mortgagee), and to ascertain the rights as between the mortgagee and the judgment creditor. However, mortgagees often refuse to provide such a statement on the basis that personal data protection law (the Personal Information Protection and Electronic Documents Act)[54] precludes them from such disclosure without the mortgagor's consent. However, the Supreme Court of Canada in *Royal Bank of Canada v Trang*[55] held that the judgment creditor was entitled to an order against the mortgagee for the provision of a mortgage discharge statement on two bases: (1) a court order is not subject to the restriction under the personal data protection law; and (2) as the data is less sensitive, the mortgagor could be taken to have impliedly consented to its disclosure by the mortgagee.

(C) Charging Order

1.28 Canada's approach towards charging orders differs from province to province. The province of Ontario previously had the concept of charging orders for property not exigible to a writ of execution such as government stock, funds or annuities. However, it has abolished this particular method of enforcement, in favour of unifying enforcement under writs of execution.[56] Charging orders however remain in Ontario for claims by solicitors against their clients under the Solicitors Act.[57] In contrast, the approach taken by the province of British Columbia is similar to the

52 Peter S, Spiro, *Judgment Creditors, Resulting Trusts, and the Matrimonial Home*, (2016) 35 CFLQ 181, at 185.

53 RSO 1990, c E24 (Ontario, Canada).

54 SC 2000, c 5 (Canada).

55 [2016] 2 SCR 412, SC (Canada).

56 See previously *Morayniss v McArthur* [1980] 30 OR (2d) 226, HC (Ontario, Canada). See *Report on the Enforcement of Judgment Debts and Related Matters*, Ontario Law Reform Commission. Part II (1981), at 251 arguing for the abolition of charging orders and an expansion of the property exigible to a writ of execution. This has been adopted under the Execution Act RSO 1990, c E24 (Ontario, Canada).

57 RSO 1990, c S15, s34(1). See also *Yong Tai Construction v Unimac Group Ltd* 2017 ONSC 2223 (CanLII), Superior Ct of Justice (Ontario, Canada).

approach taken in the United Kingdom, where the charging order is the sole method for enforcement of a judgment against land under the Court Order Enforcement Act.[58] The procedure is largely similar to the approach taken in the United Kingdom as well.

1.29 It should be noted that whilst a judgment debtor's beneficial interest in a property as a joint tenant may be disposed of by a judgment creditor in satisfaction of the judgment debt, there is some uncertainty as to when such severance occurs. In the British Columbia decision of *CIBC v Muntain*,[59] the court took the view that a mere charging order on land does not sever a joint tenancy, citing the earlier decision of *Re Young*.[60] This had the unfortunate effect of defeating the judgment creditor's claim against the judgment debtor's interest in the land, upon the death of the judgment debtor. There is also some uncertainty as to whether a sale of the whole co-owned property is possible, with the British Columbia Law Institute taking the view that this was not possible under present law.[61]

1.30 In view of these difficulties as well as the differing approaches taken in various provinces, the British Columbia Law Institute in 2005 proposed reforms in their model act (the Uniform Civil Enforcement of Money Judgments Act).[62] This model act was developed by a national working group, drawing on experts from various provinces, and aims to modernise and make uniform the law governing the enforcement of money judgments in Canada. The following reforms were proposed by the British Columbia Law Institute:

(1) If co-owned property is owned by a judgment debtor and one or more persons in joint tenancy, the creation of an enforcement charge (by registering the judgment on the judgment debtor's property) severs the joint tenancy. The enforcement charge charges only the judgment debtor's interest in the property as a tenant in common. However, if the enforcement charge is discharged before the disposition of the property by an enforcement officer, the joint tenancy is deemed not to have been severed by the enforcement charge, unless there were some other act or event severing the joint tenancy.[63]

(2) Co-owners of property charged by an enforcement charge are presumed to own equal and separate shares in the property.

58 RSBC 1996, c 78 (British Columbia, Canada).
59 [1985] BCJ 3075.
60 (1968) 70 DLR (2d) 594, CA (British Columbia, Canada).
61 British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act* (2005), at 22.
62 British Columbia Law Institute, *Report on the Uniform Civil Enforcement of Money Judgments Act* (2005).
63 *Id* at 195.

However, this presumption may be rebutted on an application made to the court.[64]

(3) The enforcement officer may sell the judgment debtor's interest in land as a tenant in common. However, it appears that the enforcement officer may not sell the land as a whole. In contrast, the enforcement officer may seize personal property co-owned with the judgment debtor and dispose of it in its entirety.[65]

The British Columbia Ministry of Attorney General recently consulted on its intention to adopt the model law, but with various departures from the BCLI's recommendations. These include in relation to the BCLI's proposals in subparagraph (1) above regarding the severance of a joint tenancy, which the Ministry appears concerned would impose an additional administrative burden on the Land Title Registry (in having to first indicate the switch to tenancy in common, and then, if the property were sold, the reversion to a joint tenancy). The consultation proposed instead adopting the approach in Alberta's Civil Enforcement Act,[66] whereby the joint tenancy is severed only on the sale of the property.[67] At the time of writing, the outcome of the Ministry's consultation is not yet known.

3 United Kingdom

1.31 The issues under discussion have to a significant extent been subsumed within the charging order regime in the United Kingdom. The charging order against land traces its history to the writ of elegit established by the Statute of Westminster the Second (De Donis Conditionalibus) 1285.[68] A writ of elegit permitted a judgment creditor to take possession of the judgment debtor's land and obtain repayment from the rents and profits. If the judgment debtor only had an equitable interest in land, the judgment creditor had to appoint a receiver.

1.32 A judgment creditor was given a further remedy under the Judgments Act 1838.[69] Section 13 provided that a judgment would operate as an equitable charge on all landed interests, legal and equitable, of a judgment debtor, but could not enforce that charge for a period of one year. The judgment creditor had to register the judgment against the land, failing which the charge did not affect purchasers, mortgagees, and other judgment creditors. Further amendments under the Land Charges Act

64 *Ibid*.
65 *Id* at 197.
66 RSA 2000, c C-15 (Alberta, Canada).
67 British Columbia Ministry of Attorney General. *Consultation Paper on the Uniform Civil Enforcement Money Judgments Act: Potential Departures and Additions* (2020), at 66–70.
68 13 Edw 1, c 1 (United Kingdom).
69 1 & 2 Vict, c 110 (United Kingdom).

1900[70] required the registration of the charge, without which it was fully ineffectual. Subsequently, the Law of Property Act 1925[71] codified the registration requirements in section 195.

1.33 By the Administration of Justice Act 1956,[72] the writ of elegit was abolished, and a separate regime created under section 35 thereof. This required an application for a charging order, instead of a general charge over all land of the judgment debtor arising by operation of law, and no longer required registration for its effectiveness against the judgment debtor. However, if the order were not registered, it would not bind third parties such as purchasers. Section 35 also did away with the one-year waiting period. The procedure for the obtaining of charging orders was set out in Order 50 of the Rules of the Supreme Court 1965,[73] which provided, briefly, that:

(1) an application for an order under section 35 could be made *ex parte*;

(2) an order given at first instance would be a charging order *nisi* and an order to show cause pending a hearing; and

(3) the order could be made absolute at the further hearing unless there was "sufficient cause to the contrary".

1.34 A judgment creditor had to separately apply for an order for sale or order appointing receivers.

1.35 An unresolved issue was the treatment of persons holding as joint tenants. A joint tenant in equity is not regarded as holding a distinct or separate interest from the other joint tenant(s); it was well established that she would be regarded as merely a beneficiary under a trust for sale of land, that is, with an interest in the proceeds of sale. In *Irani Finance Ltd v Singh*,[74] the issue arose of whether such an interest could be made subject to a charging order. The English Court of Appeal held that while section 35 of the Administration of Justice Act 1956 applied to beneficial interests in land, in that case an interest in the proceeds of sale was not such an interest in land, and therefore could not be subject to a charging order.

1.36 The Charging Orders Act 1979[75] was subsequently enacted, which provided *inter alia* that a charging order could be made over beneficial interests in land, including a beneficial interest in the proceeds of sale of land held under a trust for sale: see section 2 thereof. This meant that a joint tenant's beneficial interest could be subject to a charging order.

70 63 & 64 Vict, c 26 (United Kingdom).
71 15 & 16 Geo 5, c 20 (United Kingdom).
72 4 & 5 Eliz 2, c 46 (United Kingdom).
73 Rules of the Supreme Court (Revision) 1965 (SI 1965 No 1776 (L 23); United Kingdom), in force on 1 October 1966.
74 [1971] 1 Ch 59, CA (England & Wales).
75 1979 c 53 (United Kingdom).

Section 1(5) provided, however, that in deciding whether to grant the charging order, the Court should have regard to "all the circumstances of the case", and in particular any evidence as to the personal circumstances of the judgment debtor and whether any other creditor of the judgment debtor would be prejudiced by the making of the charging order. The charging order only stood as security for the judgment debt; the judgment creditor was required to take a further step to obtain an order for sale or an order to appoint receivers.

1.37 The Trusts of Land and Appointment of Trustees Act 1996[76] replaced the concept of a trust over proceeds of sale of land, and provided that beneficial owners in equity, including joint tenants, have an interest in land with a right to occupy the estate. A judgment creditor with the benefit of a charging order is able to apply for an order for sale of the co-owned property as a whole, under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. Section 15 thereof sets out non-exhaustive considerations to which the court should have regard when deciding to make the order for sale:

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d) the interests of any secured creditor of any beneficiary.

1.38 The present charging orders regime involves the following steps and considerations:

(1) The application may be made by any judgment creditor, but the court retains a discretion to review all the circumstances of the case, and in particular the personal circumstances of the debtor and any undue prejudice to other creditors, occasioned by the making of the order.

(2) The judgment debtor has the obligation to "show cause" why a charging order *nisi* should not be made absolute. It is generally not appropriate to grant a charging order where the judgment debtor is insolvent so as to prevent the judgment creditor from stealing a march on the other creditors,[77] and similarly in the case of supervening bankruptcy or insolvency. However, a judgment creditor may retain the charging order if the bankruptcy order is made only after the final order.[78]

76 1996 c 47 (United Kingdom).

77 *Monte Developments Ltd v Court Management Consultants Ltd* [2011] WLR 1579, HC (England & Wales).

78 *Nationwide Building Society v Wright* [2010] Ch 318, CA (England & Wales).

(3) It is not necessary for the court to quantify the extent of a judgment debtor's beneficial interest in the land in order to grant a charging order; it is sufficient that the court is satisfied that the judgment debtor has some beneficial interest in the relevant property.[79]

(4) A charging order may be protected by the entry of a notice in the land register.

(5) Enforcement of a charging order by way of an order for sale is a fresh action taken by a judgment creditor and therefore not subject to the Limitation Act 1980.[80] The court may make orders for the sale of the property and require that the proceeds of sale of the property be used to discharge any charges or securities over the property which have priority over the charging order.[81]

(6) An application for sale brought under section 15 of the Trusts of Land and Appointment of Trustees Act 1996 may involve European human rights jurisprudence.[82]

1.39 The UK experience has shown that certain issues have arisen in relation to the practice of enforcement of debt claims through charging orders. One relates to how much the minimum limit of the debt should be, if any. The Charging Orders (Orders for Sale: Financial Thresholds) Regulations 2013[83] imposed a minimum threshold of £1,000 for the making of charging orders. This has been criticised[84] as creating too low a threshold, which may enable a judgment creditor to wield the threat of an order for sale to extract concessions that may be prejudicial to other creditors.[85]

1.40 A difficult balancing decision may also arise where the court has to weigh competing claims of family members of the judgment debtor, and the judgment creditor or even other creditors, when deciding whether to make a charging order over a family home. Thus, the court may consider whether, if the charging order is realised by a sale of the home, "adequate

79 *Walton v Allman* [2016] 1 WLR 2053 at [57], HC (England & Wales).

80 1980 c 58 (United Kingdom): see *Yorkshire Bank Finance Ltd v Mulhall* [2009] 2 All ER (Comm) 164, CA (England & Wales).

81 Appendix A to Practice Direction 73.

82 *C Putnam & Sons v Taylor* [2009] EWHC 317 (Ch) at [28], HC (England & Wales).

83 SI 2013 No 491 (United Kingdom).

84 See, for instance, Neasa MacErlean, "£1,000 Debt could Force You to Sell Your Home", *The Independent* (London, 5 April 2013) <*https://www.independent.co.uk/money/loans-credit/1000-debt-could-force-you-to-sell-your-home-8562606.html*> (accessed 15 December 2020).

85 Neil Hickman, "Charging Orders and Their Impact on Creditors and Debtors", *The Law Society Gazette* (London, 7 January 2010) <*https://www.lawgazette.co.uk/law/charging-orders-and-their-impact-on-creditors-and-debtors/53640.article*> (accessed 15 December 2020).

alternative accommodation"[86] may be procured from the balance proceeds of sale; or whether the judgment creditor had known of the competing interest of the family but proceeded in any event.[87]

1.41 The question then arises as to whether a charging order effects a severance. There are obiter judicial statements which suggest that it does,[88] although some commentators have previously argued that it should not. They posit that a charge is merely an encumbrance over land, which does not destroy any of the four unities of a joint tenancy. As such, the granting of a charge logically should not effect a severance in equity of the joint tenancy.[89]

4 Hong Kong

1.42 The position in Hong Kong is essentially similar to that in England and Wales, from which it is derived. Section 20A(1) of the High Court Ordinance[90] provides that charging orders may be made on the beneficial interest of a joint tenant or a tenant in common in a property. The charging order takes effect as an equitable charge on land, but does not *per se* convey any beneficial interest in the land. As in England, the charging order may be registered under the Land Registration Ordinance[91] to protect its priority. A judgment creditor is, however, entitled to seek further orders for partition of the land or for its sale.

1.43 One significant difference, at least prior to the United Kingdom's Trusts of Land and Appointment of Trustees Act 1996,[92] is that in Hong Kong a co-owner has a beneficial interest in the land and not simply an interest in the proceeds of sale under a statutory trust for sale. This is on the basis that the Law of Property Act 1925 (United Kingdom)[93] creating the statutory trust for sale has not been adopted in Hong Kong.

1.44 In Hong Kong, a beneficial interest held under a joint ownership may be subject to a charging order, but no severance is effected by the issue of a charging order.

86 *Harman v Glencross* [1986] Fam 81 at 99, CA (England & Wales).
87 *Kremen v Agrest* [2013] EWCA Civ 41 at [21], CA (England & Wales).
88 See for example, *C Putnam & Sons v Taylor* [2009] EWHC 317 (Ch) at [20], HC (England & Wales).
89 See for example, Barry Crown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 LQR 477 at 481; Sarah Nield, "To Sever or Not to Sever: The Effect of a Mortgage by One Joint Tenant" (2001) Conv 462 at 469.
90 Cap 4 (Hong Kong).
91 Cap 128 (Hong Kong).
92 Above, n 76.
93 Above, n 71.

C RECOMMENDATIONS

1.45 As can be seen from the survey above, the general practice in some of the common law jurisdictions in relation to enforcement against jointly held or mortgaged properties is to provide avenues, whether by means of a writ of execution or a charging order, for the judgment creditor to sell the judgment debtor's share of jointly held property or whatever residue is left after the mortgage is satisfied.

1.46 The Subcommittee therefore proposes that, in principle, Singapore should align itself with such practice and implement statutory amendments to give assistance to a judgment creditor wishing to enforce against jointly held and/or mortgaged property. This is in accordance with policy that just debts must be paid, and that the law ought to provide legal tools for judgment creditors against recalcitrant debtors. It is further noted that many hold their assets in immovable property and it does not appear fair to shield these assets from creditors through unnecessary inconvenience in execution. Nevertheless, there does not seem to be any clear consensus relating to issues such as the timing of severance, as well as whether the court should be given the discretion to order the sale of the whole co-owned interest in immovable property, beyond just the judgment debtor's interest.

1.47 The specific recommendations of the Subcommittee are discussed below.

1 Writs of Seizure and Sale of Immovable Property

1.48 The Subcommittee proposes that the current rules on WSS be adapted to clarify that a judgment debtor's interest as a joint tenant in immovable property is exigible to execution, as with the approach taken in Ontario, Canada. This would address the joint ownership issue raised earlier.

1.49 The main advantage of this route is that severance as a concept is not alien to the LTA regime, and only relatively minor amendments are required to address the issues raised earlier. Currently, unilateral severance by a joint owner by statutory declaration is already allowed under the LTA.[94] Considering also that bankruptcy and sale both operate to sever a joint tenancy, it would not be a stretch to allow a court to order statutory severance in instances where a judgment debtor is also a joint owner of property. At that point, it would be open to the other beneficial owners to buy over the judgment debtor's share of the property, should they wish to avoid having the judgment debtor's share of the property sold to a third party, or to avoid the possibility of a court-ordered sale of the whole co-owned interest.

94 LTA, above, n 2, s 53(5) and (6).

1.50 The Subcommittee further recommends amending the caveat provisions under the LTA to provide a procedure for the court to ascertain the beneficial interests of any party in the immovable property.

1.51 At present, section 135(1) of the LTA provides that the sheriff may only sell the interest which belongs to the judgment debtor at the date of the registration of the writ. Section 135(2)(b) of the LTA further clarifies that any interest in land that was 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, is void against a purchaser of the land at the sale in execution under the writ. Implicit in section 135(2)(b) of the LTA is the fact that any individual claiming any prior unregistered interest (such as beneficial interests) can utilise the caveat system under the LTA to protect themselves from the execution sale.[95] Section 127(1) of the LTA then allows a caveatee to summon the caveator to attend before the court to show cause why the caveat should not be withdrawn or otherwise removed. However, the LTA at present does not consider a judgment creditor who has registered a WSS to be a caveatee, and this remedy is unavailable to such a judgment creditor.[96]

1.52 The Subcommittee therefore proposes that the definition of caveatee under section 127(6) of the LTA be extended to such judgment creditors with a registered WSS order. On the authority of *Singapore Air Charter v Peter Low*[97] a judgment creditor under a WSS is a person entitled to receive the balance proceeds after a mortgagee sale, under section 74 of the LTA. There seems no reason in principle not to align the position. The Subcommittee considers that this approach best balances the interests of the judgment creditor and those claiming beneficial interests in the immovable property. It may be difficult for the judgment creditor to obtain the necessary information regarding the beneficial interests in the immovable property. In contrast, the judgment debtor and those claiming such beneficial interests (such as under a resulting or constructive trust) are best placed to provide such evidence. Following this approach, the onus is on those seeking to prevent an execution sale of the judgment debtor's interest in the immovable property (or the whole co-owned property) to lodge a caveat to protect their interests, as well as to prove their interests subsequently where necessary. Given that land can only be sold in an execution under a writ after 30 days from the date of registration of the writ,[98] those seeking to prevent an execution sale have ample time to

95 See also John Baalman, *The Singapore Torrens System* (1961) at 218, in explaining the rationale of the provision under the then Land Titles Ordinance.

96 S4(1) LTA defines caveatee as the proprietor or other owner of land described in a caveat and to whom notice of the caveat is required to be given. The definition of caveatee for the purpose of S127(1) LTA is further extended by S127(6), which defines caveatee to include a person claiming an estate or interest in the land under another caveat.

97 Above, n 4 at [60].

98 S135(3) LTA.

lodge a caveat to protect their interests and failing to do so would mean that their interests are overreached.

1.53 On the issue regarding the timing of severance, given the lack of consensus in the surveyed jurisdictions, the Subcommittee recommends that the position should be provided for legislatively. Specifically, the Subcommittee recommends adapting the reforms proposed by the British Columbia Law Institute to recognise temporary severance of the joint tenancy. The Subcommittee proposes that temporary severance would occur at the time a WSS is registered against the immovable property,[99] and severance will be reversed after the WSS is discharged. This approach would, as noted in *Peter Low LLC v Higgins, Danial Patrick*, "better accord with the co-owners' original intention for holding the land on joint tenancy",[100] and ensure that the judgment creditor is protected in the event that the judgment debtor (who is a joint tenant) passes on before his interest or the whole co-owned interest is sold. A temporary severance upon registering the WSS against the judgment debtor's interest in immovable property can apply as the execution mechanism of choice when the judgment debtor is a registered proprietor of a jointly owned property. The severance will mean that the joint tenants now hold the property as tenants-in-common in equal shares in equity, unless the joint tenancy was already severed in equity earlier on (such as by way of a resulting or constructive trust).

1.54 On the issue of whether the court should be granted a discretion to order not just the sale of the judgment debtor's interest as a tenant-in-common (whether as severed from a joint tenancy, or as originally held at law or in equity), the Subcommittee recommends adopting the approach taken in the United Kingdom for charging orders and the reforms proposed by the British Columbia Law Institute, which confers on the court discretion to order the sale of the whole co-owned interest in immovable property in satisfaction of the judgment debt. The Subcommittee recognises that, against the policy that just debts should be paid, lies the need to provide some level of protection for judgment debtors and their dependents.[101] The Subcommittee is of the view that providing a discretion to the court would be a better way to balance the interests of the co-owners, their dependents, and the judgment creditor. These interests may vary from each case and it may be difficult to lay down a bright line rule. Such an approach is consistent with the jurisprudence under section 18(2)

99 Rules of Court, O 47 R4(1)(a), Cap 322, 2014 Rev Ed.

100 [2018] 4 SLR 1003 at [104], *per* Pang Khang Chau JC, HC.

101 This is evident from section 13 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), which lists the property of the judgment creditor that may not be seized under a WSS.

of the Supreme Court of Judicature Act,[102] where the court has a discretion to order a sale of the co-owned interest in land in lieu of partition.[103]

1.55 The Subcommittee notes that such amendments as are proposed may require some changes to the LTA or other primary legislation, given that severance will affect substantive rights in land. The Subcommittee is of the view that consequential amendments to Chapter 17 of the draft new Rules of Court proposed in 2018 by the Civil Justice Commission[104] (**'CJC'**) may not be required; rule 2(1) of the proposed Chapter 17 thereof states that an application for an enforcement order under that rule is "without prejudice to any other methods of enforcement that are available to him under any written law."

2 Pre-existing Mortgage

1.56 As mentioned above, practitioners in the Subcommittee have experienced difficulties in obtaining the proceeds of sale where the property subject to a WSS has been placed under a mortgage prior to execution. Where there is a subsisting mortgage, it is noted that, following the cases of *BYX v BYY* and *Peter Low LLC v Higgins, Danial Patrick*, the position appears to be that an execution creditor under a WSS may only obtain an order for sale without a mortgagee's consent if the property is not jointly held. However, with respect, it is not easy to reconcile the reasoning in both cases. It is further noted that in both cases the High Court did not have the benefit of arguments from the mortgagee as neither was present by counsel; further the decision in the former was obtained on an *ex-parte* basis, without the benefit of argument from the defendant.

1.57 Prior to the decision in *Singapore Air Charter v Peter Low*, practitioners in the Subcommittee had also observed difficulties in procuring a mortgagee to pay the balance proceeds to the judgment creditor under a registered WSS. This was because section 74(1) of the LTA, on its face, does not make clear whether a judgment creditor under a registered WSS is a person entitled to the residual sale proceeds of the mortgaged property. While that risk has been addressed by the decision in *Singapore Air Charter v Peter Low* (at [60]), one issue remains: it appears that no sale can be carried out due to the absence of the mortgagee's consent. Thus, practitioners in the Subcommittee have had to renew the

102 *Ibid*.

103 See recently in *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [57], where the Court of Appeal undertook a balancing exercise of various factors in determining whether a sale of the co-owned land should be granted, to bring the co-ownership to an end.

104 The New Rules of Court ('**draft new Rules of Court**') <*https://www.mlaw.gov.sg/files/Annex_D_SCJA_Rules_of_Court_2018_Rev_Ed.pdf/*> (accessed 15 December 2020), annexed to the *Civil Justice Commission Report* (Singapore: Civil Justice Commission, 2017) <*https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf/*> (accessed 15 December 2020).

registration of the WSS annually in order to ensure that the land remains bound, given that the registration of the WSS lapses one year from the date of the registration.[105] This in turn increases wasteful legal costs for the judgment creditor.

1.58 The Subcommittee proposes that the court be given a discretion to order the sale of a mortgaged immovable property free from the mortgage, at the request of the judgment creditor of a mortgagor, even where the mortgagee objects to the sale, adopting the approach in *BYX v BYY*. Such an approach effectively means that there is a forced redemption of the mortgaged interest in the immovable property. The Subcommittee is of the view that such a reform is unlikely to affect existing mortgage financing and property rights. The Subcommittee notes that under section 30(2) of the Conveyancing and Law of Property Act ('**CLPA**'),[106] the court already has a general discretion to order a sale of the mortgaged property in circumstances where it is fair and just. Such a discretion has been exercised in favour of a mortgagor, even where the proceeds of the sale were insufficient to redeem the mortgage.[107] Extending section 30(2) of the CLPA to allow judgment creditors of a mortgagor to request such a sale would not injure the interests of the mortgagee, given that such a request will only be sought if there is a surplus after using the sale proceeds to redeem the mortgage.

1.59 In a similar vein, the Subcommittee recommends that where the judgment creditor seeks to sell the judgment debtor's interest in the property subject to any encumbrances such as a mortgage, the sale should still be permitted even where the consent of the mortgagee cannot be obtained. In this regard, the Subcommittee recommends adopting the approach taken in the Australian Capital Territories. In such a case, the court should be allowed to make any order it considers appropriate in aid of the sale of the land under the WSS, including an order for the disclosure of the amount owing under a mortgage on the immovable property. Such a recommendation also obviates the need for the judgment creditor to continually renew the WSS's registration, given that the judgment creditor may now seek to have the land sold promptly, even where the mortgagee's consent could not be obtained.

1.60 It is settled law that a mortgagor's encumbered interest in an immovable property is an asset which has value and can be sold.[108] The Subcommittee is of the view that a mortgagee should not be entitled to veto such a sale of the mortgaged property (whether subject to, or free from, the

105 S134(1) LTA; *Singapore Air Charter v Peter Low*, above, n 4 at [60].

106 Cap 61, 1994 Rev Ed.

107 See the oft-cited decision in *Palk v Mortgage Services Funding plc* [1993] Ch 330, CA (England & Wales).

108 See e.g., Tan Sook Yee, Tang Hang Wu and Kelvin Low, *Tan Sook Yee's Principles of Singapore Land Law* 3rd Ed, at [18.160], S64 of the LTA, and John Baalman, *The Singapore Torrens System* (1961) at 123.

mortgage) merely on grounds such as the mortgagor being a "valued client" or that the mortgagor's "repayment… has otherwise been prompt", at the expense of other judgment creditors.[109] It is always open for such mortgagees to extend further credit to the mortgagor if they wish to, in order for the mortgagor to pay off his judgment creditors. The Subcommittee notes the reasoning in *BYX v BYY* on the applicability of the provisions under the Supreme Court of Judicature Act and the Rules of Court. However, the Subcommittee is of the view that legislatively providing for this discretion would provide clarity to the law, as opposed to waiting for another High Court, or the Court of Appeal in a suitable case, to uphold the reasoning in *BYX v BYY*.

3 Charging Orders

1.61 The Subcommittee has considered whether amendments should be made to provide for enforcement by means of a charging order regime whether in tandem with or in place of the WSS, as that appears to address most difficulties relating to both jointly held and mortgaged properties.

1.62 On balance, the Subcommittee is of the view that a charging order, while beneficial in many respects, also serves to elevate the interest of a judgment creditor to that of a secured interest in immovable property. No other form of execution presently available has this effect. Furthermore, the Subcommittee is of the view that significant costs will be incurred in drafting primary legislation to introduce charging orders, and the issues raised by the present WSS regime could be adequately addressed with the comparatively minor tweaks proposed above.

1.63 The Subcommittee is therefore of the view that, on balance, charging orders should not be introduced for the time being. Nevertheless, should the proposed reforms to the WSS regime prove to be inadequate, a charging order regime could replace the WSS regime as the primary enforcement mechanism against a judgment debtor's interest in immovable property. In any event, any future reform to introduce charging orders should not be implemented until after significant consultation has been undertaken with interested stakeholders. In particular, close consultation with the banking industry and insolvency professionals would be ideal.

1.64 That said, the Subcommittee notes certain advantages to the charging order mechanism. For completeness, therefore, we discuss below how a charging order regime might operate in the Singapore context.

1.65 The charging order presents itself as an alternative mechanism for enforcement to the WSS, which is often preconditioned upon a severance. The charging order need not state the precise extent of the judgment debtor's interest, and may be granted so long as the court is satisfied that

109 See *BYX v BYY*, above, n 7 at [7].

the judgment debtor does have a beneficial interest in the property – this allows the judgment creditor to obtain security while the precise extent of the judgment debtor's entitlement to the property is worked out at a later time. While there are some differences in procedure across the various jurisdictions canvassed, the UK procedure could provide a useful reference, as the rules developed in that jurisdiction are the most comprehensive.

1.66 These rules provide that, procedurally, an applicant for a charging order has to give details such as the name and address of the judgment debtor, the details of the judgment or order sought to be enforced, the amount of money remaining due, the assets it is intended to be charged, details of the judgment debtor's interest in the land, and if known, the existence of any other creditors of the judgment debtor. A numerical quantification of the judgment debtor's interest in the land, however, is not required at this stage. The application for a charging order is initially dealt with by the making of an interim charging order imposing a charge over the judgment debtor's interest, and by fixing a hearing to consider making a final charging order. Objections by other creditors can be heard at this stage, provided they are lodged not less than seven days before the hearing. The court may choose to decide the issues in dispute, or direct the trial of those issues. It may also make a final charging order or discharge the interim charging order. The court may, upon the claim of the judgment debtor, order the sale of the property to enforce the charging order. Where the property is singly owned, upon sale, the monies are first paid to the costs and expenses of effecting the sale, then to discharging any prior charges or securities over the property, following which the judgment creditor's charge is satisfied and any residue left over is paid to the judgment debtor.

1.67 Where the interest in immovable property is co-owned (either jointly or under a tenancy-in-common), the Subcommittee would recommend conferring on the court discretion to order the sale of the whole co-owned interest in immovable property in satisfaction of the judgment debt, for the reasons discussed above in the context of the proposed reforms to the WSS regime. The steps taken for sale under a charging order are similar to solely owned interests in immovable property under a charging order, save that after discharging the pre-existing charges and securities, but before discharging the judgment creditor's charge, the proceeds of sale are divided into equal shares (or as varied by the court), and distributed to the joint owners.[110] There is ordinarily an intervening period between the grant of the order and the sale of the property to satisfy the charge, so that other persons with beneficial interests in the immovable property may come forward to assert their claims, or to work out arrangements with the judgment creditor.

110 The Civil Procedure Rules 1998 (SI 1998 No 3132 (L 17); United Kingdom), Pt 73; and Practice Direction 73.

1.68 On the issue of whether a charging order, if introduced, would effect a temporary or permanent severance of a joint tenancy, the Subcommittee notes that the drafter of the then Land Titles Ordinance took the view that a mortgage given by a joint tenant of registered land operates as a mere charge and does not sever the joint tenancy.[111] Following this line, it is arguable that a charging order does not sever a joint tenancy in Singapore either. The Subcommittee recommends that temporary severance takes effect at the time when the interim charging order over the judgment creditor's interest is registered against the immovable property, and is reversed upon the discharge of the interim or final charging order. The reason supporting temporary severance is the same as with the Subcommittee's proposals on WSS – that it better accords with the co-owners' original intention for holding the land on joint tenancy, while simultaneously ensuring that the judgment creditor is protected in the event that the judgment debtor (who is a joint tenant) passes on before his interest or the whole co-owned interest is sold.

1.69 On the pre-existing mortgage issue, the grant of the charging order could give the judgment creditor comfort that he or she has a claim to the residue of the proceeds of sale of the property in the event of sale, even though the charging order may not by itself entitle the judgment creditor to force a sale of the property without the consent of the prior mortgagee. The chief criticism, however, lies in the fact that a charging order effectively allows an unsecured creditor to convert his or her interest into a secured one, to the prejudice of other unsecured creditors. One might argue that insofar as the judgment creditor is not taking advantage of any remedy or procedure that other debtors may not similarly avail themselves of, that prejudice is more apparent than real. The other debtors can also obtain priority if they so wish by suing on any outstanding amounts due and unpaid, and seeking enforcement the same way. It should be noted that presently, an unsecured creditor can still retain the benefit of the execution in the bankruptcy of the judgment debtor, insofar as the WSS has been registered against the land or any interest therein of the judgment debtor before the date of the bankruptcy order.[112] Under the present WSS scheme, such judgment creditors who have completed execution already have priority over other unsecured creditors of a bankrupt. Nevertheless, it should also be noted that the position for corporate insolvency is different. For a creditor of a company to retain the benefit of the execution against the liquidator, the execution must be completed before the commencement of the winding up, and execution of the land is only completed by the sale or, in the case of an equitable interest, by the appointment of a receiver.[113] Any reforms should consider how the present rules in the insolvency and

111 John Baalman, *The Singapore Torrens System* (1961) at 130.

112 See section 105(1) and (2)(c) of the Bankruptcy Act Cap 20, 2009 Rev Ed, *United Overseas Bank Ltd v Chia Kin Tuck* [2006] 3 SLR(R) 322 at [20].

113 See section 334 (1) and (2)(c) of the Companies Act (Cap 50, 2006 Rev Ed).

bankruptcy regimes on restriction of rights of creditors under execution or attachment may be affected.

1.70 The Subcommittee notes that the elevation of unsecured claims in this way has a potential impact on mortgagees. A holder of a charging order may well have the right to compel the sale of the mortgagor's interest in the immovable property over the objections of the mortgagee. It is acknowledged however that this is already permissible under present law (i.e. sans a charging order regime), albeit not resorted to as it would entail payment to the prior registered mortgagee of the full outstandings. At present, a mortgagor may take out subsequent mortgages over the same immovable property.[114] A sale by a later mortgagee of the mortgagor's interest (exercising its power of sale) does not discharge any prior interest to which the later mortgage is subject. This will include any prior mortgages or charges.[115] The introduction of charging orders would probably therefore not alter this position, save for the fact that the charging order is imposed by the court and not sought by the mortgagor.

1.71 It is noted that a charging order may bring some clarity on the position regarding joint ownership. It might be said that so long as some beneficial interest on the part of the judgment debtor can be proven *vis-à-vis* the property, the charging order should be made final, and the question whether that beneficial interest is enough to meet the judgment creditor's claim should be left to be resolved at the sale stage. However, where the property is jointly held by a husband and wife, or business partners, it is likely that objections will be raised that the judgment debtor has no beneficial interest despite legal registration as a proprietor, because the other joint owner made the payments on the property, and so the application for the charging order should be dismissed. Where those issues can be quickly resolved, the court can make a determination in the hearing. Where they cannot, the court should order a trial of the issue to determine if the judgment debtor has any interest in the property before disposing of the charging order application. Of course, that means that the joint owner who is not the judgment debtor will be saddled with all the time and cost burdens that a trial normally entails. The Subcommittee notes the wider societal impacts that eventuate as a result, particularly in cases which involve charging orders in the context of matrimonial or property disputes.

1.72 The Subcommittee notes that charging orders are not without their difficulties, one of the foremost of which is the question of their juridical nature, hovering just shy of a real security. While this may be clarified with legislative amendment, the issues relating to the elevation of unsecured interests and the interaction with the realms of matrimonial and property law suggest that further consultation may be necessary before the re-introduction of charging orders.

114 See John Baalman, *The Singapore Torrens System* (1961) at 130.
115 See section 73(2) of the Land Titles Act Cap 157, 2004 Rev Ed.

1.73 In this regard, the Subcommittee is also aware that Singapore did, historically, provide for charging orders in the ROC. However, following a rash of litigation in the 1980s on the nature of such orders, their legality under section 80 of the Supreme Court of Judicature Act,[116] and their compatibility with existing provisions in the LTA and ROC, the relevant provisions in the ROC were expunged in 1991.[117] It would seem that it was envisaged that the WSS would be the paramount instrument for execution, but, subject to the *nemo dat* maxim, the judgment creditor would not be able to take any interest beyond what the judgment debtor had beneficially vested in him or her. Other persons with equitable interests could be protected by the lodging of a caveat.

1.74 The Subcommittee notes that given that most of the objections arose out of the incompatibility between the written provisions for charging orders and other existing statutes and rules, the objections to the charging order that existed in the 1980s could in theory be surmounted by careful drafting. The Subcommittee does recognise, however, that for the reasons above, further consultation is required, even before the question of legislative implementation is considered. For instance, this might involve amending section 80 of the Supreme Court of Judicature Act to expressly allow for charging orders to be made under the ROC, by housing the charging order within the LTA regime, or requiring a standalone Act in order to introduce charging orders into Singapore. In addition, the introduction of charging orders would effectively render the present WSS regime otiose as an enforcement mechanism against immovable property, and there may be a need to repeal those otiose provisions in the ROC.

1.75 Given that most of the earlier issues raised by the present regime can be addressed with minor amendments to existing laws, on balance the Subcommittee is therefore of the view that it is more cost effective to retain the present WSS regime than to engage in a substantial overhaul. Further consultation is also necessary before charging orders are reintroduced, to study the evolved practices in foreign jurisdictions and thereby to bring local practice abreast of what is available there. However, the introduction of charging orders to Singapore may be considered in the future, should the recommended amendments to the present WSS regime prove inadequate, and root and branch reform is needed.

4 Summary

1.76 In summary, the Subcommittee proposes that consideration be given to the following:

(1) Amending the LTA and ROC to clarify that a judgment debtor's interest as a joint tenant in immovable property is exigible to

116 Cap 15, 1970 Rev Ed, now Cap 322, 2007 Rev Ed.

117 By the Rules of the Supreme Court (Amendment No 3) Rules 1991 (S 532/1991), r 27.

execution. This may be done by reforming the present WSS regime.

(2) Giving the court a discretion to order a sale of the judgment debtor's interest in a mortgaged immovable property (whether subject to or free from the mortgage), notwithstanding an objection from the prior mortgagee.

1.77 The Subcommittee observes that the CJC's proposed reforms are more judgment creditor-friendly, as seizure can be carried out following an enforcement order, with the opportunity to object only arising after seizure.[118] In contrast, under the Subcommittee's recommendations, the extent of the judgment debtor's interest in the property is to be determined prior to any enforcement order being made absolute. This is arguably a more balanced approach taking into account the interests of all the parties involved.

118 Draft new Rules of Court, above, n 104, Chapter 17, rr 2–4 and 7.

CHAPTER 2

GARNISHEE PROCEEDINGS OVER JOINT BANK ACCOUNTS

A INTRODUCTION

2.1 It is trite that successful litigants should be entitled to the fruits of their litigation. It is an abuse of the court's process for debtors to artificially and unfairly hide their assets in joint properties or bank accounts to avoid enforcement. However, regulators, judges and lawyers alike have long struggled with the vexed question of how a balance should be struck between protecting the interests of judgment creditors and the interests of innocent joint asset owners.

2.2 In Singapore, the law on whether deposits in joint accounts can be attached is in a state of flux. In the context of joint bank accounts, in the High Court decision *One Investment and Consultancy Ltd v Cham Poh Meng (DBS Bank Ltd, garnishee)*[119] Kannan Ramesh JC, as he was then, reversed a registrar's order allowing a joint bank account to be garnished. Ramesh JC surveyed the authorities before concluding that the English position that a joint account could not be garnished was both persuasive and founded on compelling policy considerations. However, he observed that the approach by the Supreme Court of Nova Scotia in *Smith v Schaffner*[120] addressed many of the concerns relating to the attachment of joint accounts, and noted: "Whether the balance should lie further in favour of the interests of creditors is a matter best left for legislative reform."[121] Further, the learned Judge recognised the issues and considered the various interests at play and took the position that where the balance ought to lie should best be left to the Rules Committee. This is explained in detail at paragraphs [21] and [22] of *One Investment*. In this context, the Subcommittee has examined the different positions adopted in various jurisdictions in relation to the garnishing of joint bank accounts.

2.3 Under the ROC,[122] a garnishee application is made under Order 49, which applies to debts due or accruing due from the garnishee to the judgment debtor. Order 49, rule 1(3) clarifies that such debts include a current or deposit account held by the judgment debtor with a bank or financial institution. The relevant rules are set out below:

119 [2016] 5 SLR 923, HC (Singapore).
120 [2007] NSJ No 294, (2007) 257 NSR (2d) 58, SC (Nova Scotia, Canada).
121 *One Investment*, above, n 119 at 935, [25].
122 Above, n 1.

Attachment of debt due to judgment debtor (O. 49, r. 1)

1.—(1) Where a person (referred to in these Rules as the judgment creditor) has obtained a judgment or order for the payment by some other person (referred to in these Rules as the judgment debtor) of money, not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (referred to in this Order as the garnishee) is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

[…]

(3) In this Order, "any debt due or accruing due" includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.

2.4 Having regard to the issues raised in *One Investment*, this chapter will consider whether there should be a reform of Order 49 of the ROC to allow judgment creditors to attach joint bank accounts. It will examine:

(1) the decision in *One Investment*;

(2) the position in other jurisdictions on the attachment of joint bank accounts; and

(3) a proposed reform to Order 49 of the ROC.

B POSITION IN SINGAPORE

2.5 As mentioned above, in *One Investment* Ramesh JC held that joint accounts could not be attached if the debt was owed by one account holder. He found that Commonwealth authorities and local academics were near unanimous in support of the position that a joint account cannot be subject to a garnishee order. He also noted that the English position was highly persuasive as the garnishee process under the ROC could be traced to the Civil Procedure Ordinance 1878 (Straits Settlements),[123] which was in turn based on English rules of procedure.[124]

2.6 In terms of the policy considerations, Ramesh JC considered that the policy concerns in favour of the English position were valid and compelling:

(1) First, allowing joint accounts to be attached under garnishee orders would cause prejudice to banks. The determination of the parties' respective contributions would be a fairly fact-intensive exercise typically resolved by a full factual

123 No 5 of 1878 (Straits Settlements).

124 *One Investment*, above, n 119 at 930, [14].

investigation at trial. Such a process is not something banks are equipped to conduct, and is also incompatible with enforcement processes. Further, the result would be the imposition of significant financial and administrative costs on banks, increasing the standard costs awarded to banks for garnishee proceedings which would ultimately be borne by the judgment creditors and debtors.[125]

(2) Second, allowing joint accounts to be attached under garnishee orders would also cause prejudice to the other joint account holders. This is because there is no requirement under the ROC for a joint account holder to be notified, nor is there any mechanism for the joint account holder to seek determination of the judgment debtor's interest in the joint account. Such prejudice is compounded by the difficulty in determining what proportion of the joint account to freeze, whether in the period between the service of the order to show cause and the garnishee order being made final, or after the garnishee order is made final.[126]

2.7 In relation to the possibility that a debtor may ring-fence his or her assets from creditors by transferring funds into a joint account with a third party, Ramesh JC affirmed the view expressed in a 2003 white paper entitled *Effective Enforcement* issued by the British Lord Chancellor's Department[127] that "the benefits of introducing a policy to attach joint accounts under [garnishee orders] would be disproportionate to the range of operation, cost and policy difficulties which would impact on debtors, creditors and third parties alike." He also observed that judgment creditors were not necessarily without recourse; they could apply for receivers to be appointed over joint accounts.[128]

2.8 Based on Order 49 of the ROC, as it currently stands, Ramesh JC set aside the order garnishing joint bank accounts in *One Investment*. However, he left the door open for reform by suggesting that "[w]hether the balance should lie further in favour of the interests of the creditors is a matter best left for legislative reform".[129]

2.9 On 11 August 2020, Justice Aedit Abdullah in *Timing Ltd v Tay Toh Hin and another* [2020] SGHC 169 ("**Timing Ltd**") declined to follow the decision of Ramesh JC (as he then was) in *One Investment*. As will be seen,

125 *Id* at 930–932, [16]–[19].
126 *Id* at 932–934, [20] and [22].
127 *Effective Enforcement: Improved Methods of Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents: A White Paper Issued by the Lord Chancellor's Department: Presented to Parliament by the Lord Chancellor by Command of Her Majesty, March 2003* (Cm 5744) (London: The Stationery Office, 2003) at [410].
128 *One Investment*, above, n 119 at 934–935, [24]–[25].
129 *Id* at 935, [25].

Aedit Abdullah J's reasoning in *Timing Ltd* mirrors largely the position advocated by the Subcommittee on joint bank accounts, set out further below.[130] Therefore, the Subcommittee is of the view that its recommendations should be considered so as to provide clarity on the position with regards to joint accounts.

C POSITION IN OTHER JURISDICTIONS

1 England and Wales

2.10 In England and Wales, the case of *Beasley v Roney*[131] established that a debt owing by a garnishee to a judgment debtor can be attached to answer a judgment debt if the debt is due to the judgment debtor alone.[132]

2.11 This position was affirmed by the Court of Appeal in *Hirschhorn v Evans*,[133] which held by a 2–1 majority that joint accounts should not be subject to garnishee orders. Slesser LJ, writing for the majority, held that a joint account which was held by a husband and wife in the case should not be garnished for the following reasons:[134]

(1) There was no evidence that the property in the account was solely the judgment debtor's property (that is, the property of the husband).

(2) The wife had not been heard on whether she would make any claim to the property that was sought to be garnished. In the wife's absence, it was not possible to come to any conclusion on whether the money in the joint account was in equity solely the husband's property, even though it was legally in both the husband's and wife's names.

(3) The bank was liable to both parties jointly and not severally. Even though each of the account holders might have a right to demand payment of the money in the account, this did not mean that the bank's obligation was several as well as joint. As the bank's obligations were owed to the husband and wife jointly, a garnishee order would be misconceived in stating that the bank was indebted to the judgment debtor in the sum stated in the order.

130 See Section D of this Chapter.
131 [1891] 1 QB 509, Div Ct (England & Wales).
132 *Id* at 512.
133 [1938] 3 All ER 491, CA (England & Wales).
134 *Id* at 495–496.

2.12 Garnishee orders are now known as third party debt orders ('**TPDOs**') in England.[135] In the *Effective Enforcement* white paper,[136] the Lord Chancellor's Department considered whether joint accounts should be subject to TPDOs. In their consideration, they considered that this would also allow judgment creditors to have access to "business accounts". Although the white paper did not define what are "business accounts", these accounts appear to be accounts used by businesses including partnership accounts, accounts where others are authorised to act as an agent, or trust accounts.[137] The paper raised the concern of freezing the entire joint account, which would deprive the innocent joint account holders of access to funds in the joint account between the interim and final order.

2.13 The Lord Chancellor's Department eventually advised against the proposal for, *inter alia*, the following reasons:

(1) First, in practice, it was difficult for the legislative reform to attach business accounts.[138] It was also almost impossible to properly locate and identify these accounts. The law reform would largely be confined to domestic debtors, which ran against the intention of the policy recommendation.[139]

(2) Second, it was difficult to prove the exact amount of funds owned by individual parties to an account. The white paper considered the possibility that banks and building societies would be responsible for calculating each account holder's proportion of funds, and observed that this proposal would be complex and costly.[140]

(3) Third, it would be necessary for other joint account holders who were not debtors to be notified of a TPDO. The implementation of a notification process would impose financial and administrative burdens on the courts and the financial institutions.[141]

(4) Fourth, the proposed reform would give rise to difficulties as regards the freezing of a joint account in the period between an interim and final TPDO. Depending on the nature of the mandate given to account holders, freezing just the proportion belonging to the debtor might not stop other account holders from withdrawing the frozen sum, or even the

135 Garnishee orders were renamed under changes introduced by the Civil Procedure (Amendment No 4) Rules 2001 (SI 2001 No 2792 (L 29)), which came into force on 25 March 2002.
136 Above, n 127.
137 *Id* at [410].
138 *Id* at [412].
139 *Id* at [417].
140 *Id* at [419]–[420].
141 *Id* at [423].

> debtor from withdrawing the remaining sum belonging to other joint account holders.[142] On the other hand, if the entire account were to be frozen, this would prejudice the innocent account holders by depriving them of access to their money in the interim period.[143]

2.14 For the abovementioned reasons, the Lord Chancellor's Department was of the view that the benefits of applying TPDOs to jointly owned bank accounts were disproportionate to the operational, cost and policy difficulties. In the circumstances, the law in England and Wales remains unchanged since the decision in *Hirschhorn* and does not allow for TPDOs to be obtained against joint accounts. In *Timing Ltd*, Aedit Abdullah J found the reasons for precluding garnishment of joint accounts elucidated in *Effective Enforcement* to be unconvincing.[144] He also examined the English authorities and observed that the statements that joint accounts could not be garnished were merely *obiter* and were not central to the finding in those cases.[145]

2 Nova Scotia

2.15 Unlike the position in England, joint accounts are liable to be garnished in Nova Scotia.

2.16 In *Smith v Schaffner*[146] the Nova Scotia Supreme Court considered the Commonwealth authorities, including the position in *Hirschhorn v Evans*.[147] Warner J explained that the justification for the common law rule appears to be the single contractual obligation of a bank to all joint account holders. However, if the interest of the execution debtor in the "property" of a joint account is established, there is no reason why a creditor should not be entitled to attach the execution debtor's "interest" in the property. To decline to do so would allow a debtor to artificially and unfairly hide assets from the creditor and constitute an abuse of the court's process.[148]

2.17 On the facts of *Smith*, interrogatories were administered against a bank. The bank's sworn answers revealed that the judgment debtor had contributed 45% of the money in the account.[149] The Court held that the judgment creditor had established the debtor's interest in the property on a balance of probabilities based on a presumption of resulting trust.[150] Rule 53.02(1)(a) of the Nova Scotia Civil Procedure Rules provided that an

142 *Id* at [425]–[426].
143 *Id* at [427].
144 *Timing Ltd* [2020] SGHC 169 at [29].
145 *Id* at [22].
146 Above, n 120.
147 *Id* at [10].
148 *Id* at [25].
149 *Id* at [19]–[20].
150 *Id* at [21] and [45].

execution order shall direct the Sheriff "to seize… any property in which the judgment debtor had an interest, including any debt…".[151] Warner J therefore held that 45% of the money in the joint back account should be garnished.

2.18 Shortly after the decision in *Smith*, a new set of Civil Procedure Rules came into effect in Nova Scotia in June 2008. Rule 79.09 of the new set of Rules now provides for the attachment of joint accounts as follows:

> (1) A judgment debtor who is a joint account holder, or to whom money is otherwise owed jointly with another person, is presumed to be entitled to an equal share of the joint account, or other joint obligation, unless an interested person proves otherwise.
>
> (2) The equal share must be calculated by dividing the amount of the joint account, or other joint obligation, by the number of joint account holders or joint obligees.
>
> (3) A deposit-taking corporation to whom an execution order is delivered must not honour a demand, other than the execution order itself, on a joint account of which the judgment debtor is one of the joint account holders until the interest of the judgment debtor is established in accordance with this Rule 79.09.
>
> (4) A person may make a motion for an order estimating the maximum interest of a judgment debtor in a joint account and permitting some or all demands to be honoured against the balance.
>
> (5) The deposit-taking corporation must prepare a written notice of an execution against a joint account, cause the notice to be delivered to the address of the joint account holder showing on the corporation's records, provide a copy to the sheriff and the judgment creditor, and advise the sheriff and the judgment creditor when the notice is delivered to all account holders.
>
> (6) The notice of execution against a joint account may be delivered in the way statements or notices about the account are delivered and, if the notice is mailed, it is taken to be delivered five days after the day it is delivered to Canada Post.
>
> (7) The deposit-taking corporation must pay the equal share to the sheriff, unless an interested person files a notice of motion for an order determining the judgment debtor's interest no more than ten days after the day the notice of execution against the joint account is delivered to all account holders.

2.19 Notably, rule 79.09 seeks to strike a balance between the interests of the judgment creditor and the other joint account holders by providing that:

> (a) a joint account holder may make a motion for an order estimating the maximum interest of a judgment debtor in a

151 *Id* at [22] (original emphasis).

joint account and permitting some or all demands to be honoured against the remaining balance; and

(b) banks or deposit-taking corporation must provide notice to each joint account holder of any notice of execution against the joint account.

3 Alberta, Newfoundland and Ontario

2.20 Besides Nova Scotia, other jurisdictions such as the provinces of Alberta, Newfoundland and Ontario have also legislatively provided for the attachment of joint accounts.[152]

2.21 In Ontario, rule 60.08(1.1) of the Rules of Civil Procedure[153] provides that: "Where a debt is payable to the debtor and to one or more co-owners, one-half of the indebtedness or a greater or lesser amount specified in an order under sub-rule (16) may be garnished."

2.22 Rule 60.08(16) goes on to state:

> On motion by a creditor, debtor, garnishee, co-owner of the debt or any other interested person, the court may,
>
> (a) where it is alleged that the debt of the garnishee to the debtor has been assigned or encumbered, order the assignee or encumbrancer to appear and state the nature and particulars of the claim;
>
> (b) determine the rights and liabilities of the garnishee, the debtor, any co-owner of the debt and any assignee or encumbrancer;
>
> (c) vary or suspend periodic payments under a notice of garnishment; or
>
> (d) determine any other matter in relation to a notice of garnishment,
>
> and the court may proceed in a summary manner, but where the motion is made to a master and raises a genuine issue of fact or of law, it shall be adjourned to be heard by a judge.

2.23 While the Ontario Rules do not provide further guidance on the application of Rule 60.08(1.1), in *Bank of Nova Scotia v Buonissimo Gourmet Specialties Inc*[154] the Ontario Superior Court of Justice held that rule 60.08(1.1) permits the garnishment of a joint bank account but does not exclude the court's equitable jurisdiction to determine the respective ownership interests of the co-owners of the joint bank account.

2.24 On the facts of *Buonissimo*, the affidavit evidence of the innocent joint account holder showed that the money in the joint account was from a mortgage refinancing in relation to a matrimonial home registered in the

152 *Id* at [16] and [17].
153 RRO 1990, Reg 194 (Ontario, Canada).
154 [2006] OJ No 56, SC (Ontario, Canada).

name of the innocent joint account holder. The evidence was corroborated by banking records. In the circumstances, Bryant J found on a balance of probabilities that the source of the monies in the account was the innocent joint account holder and not the judgment debtor. The court directed that the notice of garnishment be set aside, and the funds seized to be returned to the innocent joint account holder.[155]

2.25 Similar legislative reform was effected in Alberta and Newfoundland. In *Penney v Canadian Imperial Bank of Commerce*,[156] the Supreme Court of Newfoundland observed that "permitting a debtor to neutralize a bank account by adding another depositor" would result in "practical absurdity".[157] The Court dismissed the argument that there could not be an attachment of monies in a joint bank account, and ordered payment of monies in the joint bank account into court pending the bank's claim against one of the joint bank account holders for fraud.

2.26 On the back of the observations in *Penney*, Newfoundland effected legislative reform by means of section 122 of Newfoundland's Judgment Enforcement Act.[158] The section provides:

> For the purpose of garnishing a joint entitlement in which a debtor has an interest:
>
> (a) on being served with a garnishee order, the garnishee's response to the order shall include the names and addresses of the joint obligees other than the debtor;
>
> (b) after a garnishee has responded to a garnishee order, a copy of the garnishee order and a notice of the garnishee's response shall be served on each joint obligee;
>
> (c) if disclosure of a joint obligee's address would be unlawful or a breach of a legal duty owed by the garnishee to the obligee, paragraphs (a) and (b) shall not apply and the garnishee shall
>
> (i) serve the garnishee order on the obligee, and
>
> (ii) certify in the garnishee's response that the garnishee has done so;
>
> (d) *where a joint entitlement is owed to a debtor and another person, it is presumed for the purpose of this Part that an equal portion of the joint entitlement is owed to each joint owner;*
>
> (e) notwithstanding paragraph (d), if, on application by a creditor without notice to another person, *it appears to the court that the debtor may be beneficially entitled to a larger portion of the joint entitlement than is presumed under that paragraph, the court may require the garnishee to pay the larger portion to the sheriff;*

155 *Id* at [12]–[17].
156 [1996] NJ No 282, SC (Newfoundland, Canada).
157 *Id* at [11].
158 SNL 1996, c J-1.1 (Newfoundland, Canada).

(f) if an amount is received by the sheriff that exceeds the portion of a joint entitlement that is attributed to the debtor under paragraph (d), that amount may not be distributed unless the court is satisfied, on an application on notice to the other obligees, that the debtor is beneficially entitled to the excess amount;

(g) *notwithstanding paragraph (d), on the application of an interested person, the court may determine the actual beneficial interest of each joint obligee;* and

(h) where money is received by the sheriff in respect of a joint entitlement, that money shall not, unless the court otherwise directs, be distributed until 30 days have expired from the day that the notice is served on all the joint obligees.

[Emphasis added.]

2.27 Section 82 of the Alberta Civil Enforcement Act[159] contains a virtually identical regime.

D PROPOSED REFORM OF ORDER 49 OF THE RULES OF COURT

2.28 In the Subcommittee's view, there should be legislative reform in Singapore to allow joint bank accounts to be garnished. The proposed reform is based on the following considerations:

(1) Judgment creditors and successful litigants should be allowed to enjoy the fruits of their litigation. Litigation is an expensive and time-consuming process. The law should aid creditors to maximise their recovery after judgment has been obtained.

(2) A situation should be avoided where judgment debtors are permitted to hide behind joint accounts to defeat enforcement, especially when there is credible evidence that some of the monies in such joint accounts belongs to the judgment debtors.

(3) The cases in Singapore, England and Wales, Newfoundland, Nova Scotia and Ontario appear to recognise the need for legislative reform. The proposed reform should strike a balance between the interests of judgment creditors, the "innocent" joint account holders, the interests of the garnishee, and the obligation of the judgment debtor to satisfy the judgment debt.

(4) Finally, although in *One Investment* Ramesh JC noted that judgment creditors may appoint a receiver over the joint bank account instead of garnishing the account, the Subcommittee is of the view that this is a cumbersome and costly process. The receiver is an officer of the court who is appointed to

159 RSA 2000, c C-15 (Alberta, Canada).

> identify, collect, protect or preserve the property. The claimant must satisfy the receiver of reasonable evidence of ownership. Until then, the receiver is entitled to retain possession of the property. The process can be long drawn. This may not be cost effective if there is already sufficient evidence to prove ownership of the funds in the joint bank account. It would be less costly and cumbersome if a determination of the ownership of the monies in the joint bank account is determined in court. This avoids the need to appoint a receiver and to pay for the costs of the receivership.

2.29 In addition, Order 49 of the ROC currently does not preclude joint bank accounts from being garnished. Rule 1(3) provides that the Order applies to debts due or accruing due from the garnishee to the judgment debtor, including a current or deposit account with a bank or other financial institution. This can arguably be construed to include debts due from a bank to the judgment debtor and joint account holder provided it can be proven that the monies in the joint account belong to the judgment debtor. As for the proposed Chapter 17 of the draft new Rules of Court proposed by the CJC,[160] the proposal is to allow for deposit or money due to the judgment debtor from any non-party to be seized. There is no distinction made between sole-name accounts or joint accounts as long as the deposit or money was due to the judgment debtor. For clarity, we also recommend that it should be made clear in the amendments to the ROC that joint accounts can be garnished.

2.30 The operational, policy and cost difficulties of the attachment of joint accounts can be addressed by legislative reform both in the new Rules of Court as well as in primary legislation. We recommend that consideration be given to incorporating Rule 79.09 of the Nova Scotia Rules (where applicable) in relation to the attachment of joint bank accounts into the proposed Chapter 17 of the draft new Rules of Court. If this proposed reform is acceptable and to be implemented, having regard to the decision in *One Investment* followed by *Timing Ltd*, for avoidance of doubt and to clarify the issue of whether joint accounts may be the subject of garnishee applications, we propose reform in primary legislation to clarify that the Court has the discretion to garnish monies in joint accounts or assets held jointly by the judgment debtor and others. This can be carried out by appropriate amendments to the Civil Law Act or the Supreme Court of Judicature Act, or by enacting a standalone Act. In particular:

(1) The amendment may expressly state that monies in a joint account or assets held jointly may be attached for purposes of enforcement even where the joint entitlement is not jointly held by all judgment debtors. We suggest inserting the

160 Above, n 104.

provision below in Section 3 of the Civil Law Act under a new sub-section (i):-

"Garnishment of Joint Entitlement

(i) For purposes of enforcing a judgment by means of garnishment, the court shall be entitled to garnish the interest of a judgment debtor in a joint entitlement held jointly by the judgment debtor with other persons, on such terms and conditions as it deems just."

(2) In addition to the proposed amendment to Section 3 of the Civil Law Act as stated in sub-paragraph (1) above, we propose that the details of how the garnishment of the interest of the judgment debtor held jointly with others may be carried out, be set out in the new Rules of Court under Chapter 17. In this regard, a judgment debtor who is a joint account holder, or to whom money is otherwise owed jointly with another person, is presumed to be entitled to an equal share of the joint account, or other joint obligation, unless an interested person proves otherwise. The equal share should be calculated by dividing the amount of the joint account, or other joint obligation, by the number of joint account holders or joint obliges. (See the Nova Scotia Rules, rules 79.09(1) and (2).)

We propose that rule 2(4)(k) of the proposed Chapter 17 could state that a deposit or money due to the enforcement respondent from a non-party may be seized even if it is in the joint names of the enforcement respondent and other persons. The more difficult issue is whether to provide for the share of the judgment debtor in a joint account as implemented under the Nova Scotia Rules. Having regard to the reasoning in *Timing Ltd* and the structure of the proposed Chapter 17, the Subcommittee is of the view that it would be preferable to provide for a default sharing position of the monies in the joint account and allow a process for parties to provide evidence of the judgment debtor's interest in the funds to either increase or reduce the presumed default position. It is recommended that some consideration be given to adopting Rule 79.09 of the Nova Scotia Rules, as it would to a certain extent serve to clarify the position and balance the interest of all parties concerned.

(3) A bank or financial institution to which a garnishee order is delivered must not honour a demand on a joint account of which the judgment debtor is one of the joint account holders until the interest of the judgment debtor is established. (See the Nova Scotia Rules, rule 79.09(3).) This is not an issue under the proposed Chapter 17 since the deposits and monies appear to be seized on service of the enforcement order.

(4) The amendment should also provide for service or notification of the garnishee order to show cause (or Enforcement Order under the proposed Chapter 17) on all other joint account holders by the judgment creditor. This would give other joint account holders a chance to dispute their portion of the monies in the joint account. Under the proposed Chapter 17, there is a need to provide for clarity on the service of the enforcement order on parties affected by the enforcement order, including joint account holders. Presently, the proposed Chapter 17 only requires a notice of seizure to be served on the judgment debtor. There is a vague reference to a non-party being served with a notice of seizure but the draft is unclear as to the obligation of the judgment creditor or the Sheriff to serve the notice of seizure on parties impacted by the seizure.

(5) After the garnishee order to show cause (or Enforcement Order under the proposed Chapter 17) has been served on all parties including the other joint account holders, there should be a process for an application to be made for an order estimating the maximum interest of a judgment debtor in a joint account and permitting some or all demands to be honoured against the balance. This would give the judgment creditor, judgment debtor or the other joint bank account holder the chance to increase or decrease the amount that the judgment debtor is presumed to be entitled to in the joint bank account. (See the Nova Scotia Rules, rule 79.09(4), and also the Newfoundland Judgment Enforcement Act, section 122(g).) Under the proposed Chapter 17, provision could be made for an application to be taken out under rule 7 where any non-party (that is, the other joint account holder) objects to the enforcement order.

(6) In the event the judgment creditor is seeking to establish a greater share of the monies in the joint account beyond the default equal sharing position, or the judgment debtor or other joint account holders objects to the garnishee application, the burden remains on the judgment creditor to satisfy the Court on a balance of probabilities that the monies in the joint account belong to the judgment debtor and may be garnished. The judgment creditor has the burden to establish the judgment debtor's portion of the funds in the joint account during the show cause hearing. This does not increase the administrative costs of banks, nor require banks to conduct a fact-finding exercise to determine the judgment debtor's portion of the funds.

(7) No changes are proposed to deal with costs. Based on the current state of the law, the costs of the garnishee application are paid out of the garnished funds if the judgment creditor is

> successful in the application. If the judgment creditor is unsuccessful, he or she would have to pay the costs of the judgment debtor, the bank and any other joint account holder. This discourages frivolous applications, as judgment creditors will only file applications if they have clear and compelling evidence on the judgment debtors' proportions of the monies.

2.31 On balance, the Subcommittee is of the view that the proposed approach allows judgment creditors to enjoy the fruits of their litigation while protecting other joint account holders and addressing judgment debtors' obligations to pay their debts. The proposed process also finds support in the reasoning in *Timing Ltd*. Commercial certainty should not be achieved at the expense of justice, and this proposed reform can protect the interests of all concerned. As for the proposed Chapter 17 of the draft new Rules of Court, these proposed reforms can be adjusted as discussed above to fit into the framework of the proposed Chapter.

2.32 The Subcommittee was asked about the possibility of reform to garnish salaries. The High Court has previously held that section 13 of the Supreme Court of Judicature Act, which precludes seizure of a judgment debtor's wages or salaries under a writ of seizure and sale, serves also to prohibit such attachments of earnings in garnishee proceedings.[161] We note that Chapter 17 of the draft new Rules of Court, in defining enforcement orders, refers to "writ[s] of execution within the meaning of any written law". As such, section 13 of the Supreme Court of Judicature Act would appear to define the permissible scope of enforcement orders, and thus to preclude the garnishing of wages or salaries. This issue had also been considered by Professor Jeffrey Pinsler, who gave helpful insight on it in his article "Enforcement Against Judgment Debtor's Earnings" (2004) 16 SAcLJ 27.

2.33 It has been argued that the law should be reformed to permit garnishing of salaries by bringing Singapore law in line with jurisdictions such as the United Kingdom and Australia. These jurisdictions do give the courts the discretion to order for attachment/seizure of earnings. The Subcommittee is of the view that, given the significant policy implications surrounding this issue, we should refrain from considering this issue in this report, but may explore in the future any possible reform of this remedy. This would be done in consultation with relevant stakeholders.

161 *American Express Bank Ltd v Abdul Manaff bin Ahmad* [2003] 4 SLR 780.

CHAPTER 3

EXAMINATION OF JUDGMENT DEBTORS

A INTRODUCTION

3.1 The examination of a judgment debtor ('**EJD**') offers successful litigants potentially valuable information that may assist the judgment creditor in deciding upon the methods to employ to enforce the judgment. As the Court of Appeal observed in *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership*,[162] an order for EJD "does not *effect* the judgment of the court but it may render that judgment more *effective*".[163]

3.2 However, what happens in the event a judgment debtor fails to co-operate? How effective is the EJD process in such circumstances? As it stands, the law in Singapore does not provide any avenue by which individuals other than the judgment debtor may be examined in relation to the judgment debtor's assets and liabilities within the EJD regime. Though reform extending the third party discovery regime to the enforcement/execution stage may well be an option, for the purposes of this report the Subcommittee has separately considered possible amendments to the existing EJD regime that may achieve a similar purpose, within the mechanisms available for enforcement.

3.3 The major provision in the EJD regime is Order 48 of the ROC.[164] Under Order 48, rule 1, a judgment creditor may apply for an order requiring the judgment debtor – and only the judgment debtor – to attend court for an oral examination as to his assets, means and liabilities. Order 48, rule 2, applies in respect of an EJD order which arises out of a judgment that is not for money.

> **Order for examination of judgment debtor (O. 48, r. 1)**
>
> 1.—(1) Where a person has obtained a judgment or order for the payment by some other person (referred to in this Order as the judgment debtor) of money, the Court may, on an application made by ex parte summons supported by affidavit in Form 99 by the person entitled to enforce the judgment or order, order the judgment debtor, or, if the judgment debtor is a body corporate, an officer thereof, to attend before the Registrar, and be orally examined on whatever property the judgment debtor has and wheresoever situated, and the Court may also order the judgment debtor or officer to produce any books or documents in the possession of the judgment debtor relevant to the questions aforesaid at the time and place appointed for the examination.

162 [2013] 4 SLR 1116, CA.
163 *Id* at 1124, [16] (original emphasis).
164 Above, n 1.

> […]
>
> **Examination of party liable to satisfy judgment (O. 48, r. 2)**
>
> 2. Where any difficulty arises in or in connection with the enforcement of any judgment or order, other than such a judgment or order as is mentioned in Rule 1, the Court may make an order under that Rule for the attendance of the party liable to satisfy the judgment or order and for his examination on such questions as may be specified in the order, and that Rule shall apply accordingly with the necessary modifications.

3.4 In this regard, the CJC's draft new Rules of Court,[165] include, in rule 8 of Chapter 17, a proposal for an amended EJD regime. This will be analysed in depth in paragraph 3.12 below.

3.5 The Subcommittee respectfully takes the view that the ambit and scope of Order 48 of the ROC and Chapter 17, rule 8(1), of the draft new Rules of Court may need to be extended to allow for the examination of additional individuals who may provide useful *information* on the property of the judgment debtor. We consider the following in this report:

(1) the current position in Singapore;

(2) the position in Canada on the examination of persons other than the judgment debtor; and

(3) our proposed reform to the EJD regime.

B THE POSITION IN SINGAPORE

3.6 As mentioned above, there are presently no avenues by which persons other than the judgment debtor can be examined in Singapore. The scope of Order 48 of the ROC is expressly confined to "the judgment debtor, or, if the judgment debtor is a body corporate, an officer thereof".[166] Accordingly, in the event that a judgment debtor is unwilling or unable to provide a judgment creditor with the requisite information, the latter is left with little alternative recourse.

3.7 In this aspect, we note that an important precursor to the oral examination of judgment debtors is to obtain the judgment debtor's bank statements and records to analyse the financial health of the judgment debtor. This may aid the judgment creditor in determining the appropriate mode of enforcement proceedings. Obtaining such bank records may in turn do away with the need for an oral examination of the judgment debtor.[167] In this regard, the State Courts and Supreme Court Practice Directions set out a template questionnaire that judgment creditors can use

165 Above, n 104.

166 ROC, above, n 1, O 48, r 1(1).

167 See para 80A of the Supreme Court Practice Directions; para 100 of the State Courts Practice Directions.

to serve on the judgment debtor, and for the same to be completed prior to the oral examination of the judgment debtor; this includes the requirement for judgment debtors to provide their bank statements.[168]

3.8 In the event the judgment debtor is unwilling or unable to provide his bank statements and records, one alternative open to the judgment creditor is to apply to the court, pursuant to section 175 of the Evidence Act ("**EA**")[169], "*to inspect and take copies of any entries in a banker's book*". Banks may disclose the judgment debtor's (i.e., the customer of the bank's) bank records pursuant to an order of court under that section.[170] The Court has held that section 175 was not meant to confer an independent and alternative right to discovery against a bank; rather the applicant must demonstrate a substantive right to the documents, without relying on section 175 for an application under the section to succeed.[171] Our view is that this could similarly be applied in the EJD context; the judgment creditor would have an independent substantive right for disclosure of the bank's books under the EJD order, and thus when the judgment debtor is unable to produce the same, the judgment creditor may apply under section 175 to obtain copies of the judgment debtor's bank records.

3.9 Although there are, to our knowledge, no reported cases where an application under section 175 of the EA has been used in connection with EJD proceedings, it is our considered view that the section is worded sufficiently broadly to encompass an application for enforcement purposes, i.e., for the judgment creditor to apply pursuant to section 175 to inspect the judgment debtor's bank's records consequent to instituting EJD proceedings.[172] Taking this one step further, under the draft new Rules of Court (elaborated further at paragraph 3.12), which would extend the definition of a judgment debtor to an enforcement respondent, the judgment creditor would be able to apply pursuant to section 175 to inspect the enforcement respondent's (including non-judgment debtor's) bank's records.

3.10 The above being said, it should be highlighted that a judgment debtor who wilfully seeks to frustrate a judgment creditor's attempts to enforce the judgment or to seek an EJD order may also be subject to

168 See Appendix A, Forms 11A and 11B of the Supreme Court Practice Directions; Appendix A Forms 16 and 17 of the State Courts Practice Directions.

169 Cap 97, 1997 Rev Ed.

170 See s 47(2) read with Part I, third schedule, para 7 of the Banking Act (Cap 19, 2008 Rev Ed).

171 See *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd* [2016] 4 SLR 1392 at [92] – [93]. See also *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR(R) 91, where the Court of Appeal held that the applicant was entitled to the documents pursuant to section 175 of the EA as the court had already ordered, as part of the discovery order, for the documents to be produced.

172 See *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd* [2016] 4 SLR 1392, where the court held that one of the purposes for which an application under section 175 of the EA could be used would be for tracing monies.

considerably draconian consequences under the Debtors Act ('**DA**').[173] These include, *inter alia*, arrest, examination, and a potential civil prison term of up to six weeks. However, given the high threshold which must be met before the court's powers under the DA are engaged,[174] such a course of action may not be particularly helpful for judgment creditors, especially in instances where a judgment debtor is unable – as opposed to unwilling – to provide the necessary information.

3.11 Even if a judgment creditor is able to obtain the bank statements of the judgment debtor, it may be the case that, to evade the judgment sum, monies are not being held in the judgment debtor's account but that of another individual's account. In such circumstances, it may be more prudent for a judgment creditor to obtain the information simply by obtaining the requisite information from individuals who are likely to have it – for instance, a family member, a business associate, or even an auditor.[175]

3.12 Notably, the proposed Chapter 17 of the draft new Rules of Court defines an enforcement respondent as "a party or non-party against whom an enforcement order is sought or made",[176] and this appears to extend the scope of an EJD order beyond judgment debtors. The EJD regime found in rule 8 in the proposed Chapter 17 is as follows:

> **Examination of enforcement respondent**
>
> 8.—(1) The enforcement applicant may apply for the enforcement respondent to be examined orally in Court or to make an affidavit or both on the properties which are owned by him beneficially whether in whole or in part of which he will be entitled to in the future.
>
> (2) The Court may also order the enforcement respondent to produce such documents as are appropriate.
>
> (3) Where the enforcement respondent is an entity, the order shall state the appointment of the officer or officers of the entity who are to be examined.
>
> (4) An application under this Rule is deemed to be enforcement of a Court order and is within the terms of any written law or any order staying enforcement of that Court order.

173 Cap 73, 2014 Rev Ed ('**DA**'). See generally, ss 3–6.

174 The DA (*id*, s 3) provides that a court or judge may order the debtor to be arrested "if it appears to the court or judge that there is probable reason for believing, having regard to his conduct, or the state of his affairs, or otherwise, that he is likely to leave Singapore with a view to avoiding payment of such money or to avoiding examination in respect of his affairs".

175 Although this may, in certain circumstances, raise questions of privacy and confidentiality, it is submitted that these would in general be subordinate to the judgment creditor's interest in recovery, and the public interest in the administration of justice and the effective enforcement of court judgments.

176 Draft new Rules of Court, above, n 104, Chapter 17, r 1.

However, as can be seen above, the enforcement respondent may only be examined on properties owned by him or her beneficially (whether in whole or in part) or which he or she will be entitled to in the future,[177] suggesting that only an enforcement respondent (encompassing both a party and non-party against whom an enforcement order is sought) who has *possession* of the property belonging to the judgment debtor would be within the ambit of the proposed Chapter 17; it does not allow for the examination of persons who may have *knowledge* of the judgment debtor's assets that is crucial for enforcement purposes. We respectfully submit that rule 8(1) in the proposed Chapter 17 of the draft new Rules of Court be further extended to include non-parties who have *knowledge* of the judgment debtor's assets. Our suggested amendment will be discussed further in section D, after examining the position in Canada.

C THE POSITION IN CANADA

3.13 The position in other Commonwealth jurisdictions such as UK, Australia and Hong Kong is not unlike that in Singapore, in that persons other than the judgment debtor may not be examined. This is respectively provided for in rule 71.2(1) of the Civil Procedure Rules 1998 (United Kingdom),[178] section 108(1) of the Civil Procedure Act 2005[179] and regulation 38.1 of the Uniform Civil Procedure Rules 2005 (New South Wales, Australia),[180] and Order 48, rule 1, of the Rules of the High Court (Hong Kong).[181]

3.14 Generally, the approach taken in Canada is broader. Persons who are not judgment debtors may nevertheless, under certain circumstances, be examined on matters in connection with a judgment debtor's means of discharging the judgment or order, and/or any disposal of property by the judgment debtor, and/or any debts owing to or by the judgment debtor. While there are differences in degree amongst the various provinces, they are nevertheless similar in that persons other than the judgment debtor may be examined.

3.15 Section 66(1) of the Judgment Enforcement Act (Newfoundland) provides that:[182]

> A creditor may set a place and time for an examination and may examine a debtor *or another person* for the purpose of determining the ability of the debtor to satisfy the claims of the creditor.

177 Id, r 8(1).
178 Above, n 110.
179 Above, n 34.
180 Civil Procedure Act 2005 (New South Wales, Australia), *id*, Sch 7.
181 Cap 4A (Hong Kong).
182 Newfoundland Judgment Enforcement Act (SNL1996 c J-1.1) (emphasis added).

Save that the examination be for the "purpose of determining the ability of the debtor to satisfy the claims of the creditor", it can be readily seen that the remit granted to judgment creditors in Newfoundland is broad.

3.16 In the provinces of Manitoba,[183] Ontario[184] and Prince Edward Island,[185] the rule concerning EJD orders involving persons other than the judgment debtor is drafted as follows:

> Where any difficulty arises concerning the enforcement of an order, the court may,
>
> (a) Make an order for the examination of *any person who the court is satisfied may have knowledge* of the matters set out in subrule (2); and
>
> (b) Make such order for the examination of *any other person as is just*.

3.17 While the abovementioned pieces of legislation in Manitoba, Ontario and Prince Edward Island do not spell out what "*difficulty*" may entail, the Supreme Court of Canada offered some guidance on this in *Royal Bank of Canada v Phat Trang, Phuong Trang aka Phuong Thi Trang and Bank of Nova Scotia*.[186] In that case, the appellant bank was a judgment creditor of the respondents. The appellant sought to sell the respondents' home to finance the judgment debt, but needed a mortgage discharge statement, which the respondents' bank was unwilling to provide. In *dicta*, the Supreme Court observed that:[187]

> […] an order requiring disclosure can be made by a court in this context if either the debtor fails to respond to a written request that he or she sign a form consenting to the provision of the mortgage discharge statement to the creditor, or fails to attend a single judgment debtor examination.

3.18 On the other hand, in the Ontario case of *TA Associates Inc v Gandy*,[188] the judgment creditor applied for the examination of persons other than the judgment debtor, without applying first to examine the judgment debtor himself. No other steps had been taken in Ontario to enforce the judgment other than filing a writ of execution. The judgment creditors contended that there was no use taking out an order for the examination of the judgment debtor as, a previous examination for similar enforcement proceedings in New York had not yielded any results. The court held that the applicants had not established that any 'difficulty' had arisen in relation to enforcement, ruling that the action was premature.

183 Manitoba Court of Queen's Bench Rules (Manitoba Regulation 553/88), r 60.17(6) (emphasis added).
184 Ontario Rules of Civil Procedure (RRO 1990, Reg 194), s 60.18(6) (emphasis added).
185 Rules of the Supreme Court of Prince Edward Island, r 60(6) (emphasis added).
186 [2016] 2 SCR 412, SC (Canada).
187 *Id* at [32] *per* Côté J.
188 2016 ONSC 358, [2016] OJ No 209, Sup Ct of Justice (Ontario, Canada).

3.19 Similarly, in *McBean v Griffin*,[189] the judgment creditors sought leave of court to examine the judgment debtor's wife, as the judgment debtor was unwilling to provide certain mortgage statements that were necessary for the judgment creditor to order a writ of seizure and sale of the property that was jointly owned by the judgment creditor and his wife. However, this was disallowed as the court held that the judgment creditors had not shown that there was any attempt to obtain the information directly from the judgment debtor first and thus had not satisfied the court that there was "difficulty" regarding enforcement.

3.20 This shows that one should, at the outset, seek information from the judgment debtor and that only if this fails or it can be shown that the course of action would be futile, would the court accept that "difficulty" has arisen and that a non-party should be examined.

3.21 A similarly generous approach has been proposed for adoption by the British Columbia Law Institute. Under section 45(1)(c) of its proposed Uniform Civil Enforcement of Money Judgments Act, a judgment creditor may:[190]

> […] apply to the court for an order requiring a judgment debtor or *any other person the court considers appropriate* to:
>
> (i) Disclose to a person appointed by the court information that the disclosing person possesses about any matter referred to in clause (a), or
>
> (ii) Attend before the enforcement officer, or before any person designated by the court at a set time and place for examination under oath to answer questions about any matter referred to in clause (a) […]

3.22 In light of the foregoing, it can be seen that, though the legislation is drafted such as to allow the judgment debtor and any other persons to be examined in relation to the enforcement of a judgment, the relevant Canadian courts would still exercise the powers conferred upon them judiciously.

189 2012 ONSC 6555, [2012] OJ No 5443, Sup Ct of Justice (Ontario, Canada).

190 See the *Report on the Uniform Civil Enforcement of Money Judgments Act* (BCLI Report No 37) (Vancouver, BC: British Columbia Law Institute, 2005) at 105–108 (emphasis added). As noted at paragraph 1.30 above, the British Columbia Ministry of Attorney General recently consulted on adoption of the Uniform Civil Enforcement of Money Judgments Act, subject to certain modifications. As regards obtaining information from the judgment debtor, the consultation proposes adopting a modified form of the approach in Saskatchewan (see paragraph 3.25 below). Broadly stated, this would involve a tiered approach, with a questionnaire as a first step, subsequent recourse to an examination in front of a court reporter if necessary, plus, as a last tier, a hearing akin to British Columbia's existing 'Subpoena to Debtor' process. In addition, a Court Bailiff or lawyer would be able to request information directly from third parties at certain points. Above, n 67, at 38–43.

3.23 In New Brunswick, legislation has been drafted broadly, such that if the judgment debtor fails to attend the examination or fails to provide complete and honest answers, a judgment creditor can apply to the clerk for another person to be examined. The clerk, if satisfied that the other person can and should provide the required information, may then order that person to (i) provide the information, or (ii) attend an examination.[191]

3.24 In Nova Scotia, a non-judgment debtor may only be examined where:[192]

> (a) The person likely has information that will aid enforcement of an execution order;
>
> (b) The person will not provide the information, or will not fully or reliably provide the information, in an interview.

3.25 Finally, a "reasonable grounds" threshold is taken in Saskatchewan, where the law provides that the sheriff may serve on any person a notice requiring that person to complete a questionnaire when the sheriff has reasonable grounds to believe that a deponent:[193]

> (a) Has information concerning property of the judgment debtor; or
>
> (b) Is in possession or control, or has recently been in possession or control, of:
>
> i. Property of the judgment debtor; or
>
> ii. Records relating to the property of the judgment debtor.

3.26 Similarly, under Alberta's Civil Enforcement Regulation, a court may order the examination of a non-judgment debtor where:[194]

> […] the Court is satisfied that there are reasonable grounds for believing that another person is in possession of or has control over exigible property of an enforcement debtor […]

3.27 However, it is pertinent to note that examination of persons other than the judgment debtor seems unique to Canada and, as far as the Subcommittee is aware, such reform has not been implemented in other Commonwealth jurisdictions.

3.28 It is worth mentioning that in the English case of *North Shore Ventures Ltd v Anstead Holdings Ltd*,[195] the judgment creditor had applied for an order

191 Enforcement of Money Judgments Act (SNB 2013, C-23) (New Brunswick, Canada), s 37(1).

192 Nova Scotia Civil Procedure Rules, r 79.24.

193 Enforcement of Money Judgments Act (SS 2010, c E-9.22) (Saskatchewan, Canada), s 13(3).

194 Civil Enforcement Regulation (Alberta Regulation 276/1995) (Alberta, Canada), s 35.16.

195 [2011] EWHC 178 (Ch), HC (England & Wales).

under the Civil Procedure Rules ('**the CPR**') (United Kingdom),[196] rule 31.17, for discovery against a non-party after judgment was given, to obtain documents that would entitle the judgment creditor to enforce the judgment. The non-parties argued that this should not be allowed as, by analogy, the CPR, rule 71.2(1), does not extend to examination of third parties on a judgment debtor's assets. However, the High Court, in allowing for discovery against the non-parties, held that this approach was not inconsistent with the CPR, rule 71.2, and that there could be no inference from that rule that disclosure should not be available against third parties after judgment was obtained.[197] In coming to this conclusion, Floyd J lent weight to Kerr LJ's statement in *Maclaine Watson & Co v International Tin Council (No 2)*[198] that:[199]

> […] it was clear from ord 48 and the statutory power to appoint receivers that it is the policy of the law to assist persons in the position of the Plaintiffs to obtain the fruits of their judgment.

Nonetheless, a subsequent English case, *Watson v Sadiq*,[200] confirmed that the Court did not have jurisdiction to order oral examination of a non-party under the CPR, rule 71.2, itself.

3.29 Even so, it should be highlighted that section 95 of the Tribunals, Courts and Enforcement Act 2007[201] ('**TCE**') in the UK allows judgment creditors to apply to the court for information on what kind of action would be appropriate to take in court to recover the judgment debt[202] (that is, to ascertain the judgment debtor's assets before deciding on the enforcement method).[203] Where a judgment creditor applies to court under section 95 of the TCE, the court, pursuant to section 96 of that Act, may make an information order, amongst others, if the court is satisfied that this would help to deal with the creditor's application.[204] Such information orders would require prescribed third parties to provide prescribed information about the debtor.[205] Recipients of such information orders are envisaged to be credit reference agencies and banks.[206] This is similar to the process available pursuant to section 175 of the EA, discussed at paragraph 3.8 above, albeit limited to entries in a "*banker's book*". We understand, however, that section 95 and the other relevant provisions of the TCE

196 Above, n 110.
197 *North Shore Ventures*, above, n 195 at [21].
198 [1989] 1 Ch 286, CA (England & Wales).
199 *North Shore Ventures*, above, n 195 at [17].
200 [2015] EWHC 3403 (QB), HC (England & Wales).
201 2007 c 15 (United Kingdom) ('**TCE**').
202 A "judgment debt" for these purposes includes a sum which is payable under a judgment or order enforceable by the High Court, the Family Court or the County Court.
203 *Tribunals, Courts and Enforcement Act 2007: Explanatory Notes* (London: The Stationery Office, 2007) at 67, [434] ('***TCE Explanatory Notes***').
204 TCE, above, n 201, ss 96(2)(b) and 96(3).
205 *TCE Explanatory Notes*, above, n 203 at 68, [437].
206 *Ibid*.

providing for information request applications have yet to come into force (due initially, it would appear, to resource-related issues).[207]

3.30 Thus, though no reforms emulating the Canadian EJD regime have been implemented in the UK, it can be said that there is an avenue in the pipeline for the judgment creditor to get information about the judgment debtor's assets from persons other than the judgment debtor himself, by applying for an information order under the TCE.

D PROPOSED REFORM OF THE EJD REGIME IN SINGAPORE

3.31 The proposed EJD regime under Chapter 17 of the draft new Rules of Court brings the position in Singapore close to that of the Canadian province of Saskatchewan (referred to in paragraph 3.25 above), under which a person who has possession or control of the property of the judgment debtor can be examined. However, in addition to that, non-parties who have *information* concerning the property of the judgment debtor also come within the ambit of parties who can be examined. As examined in Section C above, other provinces in Canada also allow for parties who have information concerning the judgment debtor's property to be examined under their EJD Regime.

3.32 Accordingly, the Subcommittee recommends that rule 8(1) in Chapter 17 of the draft new Rules of Court be amended to enable the examination of individuals who have information in respect of a judgment debtor's assets and outstanding debt obligations[208] to enable the judgment creditor to assess the financial position of the judgment debtor to use the appropriate method of enforcement. Such reform is not, in our view, precluded under the current structure of the ROC, and will, in any event, further the object and purpose of the EJD regime to the extent that the reform will increase the toolkit of options at the disposal of a judgment creditor. To take this one step further, if our proposed reform is taken on board, this would correspondingly extend the reach to parties against whom a judgment creditor could possess a substantive right, for the disclosure of the parties' bank statement(s) pursuant to section 175 of the EA.

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207 Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales, The Government Response* (2012) at [33], where the then Government acknowledged that the relevant provisions "would be an important progressive step towards improving the effectiveness of enforcement options" and said it would implement them "when resources are available to do so."; see also Law Commission, *Enforcement of Family Financial Orders* (LC370, 2016) at [8.3].

208 The current sample questionnaires for judgment debtors includes questions on particulars of debtors and creditors – see Appendix A, Forms 11A and 11B of the Supreme Court Practice Directions; Appendix A, Forms 16 and 17 of the State Courts Practice Directions.

3.33 To allay concerns about the potential overreach of such reform, we recommend that any legislative amendment could be modelled after the abovementioned "reasonable grounds" approach taken in Saskatchewan, which stipulates, with specificity, the exact conditions under which a non-judgment debtor may be examined, but also incorporates an evidentiary threshold that must be met by the judgment creditor. Some examples of when the judgment creditor could have reasonable grounds for believing that the non-judgment debtor has information on the judgment debtor's assets would be: (a) when there is evidence, such as the judgment debtor's bank statements, showing a substantial amount of funds being transferred to another account, and evidence that the account belongs to the enforcement respondent (i.e., the spouse of the judgment debtor / a trust), or (b) when assets are in the spouse's name / in a trust.

3.34 In the above regard, rule 8(1) in Chapter 17 of the draft new Rules of Court may be amended to read as follows:

> Where any difficulty arises in or in connection with the enforcement of any judgment or order, the enforcement applicant may apply for the examination of any enforcement respondent who the enforcement applicant has reasonable grounds to believe:
>
> (a) has information concerning property of the judgment debtor; or
>
> (b) is in possession or control, or has recently been in possession or control, of:
>
> (i) property of the judgment debtor; or
>
> (ii) records relating to the property of the judgment debtor.

3.35 It is thus suggested that it should be mandatory for the judgment creditor to apply to examine the judgment debtor first before "leave" can be granted to examine other persons, when faced with any difficulty with the judgment debtor as outlined above. This would act as sufficient safeguard and avert the scenario in *TA Associates Inc v Gandy*,[209] where the judgment creditors tried to examine a non-party first, on the basis that the judgment debtor would not be helpful in any case. In any event, as the costs of the examination are at the discretion of the registrar who has conduct of the proceedings, the examining registrar would have the discretion to impose costs orders against a judgment creditor who abuses the process and examines other persons, who eventually are found not to possess any knowledge of the judgment debtor's assets.[210] Otherwise, it is our view that the costs of the examination of non-parties should be to the account of the judgment debtor, i.e., added to the judgment sum, as the necessity to examine the non-parties was brought about by the inability of the judgment debtor to provide the answers sought.

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209 Above, n 188.

210 Currently costs of the EJD proceedings would not be awarded to the judgment creditor if the examination proves abortive or does not yield any useful information or material – see Singapore Civil Procedure 2020 at para 48/3/12.

3.36 The suggested reform above would, in our view, be consonant as a matter of principle with the ruling of the Court of Appeal in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd*.[211] In that case, the Court was faced with the question of whether service of an EJD order should be allowed abroad on the foreign officer of a judgment debtor. The Court held that, in such matters, the primary inquiry is:[212]

> […] whether the foreign officer is *so closely connected to the substantive claim* that the Singapore court is justified in taking jurisdiction over him. We nevertheless make two tentative points. First, as the whole point of an EJD order is to obtain information about the judgment debtors' finances, *the extent of the foreign officer's knowledge of his company's financial affairs will be an important threshold consideration*. Parties should not be allowed to haul before the court a foreign officer who is unlikely to possess any relevant information. But even if a foreign officer has relevant information, that fact alone would generally be insufficient; after all, the same could be said about any individual sought to be subpoenaed to give evidence. Something more would be required. For example, *the court might wish to consider the extent of the foreign officer's involvement in the matters relating to the claim*. It might be easier to justify invoking the court's jurisdiction over a foreign officer who has played a key role in the events giving rise to the judgment creditor's successful claim.

3.37 It is accepted that the Court in *Burgundy* was not confronted with the precise question that is the subject of this report: that is, whether non-judgment debtors should be subject to examination. Nevertheless, the considerations involved are not altogether dissimilar, and it would be prudent, in the Subcommittee's view, for the control mechanisms provided in any potential legislative reform to Order 48 of the ROC and Chapter 17 of the draft new Rules of Court to follow those outlined in *Burgundy*.

3.38 As a final note, it is noteworthy that, under the Bankruptcy Act,[213] the Official Assignee may, at any time, summon the following persons to be examined on oath in relation to the bankrupt's affairs, dealings and property:[214]

(a) the bankrupt;

(b) the bankrupt's spouse;

(c) a person known or suspected by the Official Assignee to possess any of the bankrupt's property or any document relating to the bankrupt's affairs, dealings and property;

(d) a person believed by the Official Assignee to owe the bankrupt money;

(e) a person believed by the Official Assignee to give information regarding—

211 [2014] 3 SLR 381, CA.
212 *Id* at 422, [112] *per* Menon CJ (emphasis added).
213 Cap 20, 2009 Rev Ed.
214 *Id*, s 82A(2).

(i) the bankrupt; or

(ii) the bankrupt's affairs, dealings and property; and

(f) a trustee of a trust of which the bankrupt is a settlor or is or has been a trustee.

3.39 In addition to the Official Assignee, section 83(1) of the Bankruptcy Act also allows the creditor (who arguably is in an analogous position to a judgment creditor to that extent that he seeks to recover a debt owed to the estate) to apply to court to summon the bankrupt, or any other person to appear before the court to be examined, if it appears to the court that the person would be able to give information concerning the bankrupt or the bankrupt's affairs, dealings or property.

3.40 The proposed further reform to rule 8(1) in Chapter 17 of the draft Rules of Court is therefore, in the Subcommittee's view, a marginal increase to what is already provided for under Singapore law, albeit only in the context of bankruptcy.

CHAPTER 4

INTERIM RELIEF AID OF FOREIGN COURT PROCEEDINGS

4.1 Funds flow with ever-increasing speed and disregard for territorial borders. This throws into sharp relief the availability of suitable *interim* measures to prevent the dissipation of funds across borders.

4.2 Unlike in Australia, Canada, Hong Kong and the United Kingdom, the Singapore courts are statutorily restrained from granting free-standing Mareva injunctions[215] in support of foreign proceedings against foreign or domestic defendants unless, at the time of the application for the injunction, the plaintiff has an accrued cause of action against the defendant that is justiciable in a Singapore court.

4.3 Section 4(10) of the Civil Law Act[216] states:

> A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.

Speaking as it does of interlocutory orders, the section has been interpreted to "presuppose[ ] the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary."[217] This was the holding of the Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA*[218] ('***Swift-Fortune***') (for foreign defendants) and the High Court in *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon*[219] ('***Multi-Code***') (for domestic defendants).

4.4 Practically speaking, a plaintiff must therefore commence Singapore proceedings against the defendant by asserting a cause of action before or

215 The injunction is "free-standing" in the sense that the injunction stands alone, with no other claim for substantive relief or final judgment: see *Meespierson (Bahamas) Limited v Grupo Torras SA* (1999–2000) 2 ITELR 29 at 41.

216 Cap 43, 1999 Rev Ed.

217 *The Siskina* [1979] AC 210 at 254, HL (United Kingdom), *per* Lord Diplock in the context of section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo 5, c 49) which is substantially similar to section 4(10) of the Civil Law Act. This interpretation was adopted by the Court of Appeal in *Swift-Fortune v Magnifica Marine SA*, below, n 218 at 663–664, [73], and the High Court in *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon*, below, n 219 at 1034, [71].

218 [2007] 1 SLR(R) 629 at 669, [87], and 674, [96(d)], CA, following *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at 133, [43] and *The Siskina*, *id*.

219 [2009] 1 SLR(R) 1000 at 1030–1033, [68], and 1044, [84], HC .

at the time of application for a Mareva injunction[220] albeit the proceedings may later be stayed (even at the plaintiff's own initiative), for example, on the grounds of case management, *forum non conveniens* or *lis alibi pendens*.[221] Indeed, the Court of Appeal has recently clarified in *Bi Xiaoqiong v China Medical Technologies, Inc (in liquidation)* that "there ought not to be a further requirement that the cause of action in respect of which the Mareva injunction is granted must also terminate in a judgment by the court."[222] That said, the Court of Appeal cautioned that any court that finds evidence that the plaintiff has "no intention of pursuing an action in Singapore at all and wants a free standing injunction" would "likely refuse to exercise its power to issue any interlocutory injunction in aid of the plaintiff" as the injunction would have been sought for a "collateral purpose."[223] In contrast, there would be no collateral purpose if a plaintiff "wants to preserve a right to pursue an action here to get access to the defendant's assets within the jurisdiction, although as a matter of case management, that plaintiff may decide that the claim should first be pursued elsewhere."[224] It is worth emphasising that this approach extends to *all* free-standing interlocutory relief, not just Mareva injunctions.[225]

4.5 In the context of arbitral proceedings, *Swift-Fortune* has been statutorily overruled by section 12A of the International Arbitration Act[226] with effect from 1 January 2010 so that the Singapore courts now have the power to grant free-standing interim injunctions in support of foreign or Singapore seated arbitrations.[227]

4.6 In the context of foreign court proceedings, we are still awaiting a *Swift-Fortune*-esque statutory amendment of the kind that has already taken place in England[228] and Hong Kong.[229] Court-led reform, as was the case in

220 Philip Jeyaretnam and Lau Wen Jin, "The Granting of Mareva Injunctions in Support of Foreign Court Proceedings" (2016) 28 SAcLJ 503 at 506–507, [9].

221 *Multi-Code*, above, n 219 at 1056, [116(d)], implicitly approved by the Court of Appeal in *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097 at 1108, [35].

222 [2019] 2 SLR 595 at 632, [103] *per* Prakash JA.

223 *Id*. at 637, [120] *per* Prakash JA.

224 *Ibid*.

225 *Swift-Fortune*, above, n 218 at 664, [74].

226 Cap 143A, 2002 Rev Ed. The amendment was effected by the International Arbitration (Amendment) Act 2009 (No 26 of 2009), s 4.

227 *Cf* Colin Liew, "To Infinity and Beyond: Where to Next for the Court's Inherent Powers", Singapore Law Blog (3 October 2016) <*http://www.singaporelawblog.sg/blog/article/171*> (accessed 15 December 2020).

228 Civil Jurisdiction and Judgments Act 1982 (1982 c 27; United Kingdom), s 25(1), discussed in J J Spigelman, "Freezing Orders in International Commercial Litigation" (Singapore Academy of Law Distinguished Speaker Series Inaugural Lecture, 6 May 2010) at [31], [60] and [61].

229 High Court Ordinance (Cap 4; Hong Kong), s 21M.

Australia[230] and Canada,[231] will require the Court of Appeal overruling its earlier decisions. Whether that is likely remains to be seen.

4.7 Nonetheless, there are sounds reasons for considering reform in this area. First, money flows – and with them, disputes – cross borders faster than they did in 1878, when section 4(10) of the Civil Law Act was enacted. As Chan Seng Onn J observed in *Multi-Code*, our laws must evolve to:[232]

> […] the realities of the modern world today (including the rising incidents of fraudulent cross-border activities) and the increasing need to have international judicial co-operation, especially when the most appropriate place for trying the action might not necessarily be the place where the assets of the defendants were located and where the Mareva relief was required.

4.8 Second, as a responsible member of the international community, Singapore should be seen as a jurisdiction which proactively undertakes legal reform to ensure that "parties [cannot] place funds beyond the reach of legitimate attachment".[233]

4.9 Third, free-standing interim relief is not alien to Singapore law where anti-suit injunctions in aid of foreign court or arbitral proceedings[234] are granted pursuant to the court's inherent jurisdiction.

4.10 Fourth, international comity and mutual assistance between courts will be promoted, not undermined. There is little risk of stepping on the toes of a foreign court, since the interim relief will be free-standing and in aid of those proceedings. One might ask, if the Australian, Canadian, Hong Kong and United Kingdom courts will grant free-standing interim relief in aid of Singapore proceedings, should we not reciprocate?

4.11 Fifth, any reform can be calibrated to deter forum shopping by prospective applicants seeking a Mareva-friendly jurisdiction and to protect the integrity of the Singapore courts. Thus, in Hong Kong, section 21M(1) of the High Court Ordinance[235] grants the Court of First Instance jurisdiction to grant interim relief in relation to proceedings commenced outside Hong Kong *and* which "are capable of giving rise to a judgment which may be enforced in Hong Kong under any Ordinance or at common law". Further,

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230 The Australian courts issue free-standing Mareva injunctions as an exercise of the courts' inherent power to protect the integrity of the administration of justice: see Spigelman, above, n 228 at [32], [52] and [47].

231 Law and Equity Act (RSBC 1996, Cap 253; British Columbia, Canada), s 39(1), which appears to be as widely worded as section 4(10) of the Civil Law Act, has been interpreted by the courts of British Columbia to empower the grant of interim injunctions in aid of foreign proceedings or the enforcement of foreign judgments: see Jeyaretnam & Lau, above, n 220 at 521.

232 *Multi-Code*, above, n 219 at 1056–1057, [117].

233 Jeyaretnam & Lau, above, n 220 at 522, [43].

234 See, for example, *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232.

235 Above, n 229.

section 21M(4) expressly provides that the Court of First Instance may refuse interim relief "if, in the opinion of the Court, the fact that the Court has no jurisdiction apart from this section in relation to the subject matter of the proceedings concerned makes it unjust or inconvenient for the Court to grant the application." Similarly, section 25(2) of the Civil Jurisdiction and Judgments Act 1982 (United Kingdom)[236] provides that "the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it." This statutory reform was accompanied by corresponding amendments to paragraph 3.1(5) of Practice Direction 6B to allow for service out of jurisdiction when a "claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982."

4.12 In the event that statutory reform is considered to section 4(10) of the Civil Law Act to allow the Singapore courts to grant free-standing Mareva injunctions in aid of foreign court proceedings, this could be effected by amending section 4(10) by inserting the italicised text indicated below:

> A Mandatory Order or an injunction may be granted or a receiver appointed by an ~~interlocutory~~ order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made. *For the avoidance of doubt, and subject to subsections* [*x*] *to* [*y*] *the court shall have the same power to grant a Mandatory Order or an injunction, or to appoint a receiver, as it has for the purpose of and in relation to an action or a matter in the court notwithstanding that proceedings have been commenced in another jurisdiction.*

4.13 For consistency, the language of this proposed amendment mirrors the language of section 12A(2) of the International Arbitration Act[237] ("Subject to subsections (3) to (6) […] the High Court or a Judge thereof shall have the same power of making an order […] as it has for the purpose of and in relation to an action or a matter in the court"). Various subsections may also be included to guide the Singapore court's discretion, drawing inspiration from sections 21M(1) to (4) of the High Court Ordinance (Hong Kong), section 25(2) of the Civil Jurisdiction and Judgments Act 1982 (United Kingdom) and sections 12A(3) to (6) of the International Arbitration Act. Arguably, this would need to be accompanied by a corresponding amendment to Order 11 of the ROC to allow for service out of jurisdiction so that the defendant(s) to the freestanding Mareva injunction may be properly served.

236 Above, n 228.
237 Above, n 226.

4.14 However, the Subcommittee is of the view that the question of whether such statutory reform is necessary requires further reflection, not least because it carries wide-ranging policy considerations:

- First, the current state of the law could be said to enhance the attractiveness of the Singapore Courts to litigants in multijurisdictional disputes as the venue for their substantive main proceedings. In contrast, the proposed statutory reform could lead to the Singapore Courts being perceived as merely a venue for satellite litigation emanating from substantive main proceedings elsewhere. The countervailing view is that other centres for multijurisdictional disputes (e.g. Hong Kong and the United Kingdom) have seen fit to pass enabling legislation for free-standing interlocutory relief seemingly without notable adverse effects.
- Second, it may be argued that the recent amendments to the Reciprocal Enforcement of Foreign Judgments Act[238], which expand the scope of judgments covered by reciprocal arrangements beyond final money judgments to include interim injunctions, indicate that it should be for the Minister of Law to enter into bilateral or multilateral treaties to provide for such reciprocal arrangements with various jurisdictions (as opposed to the Courts exercising their discretion on an *ad hoc* basis).

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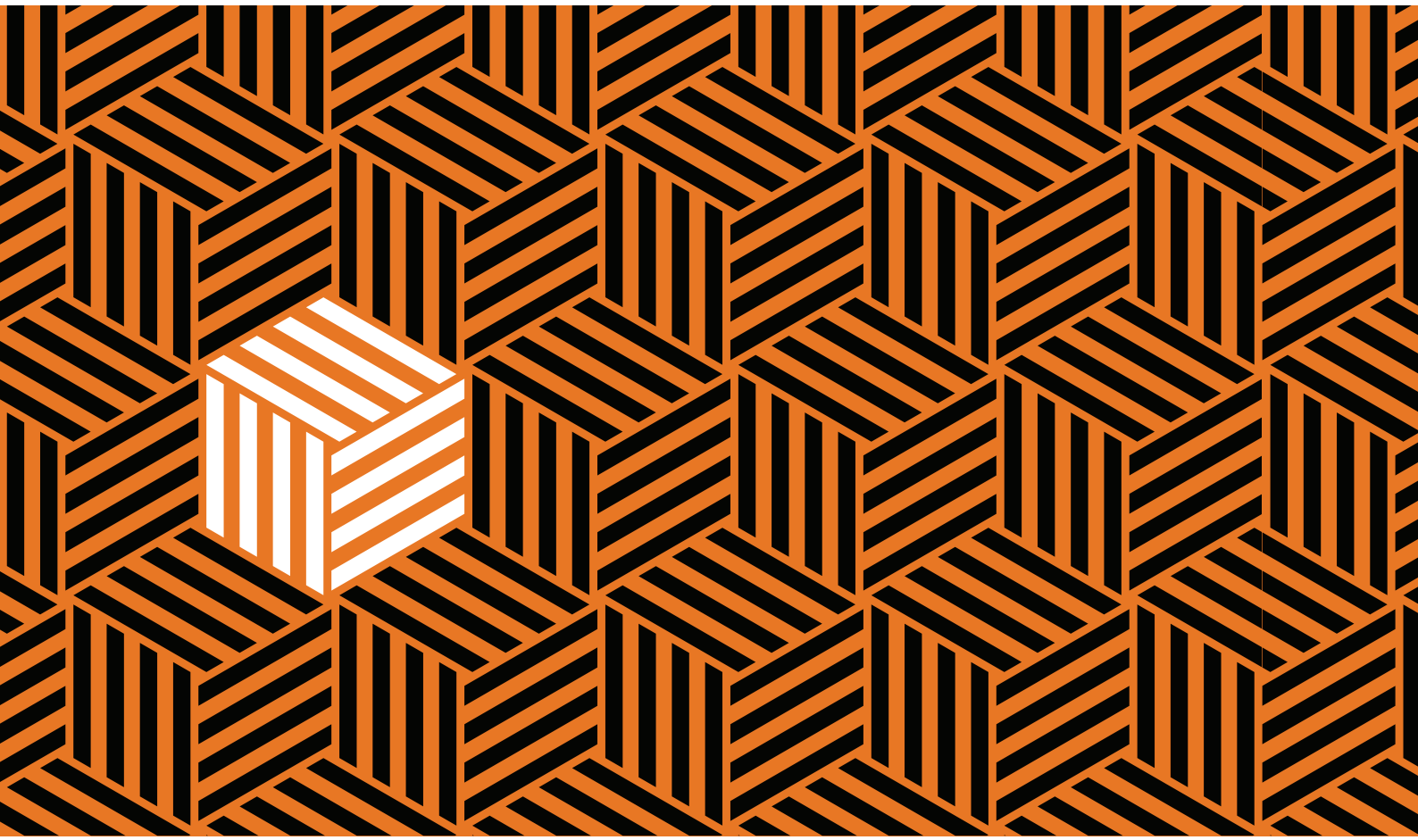
238 Cap 265, 2001 Rev Ed, as amended by the Reciprocal Enforcement of Foreign Judgments (Amendment) Act (No. 25 of 2019).



ISBN 978-981-14-9356-0 (softcover)
978-981-14-9357-7 (e-book)