The Garnishment of Monies in Joint Bank Accounts: Timing Ltd v Tay Toh Hin and another [2020] SGHC 169; and Timing Ltd v Tay Toh Hin and another [2021] SGHC 5

Abstract:

Generally, common law jurisdictions do not allow for the garnishing of monies in a joint account to satisfy a judgment debt. In *Timing Ltd v Tay Toh Hin and another* [2020] SGHC 169; and *Timing Ltd v Tay Toh Hin and another* [2021] SGHC 5, the Singapore High Court carved out a limited exception to the rule, allowing a provisional garnishee order to be granted over a joint bank account where there is at least strong prima facie evidence that all monies in that account belongs to the judgment debtor. The authors believe that the exception is a step in the right direction: it disincentivises judgment debtors from using joint accounts to keep assets out of their creditors' reach. At the same time, the requirement of strong prima facie evidence is a high threshold which ensures that garnishee banks and joint account holders will not be subject to frivolous proceedings. However, there remain a number of substantive and procedural issues, such as the legal effect of a garnishee order on the ownership rights of the joint account holders, and the appropriate costs orders in such proceedings, which will need to be dealt with in future cases.

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Timing Ltd v Tay Toh Hin and another [2021] SGHC 5

I. INTRODUCTION

Until recently, a judgment creditor in Singapore could not garnish monies in a joint bank account to satisfy a judgment debt allow a judgment creditor (see *One Investment and Consultancy Ltd and another v Cham Poh Meng (DBS Bank Ltd, garnishee)*[1] ("***One Investment***")). That is the position in most Commonwealth jurisdictions as well, including England and Wales as well (where garnishee orders are now known as Third Party Debt Orders). However, in the latest decisions of *Timing Ltd v Tay Toh Hin and another*[2] ("***Timing No.1***"), and *Timing Ltd v Tay Toh Hin and another*[3] ("***Timing No. 2***"), the Singapore High Court granted the judgment creditor a provisional garnishee order over monies in a joint account based on strong *prima facie* evidence that these monies belonged solely to the judgment debtor. This new exception may have far-reaching implications on joint account holders, and the banking industry more generally since joint bank accounts are no longer immune from attachment.

II. BACKGROUND – THE LAW PRIOR TO TIMING NO. 1 AND TIMING NO. 2

[1] *One Investment and Consultancy Ltd and another v Cham Poh Meng (DBS Bank Ltd, garnishee)* [2016] 5 SLR 923.
[2] *Timing Ltd v Tay Toh Hin and another* [2020] 5 SLR 974.
[3] *Timing Ltd v Tay Toh Hin and another* [2021] SGHC 5.

In *One Investment*, a garnishee order had been made at first instance over monies in a joint bank account and the garnishee appealed to the Singapore High Court. Judicial Commissioner Kannan Ramesh (as he then was) ("**Ramesh JC**") allowed the bank's appeal and held, as a general rule, that monies in a joint bank account could not be garnished. To allow this, Ramesh JC reasoned, would cause prejudice to garnishee banks, who would have no "*visibility as to the respective contributions of the account holders*"[4] and would face a significant administrative and financial burden if they had to be engaged in the "*fairly involved*" legal process of determining the respective contributions. It would also cause prejudice to joint bank account holders since there was no requirement under the Singapore Rules of Court[5] ("**ROC**") that they be notified of garnishee proceedings, nor any mechanism for them to seek determination of the judgment debtor's interest in the joint account.

Notably, *One Investment* aligned the Singapore position with the English position in *Macdonald v The Tacquah Gold Mines Company*[6] ("***Tacquah Gold Mines***") that was subsequently endorsed by the English Court of Appeal in *Hirschhorn v Evans*[7] ("***Hirschhorn***"). The majority of the English Court of Appeal in *Hirschhorn* had held that the joint account could not be garnished to satisfy the debt of only one party to the account because the debt owed by the garnishee bank is to both account holders jointly and not severally. In addition, the other account holder had no opportunity to be heard and there was no evidence that the monies in the joint account belonged solely to the judgment debtor.[8] *Hirschhorn* continues to represent the prevailing position in England and Wales,[9] although legal reforms[10] have been considered.[11]

III. TIMING NO. 1 – THE ESTABLISHMENT OF THE PROVISIONAL GARNISHEE ORDER FRAMEWORK

In *Timing No. 1*, an appeal to the Singapore High Court from the Assistant Registrar, Justice Aedit Abdullah ("**Abdullah J**") declined to follow *One Investment* – a decision by a court of coordinate jurisdiction. Abdullah J granted a provisional garnishee order over monies in joint bank accounts. The judgment creditor sought to enforce a judgment debt against the judgment debtor under Order 49 rule 1 of the ROC. After the judgment creditor had obtained an order for the examination of the judgment debtor ("**EJD**"), the judgment debtor was asked for the source(s) of the monies in one of the joint bank accounts, to which he indicated that it was "*the primary account*" he used, and where monies paid to him "*personally were put into joint account*".[12] The judgment debtor further acknowledged that these monies were paid to him personally and "*d[id] not belong to [his] wife*", the other joint bank account holder.[13] On the facts, Abdullah J distinguished and declined to follow *One Investment*. After surveying decisions from Australia, England and Wales, Hong Kong, and Northern Ireland – which followed the English position in *Hirschhorn* and *Tacquah Gold Mines*, and, notably, had been relied on by Ramesh JC in *One Investment* – Abdullah J found that they were distinguishable from the facts of *Timing No. 1* on "*three interconnected bases*":

> "*(a) first, in none of the Commonwealth cases cited was there any evidence placed before the court as to the respective account holders' contributions to the joint account;*
>
> *(b) second, none of the Commonwealth authorities involved any situations where there was a prima facie case that all of the moneys in the joint account in fact only belonged to the judgment debtor; and*

[4] fn 1 at [16].
[5] Cap 322, 2014 Rev Ed.
[6] *Macdonald v The Tacquah Gold Mines Company* (1884) 13 QBD 535.
[7] *Hirschhorn v Evans* [1938] 3 All ER 491.
[8] fn 7 at 495 – 496.
[9] *Continental Transfert Technique Ltd v Government of Nigeria & Ors* [2009] EWHC 2898 (Comm) at [30] – [31]. See also G Vos, *Civil Procedure Vol 1* (London: Sweet & Maxwell Ltd, 2020) at [72.2.15].
[10] English White Paper, *Effective Enforcement: Improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents* (HMSO, 26 March 2003), Cm 5744.
[11] English White Paper, *Enforcement of Family Financial Orders* (HMSO, 14 December 2016), LC 370.
[12] fn 2 at [6].
[13] *ibid.*

> *(c) third, and flowing from the first two points, in none of the Commonwealth cases cited did the court have to apply its mind to the effect of any evidence on the account holders' respective contributions to the joint account. In other words, the question of what would happen if the account holders' respective contributions were known remains open.*"[14]

Having noted these differences, Abdullah J was inclined to follow the approach in certain Canadian jurisdictions. Drawing from section 82 of the Alberta Civil Enforcement Act,[15] section 112 of the Newfoundland Judgment Enforcement Act,[16] and rule 60.08(21) of the Ontario Rules of Civil Procedure, Abdullah J established the following framework ("**Provisional Garnishee Order Framework**") for the garnishing of joint bank accounts:[17]

> "*(a) first, it is for the applicant to show to the satisfaction of the court that there is at least a strong prima facie case that the whole of the moneys in the joint account(s) belong to the judgment debtor;*
>
> *(b) second, the applicant (and not the garnishee bank) must serve notice on any joint account holder(s) at the very latest by the show cause hearing; and*
>
> *(c) third, the applicant must provide an undertaking to pay for any costs and reasonably foreseeable losses of the garnishee, or joint account holder, should it be shown to the satisfaction of the court that the moneys subject to the show cause order are not in fact payable in whole or in part to the judgment debtor.*"[18]

Although Order 49 of the ROC does not provide for these requirements, Abdullah J held that it was within his power to implement the Provisional Garnishee Order Framework in the exercise of the discretion conferred under the provision.[19] Notably, he acknowledged that this framework could ameliorate the concerns identified by Ramesh JC in *One Investment*[20].

In this case, a strong *prima facie* case was established because the judgment debtor himself had admitted in the EJD that the monies in one of the joint bank accounts were "*paid to [him] personally*" and belonged solely to him. Upon this satisfactory proof, the Singapore High Court allowed the judgment creditor's appeal and granted the provisional garnishee order over the monies in four joint bank accounts held by the judgment debtor and his wife. This led to the show cause hearing in *Timing No. 2* where the Court had to decide on whether the provisional garnishee order should be made absolute.

IV. TIMING NO. 2 – HIGH THRESHOLD TO PROVE SOLE BENEFICIAL OWNERSHIP OF MONIES IN JOINT BANK ACCOUNT

The garnishee failed to make absolute the provisional garnishee orders in *Timing No. 2*. By the time the matter went again before Abdullah J, it had been clarified following the hearing in *Timing No. 1* that only two of the four accounts that had been provisionally garnished were in fact joint accounts. At the show cause hearing, a lower court declined to make absolute the monies in the two joint accounts held by the judgment debtor and his wife. The judgment creditor appealed and – perhaps to its surprise – Abdullah J affirmed the lower court's decision.

Abdullah J began by reiterating that the legal burden of proof in showing that a provisional garnishee order should be made absolute lies firmly on the party seeking the benefit of the garnishee order, in this case, the judgment creditor, although, as a practical matter, the effect of the provisional garnishee order being granted would be to shift the evidential burden to the person resisting the order, in this case, the joint bank account holders.[21]

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[14] fn 2 at [21].
[15] RSA 2000 C-15.
[16] SNL 1996 J-1.1.
[17] RRO 1990 Reg 194.
[18] fn 2 at [26].
[19] *ibid.*
[20] fn 2 at [27].
[21] fn 2 at [16] – [19]

Next, Abdullah J considered that the judgment creditor failed to prove on a balance of probabilities that all the monies in the two joint accounts was beneficially owned by the judgment debtor. Abdullah J stated that even if the judgment creditor has satisfactorily shown a strong *prima facie* case that the account should be provisionally garnished, this determination at the interlocutory stage "*cannot ossify into a fait accompli*"; it is unsurprising that a more holistic presentation of the evidence will affect the strength and persuasiveness of what was initially a strong *prima facie* case.[22] One fact which appeared to tip the balance for Abdullah J was that the wife of the judgment debtor had no other accounts in Singapore which were not held jointly with her husband. Abdullah J observed that it would be odd if, in the case of a 36-year marriage in which there was no separation of monies between the couple, there was no mutual intent on the part of the couple that the wife (the other joint bank account holder) should have a beneficial interest in the monies in the joint accounts.[23]

Finally, although this was no longer material to the appeal, Abdullah J accepted the alternative argument by the garnishee that a strong presumption of advancement operated in favour of the wife, and provided a further basis for finding that she did in fact share the beneficial ownership of the money in the joint accounts.[24] The closeness of the relationship between husband and wife and the financial dependence of the wife on her husband gave rise to this strong presumption.[25]

V. COMMENT

Given what appears to be differing legal positions taken in *One Investment* and *Timing No. 1*, the law in Singapore will remain somewhat unsettled until the Singapore Court of Appeal makes a definitive ruling on the issue. For the moment, *Timing No. 1* has carved out an exception to the established position. But it is an extremely narrow one: there must be strong *prima facie* evidence that *all* monies in a joint account belongs to the judgment debtor. Based on the Provisional Garnishee Order Framework, the burden is solely on the judgment creditor to furnish the necessary evidence since it "*seeks to interfere with the obligations that exist between the garnishee bank and the joint account holders*".[26] It would probably be difficult in practice for a judgment creditor to obtain such evidence. From the facts of *Timing No. 1*, it appears that but for the judgment debtor's admission at the EJD that the monies belonged entirely to him, the provisional garnishee order might never have been granted.

Despite the narrowness of the exception, the authors believe that *Timing No. 1*'s willingness to depart from an absolute rule is the right approach. An absolute bar against joint accounts being garnished would allow a debtor to easily ring-fence his assets from creditors by transferring funds into a joint account with a third party; Ramesh JC also acknowledged this as "*the most persuasive reason*" in favour of allowing joint accounts to be garnished.[27] The patent unfairness of debtors sheltering money in joint accounts was also noted in the English Law Commission's report entitled "Enforcement of Family Financial Orders".[28]

However, *Timing No. 1* leaves a number of critical issues unresolved.

First, the issue of prejudice to the garnishee banks that Ramesh JC flagged in *One Investment* was not dealt with in *Timing No. 1*. As a neutral third party in the proceedings, the garnishee should not be prejudiced by any requirement to assist the judgment creditor in showing proof and thereby risking exposure to liability to the joint bank account holders.[29] In any case, the garnishee is also not able to do so since it does not have visibility as to the respective contributions of the joint bank account holders.[30]

[22] fn 3 at [31].
[23] fn 3 at [33].
[24] fn 3 at [47]
[25] fn 3 at [42].
[26] fn 2 at [33].
[27] fn 1 at [24].
[28] fn 11 at [10.83] and [10.87].
[29] fn 1 at [16].
[30] fn 1 at [16].

Timing No. 1 and *Timing No. 2* are likely to lead to the protraction of show cause hearings by effectively creating a two-stage process – an interlocutory stage and confirmatory stage.[31] In practice, garnishees usually only provide information on the nature of the bank accounts to the judgment creditor and the Court at the show cause hearing because of banking secrecy concerns.[32] After the provisional garnishee order has been granted at the interlocutory stage, the judgment creditor must still serve notice on the other joint bank account holders to provide them the opportunity to attend the confirmatory stage of the show cause hearing for the provisional garnishee order to be made absolute. This means that the garnishee must now attend at least two hearings instead of the usual one and may potentially be required to file affidavits, if necessary.

The potential prejudice may perhaps be dealt with using rules as to costs. Unfortunately, there was no substantial discussion about this in the written judgment of *Timing No. 2*. Currently, costs for garnishee proceedings are fixed in accordance with Appendix 2 to Order 59 of the ROC. The Appendix provides for a fixed scale of costs to be awarded to the applicant for a garnishee order and to the garnishee. The quantum is in the range of a few hundred dollars, as reflects, perhaps, the assumption that garnishee proceedings are meant to be a relatively straightforward procedure. With the greater complication and protraction of garnishee proceedings, it remains to be seen whether costs incurred by the garnishee and / or the other joint bank account holder would still be fixed.

It is submitted that costs should be allowed both to the garnishee and other joint bank account holders and should be on a standard basis – this should result in the quantum of costs awarded being higher than the fixed amounts prescribed in the ROC. To allow for costs in this way would accord with the fact that the garnishee and joint account holder are parties who have nothing to gain from the garnishee proceedings but are now being involved by the judgment creditor in its enforcement of judgment debt. This would go some way towards redressing the prejudice suffered by the garnishee and other joint bank account holders, who would likely need to obtain legal representation. Indemnity costs could even be awarded in exceptional cases. The proper allocation of costs in proceedings involving joint accounts would prevent judgment creditors from making such garnishee applications on a wing and a prayer or, worse, in bad faith – for example, as a pressure tactic against the judgment debtor.

The second unresolved issue is the substantive question of what legal effect a garnishee order has on the ownership rights of the joint account holders. Singapore law regards joint bank account owners as holding the monies as joint tenants.[33] It would appear that the effect of garnishing the joint bank account holder would be to sever the joint tenancy. This is the view taken by the English Law Commission.[34] The position in Singapore as regards joint accounts is far from clear, but is likely to be influenced by a growing corpus of Singapore High Court decisions about whether writs of seizure and sale ("**WSS**") (equivalent to "charging orders" in England and Wales) can be issued against a judgment debtor's interest in jointly-tenanted real properties. The position in this latter debate is itself unsettled. One view is that, since joint tenants own nothing by themselves, only the entire estate indivisibly with the other tenants, unless the WSS also severs the joint tenancy, there would be nothing for the order to latch on to.[35] The other view is that, although joint tenants do not own sufficiently distinct interests that could be seized under a WSS, that is but one feature of a joint tenancy; the other, not incompatible feature, is that joint tenants have a real ownership interest which is capable of immediate alienation without the consent of the other joint tenants. Accordingly, if this second aspect is recognised, it need not be a requirement that the WSS concomitantly severs a joint tenancy in land before a WSS can attach.[36] If this position in *Ong Boon Hwee v Cheah Ng Soo and another* is also applied to joint bank accounts, the making of a garnishee order over a joint bank account would not sever the joint tenancy in the account. There would, indeed, be no need for severance. As far as ownership is concerned, the joint account remains a joint tenancy. If that is the position, there would be no need to go into the further, potentially complicated, issue of determining what shares the joint account holders should hold the monies in the account as tenants in common upon severance, which would in turn bring up issues such as whether

[31] fn 2 at [31]; and fn 3 at [31].
[32] Banking Act (Cap 19, 2008 Rev Ed).
[33] *Estate of Yang Chun (Mrs) née Sun Hui Min, deceased v Yang Chia-Yin* [2019] 5 SLR 593 at [52] – [53].
[34] fn 11 at [10.103].
[35] *Chan Lung Kien v Chan Shwe Ching* [2018] 4 SLR 208 at [29].
[36] *Ong Boon Hwee v Cheah Ng Soo and another* [2019] 4 SLR 1392 at [48] – [50].

there should be a presumption that the account holders hold their shares in the proportion 50:50, as the English Law Commission has recommended.[37]

VI. CONCLUSION

The Provisional Garnishee Order Framework proposed in *Timing No. 1* is to be welcomed notwithstanding the practical and substantive legal issues which remain to be worked out in future decisions. In any case, *Timing No. 2* has also shown that the bar for judgment creditors to cross is extremely high since they would need to prove that the judgment debtor is the sole beneficial owner of all the monies in the joint bank account. This strikes a proper balance between the interests of the judgment creditors, on the one hand, in obtaining satisfaction of judgment debts and the interests of garnishee banks and the other joint account holders in not being subject to frivolous proceedings. The immediate issue to be clarified, however, is that of costs. In any case, an extremely limited exception is better than no exception. The mere possibility, however remote, that monies in joint bank accounts could be garnished would already go some distance in disincentivising judgment debtors from hiding funds in joint bank accounts.

[37] fn 11 at [10.108].