

Kong permanently. The creditor need only show that the debtor's departure is imminent and, by reason of that, any judgment against him is likely to be obstructed or delayed.¹⁵

The words 'satisfaction of the judgment or order is likely to be obstructed or delayed' in section 21B(2)(b)¹⁶ have been widely construed and will permit the court to make a prohibition order to prevent the debtor from participating in any activities which may in all probability affect the enforcement of the judgment.¹⁷ Thus, in *Re Murjani, Ex P Bank of India*,¹⁸ the court upheld the validity of a prohibition order obtained by the creditor to restrain the debtor from flying to New York to complete the sale of an overseas company which he controlled and operated. The court noted that the disposal of the company's assets was on terms that would have effectively placed the proceeds of sale out of the reach of the creditor at a time when there were still ongoing negotiations between the parties for a proportion of the sale proceeds to be applied in reduction of the debtor's outstanding indebtedness to the creditor. The court ruled that the creditor's purpose in obtaining the prohibition order was not improper and was clearly a purpose contemplated by section 21B.

(iii) *Prohibition order to facilitate a judgment for a specified sum of money*

The two mandatory conditions specified in section 21B(2)¹⁹ do not apply where the judgment is for liquidated damages. However, in *AVCO Financial Services (Asia) Ltd v Topma Electronics Ltd*,²⁰ the court made it clear that it would not be appropriate to make a prohibition order in this case unless prohibiting the debtor from leaving Hong Kong is reasonably and properly conducive to the enforcement of the judgment. There must be some evidence that enforcement of the judgment would be impeded in some significant way if no prohibition order was granted.

15 *HBZ Finance Ltd v Glory Products Co Ltd* (unreported, 2000; HCA 5893/2000).

16 District Court Ordinance, s 52E(2)(b).

17 *Re Murjani, Ex P Bank of India* [1991] 2 HKC 432, at 455.

18 [1991] 2 HKC 432.

19 District Court Ordinance, s 52E(2).

20 [1999] 4 HKC 193.

b) Procedure

The application must be made without undue delay.²¹ Application is made *ex parte* by the judgment creditor, with an affidavit in support.²² However, unlike other *ex parte* interlocutory applications, the practice of the court is to require the applicant to appear in support of the application.²³

As with all *ex parte* applications, the creditor is under an obligation to make full and frank disclosure of all relevant information in support of his application.²⁴ It has been held that this duty extends to relevant information that comes to the attention of the applicant after the order has been granted but before it has been served. Where this happens, the applicant must seek a further appointment before the judge who granted the order and inform him of the fresh information.²⁵

Upon the hearing of the matter, the court may make an order subject to such conditions it thinks fit, including a condition that the order shall have no effect if the judgment debtor satisfies the judgment or provides such security as the court orders.²⁶ The order must be in the prescribed form.²⁷

A sealed copy of the order must be served on the Director of Immigration Control Administration Section (during office hours) and the Duty Senior Immigration Officer at the Hong Kong International Airport (out of office hours).²⁸ A sealed copy of the order must also be served on the Commissioner of Police and the judgment debtor, if he can be found.²⁹ Additionally, the Chief Bailiff must be served with four sealed copies of the order.³⁰ In order to assist the Immigration Department to identify with certainty, the person to be prevented from leaving Hong Kong, the judgment creditor's solicitors should provide as much of the

21 *So Po Tong v Richard Patterson* (unreported, 1987; HCA 6993/1987); *HBZ Finance Ltd v Glory Products Co Ltd* (unreported, 2000; HCA 5893/2000), (delay of two months before application made).

22 RHC and RDC O 44A r 2.

23 WS Clarke, *Hong Kong Civil Court Practice*, Vol 1, Div V [85].

24 *Auto-Treasure Ltd (t/a Albert Jewelry Creation) v Pyramid International (a firm)* (unreported, 1992; Civ App 24/1992), CA.

25 *Ibid.*

26 High Court Ordinance, s 21B(4)(b); District Court Ordinance, s 52E(4)(b).

27 *Ie*, RHC and RDC App A Form 106.

28 Law Society Circular No 98-185 (PA).

29 High Court Ordinance, s 21B(6); District Court Ordinance, s 52E(6).

30 Law Society Circular No 98-185 (PA).

- (b) the Hong Kong dollar equivalent of the judgment debt (calculated according to the exchange rate specified).⁸⁷

The amount so certified must then be entered in the writ, using the prescribed form of recital.⁸⁸

When lodging the appropriate papers in court, the judgment creditor will also be required to pay a deposit to cover the bailiff's travelling expenses and the cost of posting commercial security guards at the judgment debtor's premises for a period of eight days.⁸⁹

Issue of second writ for costs

One point of practical importance in litigation is that a judgment creditor need not wait until taxation of his costs to issue a writ of fi fa. Under Order 47 rule 3, a judgment creditor may issue a writ of fi fa for his judgment debt immediately upon obtaining judgment. A second writ may then be issued to enforce payment of the judgment creditor's taxed costs provided that at least eight days has elapsed since the issue of the first writ.⁹⁰

Issue of writ of fi fa despite stay of execution

Neither is a judgment creditor precluded from issuing a writ of fi fa during the period of automatic stay of execution imposed by Order 13 rule 8. Thus ruled the court in *Siltex Trading Co v Kong Sung Sin*.⁹¹ In this case, the plaintiff had issued and served its writ on 15 October. On 6 November, the first defendant filed an acknowledgment of service stating that he did not intend to contest the proceedings and that he intended to apply for a stay of execution by writ of fi fa. As the plaintiff's claim was for a

87 See High Court Practice Direction No 16.2 'Judgment: Foreign Currency', para 7(a), applied to the District Court by High Court Practice Direction No 27, para 14.1.

88 *Ibid*, para 7(b). RHC and RDC App A, Form 53 will be adapted to meet the circumstances of the case but substituting the recital set out in para 7(b) of the Practice Direction.

89 The fees are prescribed by the High Court Fees Rules (Cap 4, LHK, sub leg D). Goods seized under a writ of fi fa will normally be impounded by leaving commercial security guards on the debtor's premises to guard the goods until the sale takes place. According to the Chief Bailiff, in the normal course of events, the sale will take place eight days after seizure of the goods. Accordingly, an eight-day deposit is required.

90 RHC and RDC O 47 r 3(1).

91 [1986] HKLR 559.

liquidated debt, Order 13 rule 8 came into effect imposing an automatic stay of execution for 14 days from the date of the acknowledgment of service, that is, from 6 to 20 November. On 20 pNovember, the first defendant issued a summons for a stay. However, unfortunately for the first defendant, the summons was not served until 5.00pm on 21 November and therefore did not take effect until the next day – 22 November.⁹² The automatic stay imposed by Order 13 rule 8 thus expired by effluxion of time on 20 pNovember. In the meantime, on 14 November, the plaintiff issued a writ of fi fa and the bailiff levied execution on 22 November. At first instance, the Master set aside the fi fa and ordered the goods seized by the bailiff to be returned to the first defendant. On appeal by the plaintiff, the court, in allowing the appeal, held that a judgment creditor is free to issue a writ of fi fa during the period of automatic stay under Order 13 rule 8 provided that the writ is not passed to the bailiff and no enforcement is attempted during this 14-day period. The court sensibly noted that this thus enables a judgment creditor to levy execution the moment the 14-day stay period expires.⁹³

b) Delivery of writ to bailiff

After the writ has been issued, it is returned to the judgment creditor who will then forward the same to the bailiff's office together with a prescribed questionnaire⁹⁴ indicating the mode of execution preferred, and, whether the judgment creditor wishes to accompany the bailiff when he proceeds to execution. The bailiff is obliged to indorse upon the writ the exact hour, day, month and year on which he receives it.⁹⁵ The date of delivery of the writ to the bailiff is significant for a number of reasons. First, under section 21C(1)⁹⁶ of the High Court Ordinance, the writ binds the property⁹⁷ in the goods of the judgment debtor as from the time when the writ is delivered to the bailiff. Secondly, where there are several competing judgment creditors, priority amongst them is governed

92 See RHC and RDC O 65 r 7.

93 [1986] HKLR 559, at 562.

94 Interview with the Chief Bailiff, Mr CW Tsang on 7 October 2003.

95 High Court Ordinance, s 21C(3); District Court Ordinance, s 68A(3). See also RHC and RDC O 46 r 9.

96 See also District Court Ordinance, s 68A(3).

97 'Property' means the special property in the goods, and not merely a special property: High Court Ordinance, s 21C(4)(a); District Court Ordinance, s 68A(4)(a).

purchasing the goods, he had failed to adduce proper evidence of the value of the goods as at the date of the auction, thus failing to establish that the sale at the auction was at a substantial undervalue. Further, the third party had delayed in advancing his claim to the equipment seized until 11 months after the seizure.

Recently, the Hong Kong courts have adopted this approach on two separate occasions. Both cases involved a third party owner whose goods had been wrongfully seized by the bailiff in execution. In both cases, the third party owner claimed that he had sustained a substantial grievance by reason of financial loss suffered as a result of the seizure of his goods. In *Fu Lok Man James v Chief Bailiff of the High Court*,²²⁹ the third party owner brought proceedings for detinue and conversion in respect of goods seized under a combined writ of possession and *fi fa*. After the goods had been seized, the third party claimant and the judgment creditor agreed, by consent order, that the goods should be sold by the bailiff 'for the best possible' price. The proceeds of sale amounted to \$101,578. The third party owner alleged that he had suffered financial loss to the extent of \$324,098, being the difference between the true value of the goods (after deduction of commission payable to the judgment debtor) and the proceeds of sale. The Court of Appeal held, *inter alia*, that the third party owner had failed to establish that he had suffered a substantial grievance. First, the evidence showed that the bailiff had acted honestly when levying execution. Further, the loss suffered by the third party owner flowed not from the execution itself but from the sale to which the third party owner had agreed.

In *Brand Farrar Buxbaum LLP v Samuel-Rozenbaum Diamond Ltd & Another & Samuel-Rozenbaum HK Ltd (Claimant)*,²³⁰ the executing bailiff seized a quantity of diamonds at the Hong Kong Convention and Exhibition Centre. The third party owner asserted that as a result of the seizure, the diamonds had been locked up for nine months, resulting in loss of sales. Further, the third party owner contended that customers had been deterred from making purchases on the day of seizure itself because of the disruption caused by the execution process. The evidence showed that the bailiff had made an honest mistake in the execution of her duties.

The court rejected the third party owner's allegations, concluding that there was no evidence to support a finding that

229 [1999] 3 HKC 762, CA. See also the earlier discussion of this case at p 58, ante.

230 [2003] 1 HKLRD 600. See also the discussion of this case at p 76, ante.

that the third party owner had suffered any financial loss. The court noted that there was no evidence that during the course of the nine months the diamonds had diminished in value or that they had become unsaleable. Furthermore, there was no evidence to show that potential customers scared away on the day of seizure would necessarily have made a purchase on that occasion; on the contrary, evidence was adduced of one customer returning later that day to conclude a sale. In examining the surrounding facts, the court observed that in almost all cases of execution, there must be some element of inconvenience or annoyance caused. The execution process in this case had lasted only just over two hours, leaving a further period of 21 hours for sales to have been made.

Where the bailiff wrongfully seizes and sells goods belonging to a third person, not only may the bailiff find himself liable in conversion, but so may the judgment creditor. In *Tyrone Crystal Ltd v European Asian Bank*,²³¹ the third party claimant sued the bailiff in conversion, and, in addition, the judgment creditor was sued, as procurer of the conversion. The court noted that the general rule is that an execution creditor is not liable for wrongful execution upon a correctly indorsed writ. However, an exception to this rule arose where the creditor intermeddles by directing the bailiff to levy the amount of the judgment on somebody else's goods. Such a direction may take the form of an indorsement on the writ of *fi fa*, but the court recognised that the exception is not confined to those cases where the direction is indorsed on the writ. In the present case, the direction had taken the form of a letter written by the judgment creditor's solicitors to the Chief Bailiff. Accordingly, this was sufficient to render the judgment creditor liable in damages to the third party claimant, notwithstanding the fact that there was no direction enclosed on the writ itself.²³²

This case may serve as a useful warning to judgment creditors, and those advising them, of the dangers of requesting the bailiff to seize specific items (such as a car) unless they are absolutely sure that the items belong to the debtor.

231 [1985] 2 HKC 762.

232 As to the liability of a judgment creditor for intermeddling, see also *Hock Finance Holdings Ltd v Tat Ming Godown Co Ltd* [1985] 2 HKC 495.

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The court has the power to order substituted service, or dispense with personal service, if it is just to do so.¹⁰² Where the court makes an order dispensing with service, this must be recorded in the order for committal itself.¹⁰³

In *Federal Bank of the Middle East v Hadkinson*,¹⁰⁴ the English Court of Appeal was confronted with a situation where the proper procedures had not been followed. The defendant in this case was subject to a worldwide freezing order. Subsequently, he applied to discharge the disclosure provisions made ancillary to the freezing order. At the hearing of the defendant's application, the plaintiff took the point that the defendant was in breach of the freezing order, but no formal application for contempt was taken out.¹⁰⁵ The judge held that the defendant was in contempt for breaching the freezing order.

On appeal by the defendant, the Court of Appeal, in allowing the appeal on the contempt issue, held that that it was wrong for a judge to make a finding of contempt without a formal application having been made. There was no motion to commit and no supporting affidavit evidence. Neither was the defendant given the opportunity to adduce evidence to answer the allegations made against him. The judge did not have the benefit of any evidence from either side about the circumstances of the alleged breach of the freezing order. The judge should therefore have declined to deal with the matter in the informal manner raised by the plaintiff. Instead, he should have granted an adjournment to enable the plaintiff to issue and serve a proper application for committal, supported by evidence.

Regarding the contents of the motion, Order 52, rule 3(1A) provides that the grounds in respect of which leave for making the application for committal has been granted, must be included in the notice of motion. Thus care should be taken in drafting the motion to ensure that the grounds stated are exactly the same as

102 RHC and RDC O 52 r 3(4). See *Wright v Jess* [1987] 1 WLR 1076, CA, where the English Court of Appeal stated that personal service should only be dispensed with where to do so was necessary to uphold authority of the court or to protect the applicant from the risk of physical harm.

103 *Wright v Jess* [1987] 1 WLR 1076, CA.

104 [2000] 1 WLR 1695, CA.

105 As noted earlier, in England, leave of the court is not required where an application for committal is made to a court other than a Divisional Court. However, application must be made by motion, supported by an affidavit: RSC O 52 r 4(1).

those set out in the statement, subject to any variations made by the order granting leave.

At the substantive hearing, the applicant is confined to the grounds specified in the notice of motion, except with leave of the court.¹⁰⁶ The grounds may not be expanded upon by later affidavit evidence.¹⁰⁷

3 THE HEARING

a) Hearing in open court

Where committal proceedings are brought to enforce a judgment, the hearing of the application will normally be heard in open court. Generally, a court is only permitted to sit in private in the limited circumstances specified by the Rules.¹⁰⁸

Where the respondent fails to attend the hearing, the court may nevertheless proceed without him provided that it is satisfied that all the requisite documents have been properly served¹⁰⁹ on the respondent, or that service has been dispensed with.¹¹⁰ However, where the respondent is absent, the applicant is under a duty to bring all relevant matters to the court's attention, including those in the respondent's favour, the applicant's position being similar to that of the prosecution in a criminal case.¹¹¹

106 RHC O 52 r 6(3).

107 *Channel v FGM Cosmetics* [1981] FSR 471; *Harmsworth v Harmsworth* [1987] 3 All ER 816, CA, at 821; *Yee Sang Metal and Building Supplies Co Ltd v Yip Yeuk Pik* (unreported, 2002; HCMP 2493/2002).

108 A court may sit in private where: (a) the application arises out of proceedings relating to the wardship or adoption of an infant, or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant or rights of access to an infant (RHC and RDC O 52 r 6(1)(a)); (b) the application arises out of proceedings relating to a person suffering or appearing to be suffering from mental disorder within the meaning of the Mental Health Ordinance [Cap 136, LHK] (RHC and RDC O 52 r 6(1)(b)); (c) the application arises out of proceedings in which a secret process, discovery or invention is in issue (RHC and RDC O 52 r 6(1)(c)); or (d) it appears to the court that the administration of justice or for reasons affecting the security of Hong Kong, the application should be heard in private (RHC and RDC O 52 r 6(1)(d)).

109 RHC and RDC O 52 r 3(3); *Winsome Paints Company Limited v Wong Yin Sun trading as Yau Chueng Paint and Dye Company* (unreported, 2002; HCMP 3185/2002).

110 RHC and RDC O 52 r 3(4).

111 *Hong Kong Civil Procedure* at para 52/6/4; *Hasan v Chu Chung Kwan (t/a Wai Tat Co)* (unreported, 1995; MP 364/1009).

- (a) identify the charging order sought to be enforced and the subject matter of the charge;
- (b) specify the amount in respect of which the charge was imposed and the balance outstanding at the date of the affidavit;
- (c) verify (so far as is known) the debtor's title to the property charged;
- (d) identify any other encumbrances on the property charged giving details (so far as is known) of the encumbrancers and the amounts owing to them;
- (e) set out the creditor's proposals as to the manner of sale together with estimates of the gross price which would be realised on a sale and of the costs involved;
- (f) where the property charged comprises land in respect of which the creditor claims possession, provide particulars of every person who, to the best of the creditor's knowledge, is in possession of the property or any part of it.

If the charging order absolute is obtained in the Court of First Instance, enforcement proceedings must also be taken in the Court of First Instance.¹⁴¹

Where the subject matter of the charging order is the judgment debtor's beneficial interest in certain property, it is essential for the judgment creditor to join the legal owner of the property as a party to the sale proceedings to ensure that good title to the property is given.¹⁴²

A number of recent decisions have provided some guidance regarding the factors that a court will take into consideration in determining whether or not to make an order for the sale of the charged property. In *Union Finance Ltd v Leung Wai Ling*,¹⁴³ the court held that the discretion to make an order for sale must be exercised judicially and that the competing equities of the parties must be carefully weighed. The court pointed out that whilst the amount of the judgment debt is a relevant factor in the weighing exercise, the court must also take into account other matters, such as the conduct of the debtor. At first instance, the judgment creditor's application for an order for the sale of the property

141 *Standard Chartered Bank v Kwok Fat* (unreported, 2001; DCMP 3555/2000), where it was held that the District Court has no jurisdiction in such a case.

142 *Audrey PF Chow & Co v Ying Kai-leung* [1976] HKLR 166.

143 [2000] 2 HKC 821.

charged was dismissed on the ground that the amount of the debt was relatively small compared to the value of the property charged. In allowing the judgment creditor's appeal and making an order for the sale of the property, the court held that the Master had placed too much weight on this factor alone, without taking into account the other matters.

In *Ip Hon Nam v Chan Moon Kau*,¹⁴⁴ the court ruled that the fact that the judgment debtor holds a negative equity in the property charged is a matter to be taken into account. Clearly, the court may decline to make an order for sale if the property is already mortgaged and the proceeds of sale realized will not even cover the amount outstanding on the mortgage.

Where a judgment creditor brings proceedings to enforce a charging order, he is not subject to the limitation periods prescribed by the Limitation Ordinance.¹⁴⁵ Section 4(4) of the Limitation Ordinance prohibits the bringing of an action on a judgment after the expiration of 12 years from the date on which the judgment becomes enforceable. However, in *Orakpo v Ezekiel*,¹⁴⁶ the English Court of Appeal, in considering the English equivalent to section 4(4) of the Limitation Ordinance,¹⁴⁷ ruled that the statutory time limit does not apply to proceedings to enforce a charging order.

This may be an important point in practice, as there may be circumstances where it is to the creditor's advantage to delay the commencement of enforcement proceedings, eg, where the charging order relates to property that is expected to increase in value at a later date.

A related question that arises is whether a delay in commencing enforcement proceedings will affect the amount of interest recoverable by the judgment creditor. Of relevance here are the provisions of section 19(5) of the Limitation Ordinance.

Section 19(5) of the Limitation Ordinance provides as follows:

No action to recover arrears of interest payable in respect of money secured by a mortgage or other charge ... shall be brought after the expiration of six years from the date on which the interest became due.

144 [2002] 2 HKC 220, DC. See p 179, ante.

145 Cap 347, LHK.

146 Unreported, 22 June 1994, CA. The facts in this case gave rise to two separate sets of proceedings: see also *Ezekiel v Orakpo*, Times, 8 November 1994, on appeal, at [1977] 1 WLR 340, CA.

147 That is, s 24(1) Limitation Act 1980. Note that in England, the limitation period for an action on a judgment has been reduced to six years.