

Customer Information Bulletin

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PROPERTY (SEIZURE AND SALE) ORDERS UNDER THE CIVIL JUDGMENTS ENFORCEMENT ACT 2004 AND SECTION 133 OF THE TRANSFER OF LAND ACT 1893

1 Introduction

The Civil Judgments Enforcement Act 2004 ("the Act") was proclaimed on 22 December 2004 to come into operation on 1 May 2005. The object of this Act is to provide for the enforcement of judgments given in the civil jurisdiction of the Supreme, District and Magistrates Courts (the "Court") and for related matters.

The Act introduces an enforcement process known as a Property (Seizure and Sale) Order ("PSSO"). A PSSO replaces the Warrant of Execution (Warrant) and the Writ of Fieri Facias (Fi Fa).

The old Section 133 of the Transfer of Land Act was at the same time repealed and replaced with a new section that incorporates reference to the Civil Judgments Enforcement Act 2004. It sets out modified procedures for dealing with land under the Transfer of Land Act.

2 New Documents

This new process for the enforcement of civil judgments has led to the creation of the following new documents that will be lodged for registration:

- Application to Register Property (Seizure and Sale) Order (Form A10);
- Application to Register an Order Extending the Sale Period in a Property (Seizure and Sale) Order (Form A11);
- Application to Register a Discharge of a Property (Seizure and Sale) Order (Form A12);
- Transfer of Land Under Property (Seizure and Sale) Order (Form T7); and
- Transfer of a Mortgage, Charge, Lease etc Under Property (Seizure and Sale) Order (Form T8).

The use and effect of each of these documents will now be considered one at a time.

2.1 Application to Register Property (Seizure and Sale) Order (Form A10)

A PSSO can be issued out of any of the above-mentioned courts and has a life of 12 months. An application can be made to the Court to extend the life of the Order beyond the initial 12 months period.

To register a PSSO, a copy of it certified by the Sheriff or a Deputy Sheriff, must be attached to the Application Form A10.

A PSSO can be registered against the registered interests of:

- the proprietor of the fee simple; or
- a mortgagee \ chargee \ lessee etc.

Against the Fee Simple

If the PSSO is to be registered against the proprietor of the fee simple, "Fee Simple" is to be inserted under the word "Description" (Note 1) in the Saleable Interest panel of the application.

For an Application to Register a Property (Seizure and Sale) Order against the fee simple Smart Register will generate the following prime endorsement on the relevant certificate of title to the land:

Property (Seizure and Sale) Order Registered

Nothing else needs to be added to this endorsement unless the PSSO is limited to the interest or share of only one of the registered proprietors.

Against Other Interests

A PSSO can be registered against a mortgage, charge or lease etc. If the PSSO is to be lodged against, for example a mortgagee's interest, "Mortgage" is to be inserted under the word "Description" (Note 1) and the Mortgage number inserted under the word "Registration Number" (Note 2).

For an Application to Register a Property (Seizure and Sale) Order against a mortgage Smart Register will generate the following endorsement below the relevant mortgage, charge or lease etc:

Mortgage J123456 to Registered

Property (Seizure and Sale) Order Registered

Execution

An Application to Register a Property (Seizure and Sale) Order (Form A10) incorporates a statutory declaration to declare that the judgment debtor as shown in the PSSO is one and the same person as the proprietor of the saleable interest referred to on the certificate of title. A person qualified to take statutory declarations must witness the document.

Note: The statutory declaration is part of the form and is to be made even if there are no discrepancies in the names or addresses.

Suspension Order

Before the application to register the PSSO is lodged, the court may have granted a Suspension Order. An application to register a PSSO has the following question that must be answered:

Has a Suspension Order been made? YES / NO

If a suspension order has been made an original sealed copy must also accompany the application. A reference to the suspension order is not endorsed on the title.

Note: If a Suspension Order is obtained after the PSSO has been registered, there is no provision or requirement that it be served on the Registrar of Titles.

Subject to the terms of the Suspension Order, the Sheriff cannot sell the land, while it is subject to such an order.

Effect of Registration

An Application to Register a Property (Seizure and Sale) Order binds the land for 6 months (the sale period) from the date of its registration. If the court grants an order extending the sale period, an application to register an order extending the sale period (see below) must be lodged before the 6 months period has expired.

Note: This process is very different from the previous practices for Fi Fa's and Warrants. These could be re-lodged before the expiry of each 4 months and continue to bind the land for a long time. That practice no longer applies. The PSSO only binds the land for 6 months, unless a court extends its operation. Grant of an extension is not automatic. If the sale period has expired no further registrations of that PSSO can be accepted.

If a PSSO endorsed on the title has expired, it no longer binds the register. However, before any instruments (e.g. Transfers, Mortgages and Leases etc) can be registered, an Application to Register a Discharge of a Property (Seizure and Sale) Order (see below) must be lodged.

When a PSSO is registered against land and is current, it is a bar to the registration of any subsequent instruments, unless the written consent of the Sheriff or a Deputy Sheriff is endorsed on or filed with the document to be lodged.

If a caveat is lodged against the proprietor of the Fee Simple or other interest that is encumbered by a PSSO, notice that a caveat has been lodged must be served on the judgment creditor. The judgment creditor can take action to remove the caveat under Section 138B of the TLA.

2.2 Application to Register an Order Extending the Sale Period in a Property (Seizure and Sale) Order (Form A11)

When a PSSO has been registered it binds the land for 6 months (called the sale period). It may be possible to obtain an order extending the sale period in a PSSO. The court may extend it for any specified time period that is not greater than 6 months.

If an order to extend the sale period is obtained, an Application to Register an Order Extending the Sale Period in a Property (Seizure and Sale) Order (Form A11) must be lodged before the expiry of the PSSO.

To register an order extending the sale period in a PSSO, an original sealed copy of the order must be attached to the Application Form A11. The application Form A11 has a box to insert the "Period of Extension" (see Note 6).

Against the Fee simple

The SMR notification code for an application to register an order extending the sale period is UOE. This will generate the following under endorsement below the PSSO:

Property (Seizure and Sale) Order Registered

Order Extending Sale Period Registered

Against Other Interests

If a PSSO has been lodged against, for example a mortgagee's interest, and an order to extend the sale period has been lodged, Smart Register will generate the following under endorsement below the mortgage:

Mortgage J123456 to Registered

Property (Seizure and Sale) Order Registered

Order Extending Sale Period Registered

General Comment

The period of the extension is not endorsed on the title, therefore it will be necessary to search the extension order to determine when the sale period expires. This is very different from the previous practice for Fi Fa's and Warrants. These were automatically extended for 4 months each time they were renewed.

2.3 Application to Register a Discharge of a Property (Seizure and Sale) Order (Form A12)

An expired PSSO must be discharged before dealing with the land (i.e. selling or mortgaging etc). An application to register a discharge of a PSSO has been created for this purpose (see Form A12).

The application to discharge a PSSO has a "Reason Panel" giving 4 options. Three of the options need to be deleted, leaving the one that suits the circumstance.

To register a discharge of the PSSO, the application can be made by:

- The judgment creditor using Option 1 (no evidence is required);
- By any person using Option 4 if the sale period has expired (no evidence is required); or
- By any person using Options 2 or 3 if the order has been satisfied or the order has been cancelled (evidence must be produced – see Instruction 2 on the document).

Note: The requirement to lodge a discharge is different from the previous practice for Fi Fa's and Warrants. These lapsed after 4 months but stayed inactive on the title until removed by sundry document.

2.4 Transfers of Land under Property (Seizure and Sale) Order (Forms T7 and T8)

During the sale period the Sheriff or a Deputy Sheriff can transfer the land or other registered interest in the land subject to a PSSO. A Transfer of Land (Form T7) is to be used for transfers of the fee simple. A transfer of mortgage, charge or lease etc (Form T8) is to be used for transfers of other registered interests.

The new Section 133 of the TLA contains some express requirements.

Under Section 62(2) of the Act a PSSO continues in effect until the sale period expires, even though it may extend beyond the 12 months or other period provided under Section 102 of the Act. This differs from the previous process.

Registration fees

The standard registration fees for applications and transfers apply to each of the above-mentioned documents.

3 Transitional provisions for Writs and Warrants

Any writ or warrant endorsed on a title that is still current as at 1 May 2005 is deemed to be a PSSO and will automatically bind the land for 6 months from the date of its lodgment.

It is still possible to lodge a new writ or warrant after 1 May 2005 because they are valid for 12 months. In this instance they will be lodged under the old procedure, that is, the writ or warrant will incorporate the usual letter to the Registrar of Titles and be attached to a B4 cover sheet. They will still be endorsed on the title as a Writ or Warrant, but they will be deemed to be a PSSO and will bind the title for 6 months from the date of lodgment.

If the sale period of a Writ or Warrant lodged either before or after 1 May 2005, is subsequently extended, an application to register an order extending the sale period (Form A11) will be lodged as an under endorsement below the Writ or Warrant.

After 1 May 2005, any Writ or Warrant that has been satisfied, or on which the sale period has expired, must be discharged using an application to register a discharge of a PSSO (Form A12) before any instrument (e.g. Transfers, Mortgages and Leases etc) can be registered.

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