The Bank of East Asia Ltd v Mody Sonal M and Others
[2004] SGHC 149

Case Number : Suit 837/2003

Decision Date : 13 July 2004

Tribunal/Court : High Court

Coram : Andrew Ang JC

Counsel Name(s) : Robert Wee (Ho and Wee) for plaintiff; Defendants in person

Parties : The Bank of East Asia Ltd — Mody Sonal M; Mody Manharlal Trikamdas; Mody Meena Manharlal

Credit and Security – Mortgage of real property – Mortgagee's power of sale – Equitable duties owed by mortgagee – Mortgagee's duty to act in good faith and take reasonable steps to obtain true market value at time of sale

Credit and Security – Mortgage of real property – Mortgagee's power of sale – Equitable duties owed by mortgagee – Whether mortgagee's alleged breach of duty forming basis for counterclaim by surety for damages arising therefrom

Equity – Undue influence – Presumed – Elements to be proven to raise presumption of undue influence – Personal guarantee given as directors of company to secure company's debts

13 July 2004

Andrew Ang JC:

The facts

1 The plaintiff is a bank incorporated in Hong Kong with a branch in Singapore. The suit by the plaintiff bank ("the Bank") is against three members of a family ("the defendants") in respect of a joint and several guarantee dated 28 June 2000 given by them to the Bank to secure overdraft facilities extended by the Bank's Singapore branch to the Bank's customer, MTM Trading Pte Ltd ("the Company"). All three defendants are directors of the Company. The first defendant and the third defendant are also shareholders of the Company respectively holding 10% and 20% of the Company's shares. The second defendant holds none.

2 The Company had mortgaged to the Bank an apartment, #07-02 at 83 Meyer Road ("the Property"), to secure its own indebtedness. The Property was sold at a public auction on 17 April 2003 at a price of $1.14m. After the net proceeds of sale were applied in payment of the Company's outstandings to the Bank, a balance remained owing under the Company's overdraft account which, as at 16 July 2003, amounted to $639,293.19. The Company has since been wound up. The Bank's claim is for payment of this sum and interest thereon from 17 July 2003 at the rate of half per cent per annum above the Bank's prime lending rate in respect of the first $1.3m and at the rate of 4% per annum above the Bank's prime lending rate in respect of the balance owing.

The defences

3 The defendants appear in person. However, until five days before the trial of this action, the first and third defendants were represented by Straits Law Practice LLC and the second defendant was represented by M/s Ravi, Lim & Partners. Hence, all documents filed by the defendants prior thereto were prepared by their respective former solicitors. The defendants have put up the following defences:

(a) All three defendants alleged that they were not given a breakdown of the sum demanded from them despite numerous requests. I should say right away that I find no merit in this defence. The Company had been provided monthly statements of account. The defendants as the directors of the Company knew, or ought to have known, the state of the accounts. In any case, the Bank annexed to their reply detailed statements of account showing how the sum of S$639,293.19 was arrived at. There was no challenge to this at the trial.

(b) More interesting is the defence put up by the first and third defendants that the guarantee was "procured by the undue influence of the second defendant over them".

The first and third defendants are respectively the daughter and the wife of the second defendant. They averred that the second defendant ran the business of the Company with the help of his son and that they were not involved, save that they signed documents on the instructions of the second defendant. They further averred that they had always reposed confidence and trust in the second defendant, depending totally upon him in all financial matters. It was also alleged that the second defendant was always the dominant personality whom neither the first defendant nor the third defendant was allowed to question. Accordingly, they maintained they were not exercising an independent will when told by the second defendant to sign the guarantee.

The first and third defendants further contended that entering into the guarantee was manifestly disadvantageous to them in that they had nothing to gain and everything to lose. They had also entered into the guarantee without the benefit of independent legal advice. They averred that the Bank knew from the beginning that the second defendant alone was to enjoy the banking facilities and that it was he who liaised and negotiated with the Bank.

Undue influence

4 It is usual, following the lead in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, to divide cases of undue influence as follows:

(a) *Class 1 – Actual undue influence.*

In these cases the person wronged needs to show affirmatively that he entered into the impugned transaction because of the undue influence exerted on him by the wrongdoer.

(b) *Class 2 – Presumed undue influence*.

In such cases, there is no requirement to prove actual undue influence. It is enough if the complainant demonstrates that (i) there was a relationship of trust and confidence between him and the wrongdoer; and (ii) the relationship was such that it could fairly be presumed that the wrongdoer abused the trust and confidence in procuring the complainant to enter into the impugned transaction.

(c) *Class 2(A).*

Certain relationships have been recognised by law as giving rise to such a presumption *ipso facto*. These include the relationships between solicitor and client, trustee and *cestui que trust*, and between doctor and patient. The relationship between husband and wife is not within this class: *Bank of Montreal v Jane Jacques Stuart* [1911] AC 120.

(d) *Class 2(B).*

Outside of these special categories, it is open to a complainant to raise such presumption as against a wrongdoer if he proves that there existed a relationship between them under which he generally reposed trust and confidence in the wrongdoer. Unless such presumption of undue influence is rebutted by proof otherwise, the complainant will succeed in setting aside the transaction without having to prove actual undue influence or that the wrongdoer abused the trust and confidence.

The foregoing consider the right of the complainant to set aside the impugned transaction as against the wrongdoer. In surety cases, however, the complainant seeks to avoid a transaction, not against the wrongdoer but against a creditor, such as the creditor bank in the present case. In such cases, the decisive question is whether the creditor bank had notice, actual or constructive, of such wrongdoing. Additionally, if the wrongdoer was acting as agent for the bank in obtaining the surety from the complainant, the transaction will also be set aside as the wrongful act of the agent will be attributed to the bank. Lord Browne-Wilkinson took the law in relation to the doctrine of constructive notice one step further when he outlined in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 the circumstances in which a creditor is put on inquiry when a wife stands surety for her husband's debts.

5 In *O'Brien*, the first and second defendants, who were husband and wife, mortgaged their matrimonial home as security for overdraft facilities extended by the plaintiff bank to a company in which the husband, but not the wife, had an interest. The wife signed the deed without reading it, in reliance on the husband's false representation that it was for a smaller amount and that it would last only three weeks. When the company breached its overdraft limit, the bank sought to enforce the mortgage and obtained an order for possession. The judge at first instance dismissed the wife's appeal, holding that there was no evidence that in deceiving the wife the husband was acting as the agent of the bank and that, accordingly, they could not be held responsible for his misrepresentation. The Court of Appeal allowed an appeal by the wife, holding that she was entitled to special protection in equity. The bank's appeal to the House of Lords was dismissed. It was held (and I take the liberty of quoting from the headnotes at 180) that:

> there was no basis for providing special protection in equity to wives in relation to surety transactions; but that where a wife had been induced to stand as surety for her husband's debt by his undue influence, misrepresentation or some other legal wrong, she had an equity as against him to set aside that transaction; that on ordinary principles the wife's right to set aside the transaction would be enforceable against a third party who had actual or constructive notice of the circumstances giving rise to her equity or for whom the husband was acting as agent ...

Lord Browne-Wilkinson then went on to say, at 196:

> [I]n my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.
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> It follow [*sic*] that unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights.

6 This case was followed eight years later by *Royal Bank of Scotland Plc v Etridge (No 2)*

[2002] 2 AC 773. As the first and third defendants have relied principally on *Etridge* in seeking to avoid the guarantee, I shall devote greater attention to the case. The *Etridge* case was one of eight appeals heard by the House of Lords at the same time. Each case arose out of a transaction in which a wife charged her home in favour of a bank as surety for her husband's indebtedness or that of a company through which he carried on business. In each of the cases, the wife later contended that she executed the charge under the undue influence of the husband. It was held that the relationship of husband and wife was not one of those special relationships where an irrebutable presumption of trust and confidence arose. Accordingly, where a wife sought to impugn a transaction which she had entered into on the ground of her husband's undue influence, she had to establish two prerequisites. First, that she reposed trust and confidence in her husband in the management of her financial affairs. Second, that the transaction was not readily explicable other than on the basis that it had been procured by undue influence exercised by her husband: see *Etridge* at [30]. Only then could she rely on a presumption of undue influence which shifts the burden of proof to the opposite party to rebut the presumption.

7 The House further held that a guarantee by a wife with a charge on the matrimonial home to secure her husband's debts was not manifestly to her disadvantage as to be explicable only on the basis that she must have been unduly influenced by her husband in so doing. Lord Nicholls of Birkenhead had this to say at [27]–[30] of his judgment:

> 27 The problem has arisen in the context of wives guaranteeing payment of their husband's business debts. In recent years judge after judge has grappled with the baffling question whether a wife's guarantee of her husband's bank overdraft, together with a charge on her share of the matrimonial home, was a transaction manifestly to her disadvantage.
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> 28 In a narrow sense, such a transaction plainly ("manifestly") is disadvantageous to the wife. She undertakes a serious financial obligation, and in return she personally receives nothing. But that would be to take an unrealistically blinkered view of such a transaction. Unlike the relationship of solicitor and client or medical adviser and patient, in the case of husband and wife there are inherent reasons why such a transaction may well be for her benefit. Ordinarily, the fortunes of husband and wife are bound up together. If the husband's business is the source of the family income, the wife has a lively interest in doing what she can to support the business. A wife's affection and self-interest run hand-in-hand in inclining her to join with her husband in charging the matrimonial home, usually a jointly-owned asset, to obtain the financial facilities needed by the business. The finance may be needed to start a new business, or expand a promising business, or rescue an ailing business.
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> 29 Which, then, is the correct approach to adopt in deciding whether a transaction is disadvantageous to the wife: the narrow approach, or the wider approach? The answer is neither. The answer lies in discarding a label which gives rise to this sort of ambiguity. The better approach is to adhere more directly to the test outlined by Lindley LJ in *Allcard v Skinner* [(1887)] 36 Ch D 145, and adopted by Lord Scarman in *National Westminster Bank plc v Morgan* [1985] AC 686, in the passages I have cited. [Comment: This test requires one to go beyond the relationship between the parties and to consider whether "the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it": per Lord Scarman in *National Westminster Bank Plc v Morgan* [1985] AC 868 at 704.]
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> 30 I return to husband and wife cases. I do not think that, in the ordinary course, a guarantee of the character I have mentioned is to be regarded as a transaction which, failing

proof to the contrary, is explicable only on the basis that it has been procured by the exercise of undue influence by the husband. Wives frequently enter into such transactions. There are good and sufficient reasons why they are willing to do so, despite the risks involved for them and their families. They may be enthusiastic. They may not. They may be less optimistic than their husbands about the prospects of the husband's businesses. They may be anxious, perhaps exceedingly so. But this is a far cry from saying that such transactions as a class are to be regarded as prima facie evidence of the exercise of undue influence by husbands.

Lord Nicholls went on to consider the judgment of Lord Browne-Wilkinson in *O'Brien* where the latter had said at 196:

> Therefore in my judgment a creditor in put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

His Lordship then concluded that the passage was to be taken to mean that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts.

8 Lord Nicholls also went on to consider a wider application of the *O'Brien* principle to cover relationships other than between husband and wife where trust and confidence are likely to exist. In [84], [87] and [88] of his judgment, which the first and third defendants have sought to draw support from, he said:

> 84 The crucially important question raised by this wider application of the *O'Brien* principle concerns the circumstances which will put a bank on inquiry. A bank is put on inquiry whenever a wife stands as surety for her husband's debts. It is sufficient that the bank knows of the husband-wife relationship. That bare fact is enough. The bank must then take reasonable steps to bring home to the wife the risks involved. What, then, of other relationships where there is an increased risk of undue influence, such as parent and child? Is it enough that the bank knows of the relationship? For reasons already discussed in relation to husbands and wives, a bank cannot be expected to probe the emotional relationship between two individuals, whoever they may be. Nor is it desirable that a bank should attempt this. Take the case where a father puts forward his daughter as a surety for his business overdraft. A bank should not be called upon to evaluate highly personal matters such as the degree of trust and confidence existing between the father and his daughter, with the bank put on inquiry in one case and not in another. As with wives, so with daughters, whether a bank is put on inquiry should not depend on the degree of trust and confidence the particular daughter places in her father in relation to financial matters. Moreover, as with wives, so with other relationships, the test of what puts a bank on inquiry should be simple, clear and easy in widely varying circumstances. This suggests that, in the case of a father and daughter, knowledge by the bank of the relationship of father and daughter should suffice to put the bank on inquiry. When the bank knows of the relationship, it must then take reasonable steps to ensure the daughter knows what she is letting herself into.
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> 87 These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as "put on inquiry"

in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.

88 Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.

The third defendant has also cited [49] of Lord Nicholls' judgment where he said:

49 Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry in such cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business.

Neither *O'Brien* nor any of the above passages in *Etridge* cited by the first and /or third defendants will avail them.

9 In *O'Brien*, the wife secured the overdraft facilities of a company in which the husband, but not the wife, had an interest. On its face, such a transaction was not to the financial advantage of the wife. This factor, together with the fact that the relationship of husband and wife lent itself to the risk that the husband might have unduly influenced the wife, put the bank on inquiry. Failing to take reasonable steps to satisfy itself that the wife's agreement to stand surety had been properly obtained, the bank was fixed with constructive notice of the husband's misrepresentation to the wife as to the true extent of her mortgage. The bank was put on inquiry not merely because of the husband and wife relationship but also because the indebtedness secured was that of a company in which the husband, but not the wife, had an interest.

10 Similarly, all the passages in *Etridge* which the first defendant and/or third defendant sought to rely on refer to factual situations where the indebtedness of the husband or father (of or a company in which he had an interest) was secured by the wife or daughter.

11 In the present case, the personal guarantee of the first and third defendants were not given to secure the second defendant's indebtedness or that of a company in which he held an interest. While they held shares in the Company, he held none. Their guarantees were given as directors of the Company. Contrary to their assertions that they had nothing to gain but everything to lose, they, as shareholders of the Company, of course stood to gain if the Company were to use the facilities to advantage. In this connection, I noted that when cross-examining the plaintiff's witness Raymond Cheng,[1] the second defendant had declared that he had never taken a salary or other remuneration from the Company and that in fact he had helped it financially.

12 In these circumstances, the Bank was not put on inquiry. Accordingly, it cannot be fixed with

constructive notice for not having taken steps to satisfy itself that the agreement of the first defendant and the third defendant to stand surety had been properly obtained. Although it is not necessary for the purpose of my arriving at the above conclusion, I might add that, from my observation of the conduct of the three defendants and of the first defendant's brother who was also in court, the second defendant was far from the imperious head of household he was made out to be. Indeed, towards the rest of the family, he appeared to be more a lamb than a lion. In particular, the first defendant was least likely to have been the victim of undue influence.

13 The first defendant obtained a first degree in the United Kingdom in 1991 and thereafter worked for a publishing company in Hong Kong. She obtained a Masters degree in Business Administration (MBA) from the F W Olin Graduate School of Business at Babson College, United States of America, in 1996. She had been working for three years before she embarked on her MBA. Thereafter she worked another four years before she signed the guarantee as director of the Company at the age of 32. At the time she signed the guarantee, she was working for a health and nutritional company in Hong Kong as a distributor.

14 When ABN Amro Bank NV succeeded in an action in Case No HCMP004274/2001 in the High Court of Hong Kong against her parents for possession of a property, she appeared and argued on behalf of her father for leave to appeal out of time.

15 In November 2002, she again appeared before a High Court judge in Hong Kong in the same suit. This time, she acted for her mother, also for leave to appeal out of time. In this application, the mother's defence was that she executed the mortgage under the undue influence of the husband (the second defendant in the present action). In arguing the case for her mother, the first defendant was able to cite several authorities, including the landmark case of *O'Brien*.

16 On 2 April 2003, she "represented" her mother in the Court of Appeal in Hong Kong (although the court did explain that she was not able to represent her mother as such). Her mother won the appeal against an order for security for costs.

17 As can be seen from the foregoing, the first defendant is no babe in the woods. The evidence also shows that although the second defendant called her on or about 1 June 2000 asking her to come to Singapore to sign "important and urgent" documents, it was not until 27 June 2000 that she finally arrived from Hong Kong. I found it unbelievable that despite her burning curiosity, her father nevertheless managed to keep the proposed guarantee a secret until she arrived in Singapore. When asked why the guarantee would have been so confidential when, on her own admission, the relationship between herself and the second defendant was very close, all she could say was, "I guess he didn't want to tell me over the phone about something so important". It is difficult to believe that after telling the first defendant that he wanted her to sign some "important and urgent documents" and (on another occasion) that it was "very, very important", the second defendant would for more than three weeks decline to tell her what the documents were that she was to sign. This was in spite of the fact that they were in daily contact over the phone.

18 What is the evidence that the second defendant exercised undue influence over the first defendant thereby causing her to sign the guarantee? The first defendant recounted how she first came to know that she was to sign the guarantee only when she and her parents were in the car on the way to the Bank. She claims to have refused to sign, whereupon her father became very upset with her and informed her that "if [she] did not sign the guarantee ... everything that he had worked so hard for would fall through and it would be [her] fault".

19 Even if I were to believe this account (which I do not), it would, in my view, be an

exaggeration to castigate the father's conduct as undue influence. As Prakash J in *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 3 SLR 802 at 855, [189], stated:

> It is not enough to set aside a contract that one party tried to influence the other to enter it. There must be something wrong in the way that the influence was exercised, *ie* some unfair or improper conduct, some coercion or some form of misleading.

Given what we have learnt about the first defendant, it can hardly be said that the father, taking improper advantage of their relationship and of the daughter's vulnerability, caused her to sign the guarantee. By her own admission, she signed the guarantee because the loan was important to her parents.

20 Unlike the first defendant, the third defendant did not allege actual undue influence, apart from describing him as the dominant personality whom neither the first nor third defendants were allowed to question. Instead, she sought to invoke a presumption of undue influence by stating (a) that she had reposed trust and confidence in her husband in all financial matters, and *ergo* in relation to the guarantee; and (b) that the guarantee was manifestly disadvantageous to her. For the reasons which I have given above, the presumption did not arise.

Defences raised but not pleaded

21 Although it is not strictly necessary, for the sake of completeness I shall now deal with two other defences which were raised but not pleaded. Both the first and third defendant alleged in their respective affidavits of evidence-in-chief that the second defendant was acting as agent for the Bank when he asked them to sign the guarantee. If so, the bank would be fixed with any wrongdoing on his part and the guarantee could be set aside. It was a bare assertion unsupported by any evidence. The third defendant retracted the allegation under cross-examination but the first defendant did not. I find no such agency. As Lord Browne-Wilkinson said in *O'Brien* at 195:

> Although there may be cases where, without artificiality, it can properly be held that the husband was acting as the agent of the creditor in procuring the wife to stand as surety, such cases will be of very rare occurrence.

Not to be faulted for lack of resourcefulness, the first defendant also alleged duress in her affidavit evidence-in-chief although, here again, the defence had not been pleaded. The allegation does not bear scrutiny. There is no evidence of any actual or threatened violence against, or imprisonment of the first defendant. Nor was she subjected to any economic duress. This defence therefore fails.

The counterclaim

22 I move on to the counterclaim. All three defendants averred that the Bank, as mortgagee exercising their power of sale, owed a duty to the mortgagor and to the defendants to act in good faith and to take reasonable precautions to obtain the best price reasonably obtainable at the time. They alleged that, in breach of this duty, the Bank sold the Property at a price of $1.14m when $1.45m was obtainable. In particular, the defendants alleged that the Bank had been informed that there was a buyer willing to pay $1.45m for the Property but that he needed two weeks to arrange for funds for the purchase. The second defendant had requested the Bank to set their reserve price at no lower than $1.45m and to postpone the auction to another date if the price was not reached. The Bank did not accede to the request. In the event, at the auction on 17 April 2003, the Property was sold for $1.14m to the same prospective buyer who allegedly had been prepared to pay $1.45m. Four months later, he sold the same for $1.36m.

23 The defendants therefore claimed damages against the Bank in the amount of $310,000, this being the difference between the alleged prevailing market price at the time of the auction and the actual price that the auction fetched. In my view, the counterclaim is misconceived. Although the alleged breach of duty could be used as a defence in equity to set off the alleged loss in the sale against the amount claimed under the guarantee, it cannot form the basis of a counterclaim. The guarantors as such have no right to the equity of redemption. If any authority is required, one only needs to look at *Burgess v Auger* [1998] 2 BCLC 478.

24 In that case, the plaintiff, a majority shareholder and director of a company, Allied Components Ltd ("Allied"), gave a guarantee to secure Allied's indebtedness to a bank. Allied also gave a second fixed and floating charge to the bank, ranking after an existing charge in favour of another company (the "first chargee"). When Allied got into financial difficulties, the first chargee appointed receivers who sold the Allied's business to an associated company of the first chargee.

25 The plaintiff alleged that the sale was at an undervalue. He sued both the first chargee and the receivers for alleged breaches of duties of good faith which, he contended, they owed to him and as a result of which he had been exposed to liability under the guarantee. The first chargee and the receivers applied to strike out the plaintiff's claims on the ground that they owed him no duty. The master dismissed the plaintiff's actions and he appealed. Lightman J held that the duties owed by the first chargee and the receivers were owed only to those interested in the equity of redemption. The plaintiff, as director, shareholder, employee and guarantor of Allied's indebtedness, had no interest in the equity of redemption.

26 Likewise, in the present case, the defendants have no interest in the equity of redemption in the Property to found their counterclaim. The counterclaim therefore fails.

Equitable right of set off

27 Be that as it may, I will proceed to consider whether in selling the property at the price of $1.14m the Bank breached its duty to the defendants and thereby afforded them an equitable right of set off.

28 What are the duties of a mortgagee bank in these circumstances? In an oft-quoted statement of the law, Salmon LJ said in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at 965–966:

> It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.

Further on in his judgment at 966, Salmon LJ went on to state the two duties of a mortgagee, *viz*, to act in good faith and to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it.

29 In *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410, Lord Denning MR held that the duty owed by a mortgagee to the mortgagor extended to a surety as well. At 1415 of the report, he stated the law thus:

> If a mortgagee enters into possession and realises a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself, to clear off as much of the debt as he can, but also to the mortgagor so as to reduce the balance owing as much as possible, and also to the guarantor so that he is made liable for as little as possible on the guarantee.

This statement of the law was unexceptionable. However, immediately thereafter, he went on to say:

> This duty is only a particular application of the general duty of care to your neighbour which was stated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 and applied in many cases since: see *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and *Anns v Merton London Borough Council* [1978] AC 728. The mortgagor and the guarantor are clearly in very close "proximity" to those who conduct the sale. The duty of care is owing to them – if not to the general body of creditors of the mortgagor. There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time, he must exercise a reasonable degree of care.

Apparently, it is this latter portion of Lord Denning's judgment which the defendants pin their hopes on. Without doubt, their argument centres on the allegedly poor timing of the auction.

30 However, as Selvam J pointed out in *The Bank of East Asia Ltd v Tan Chin Mong Holdings (S) Pte Ltd* [2001] 2 SLR 193, Lord Denning's proposition (that the duty of the mortgagee in the context of a mortgagee sale was but a particular application of the general duty of care to your neighbour which was stated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562) has been widely criticised. In particular, Selvam J referred to *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536 at 543–544, where Lord Templeman, in delivering the judgment of the Privy Council, had this to say:

> [T]he tort of negligence has not yet subsumed all torts and does not supplant the principles of equity or contradict contractual promises or complement the remedy of judicial review of supplement statutory rights.

In *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, another Privy Council decision, on appeal this time from New Zealand, where Lord Denning's *obiter* was followed, Lord Templeman further stated the position as follows, at 315:

> The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of wilful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor.

31 Was it wrong for the Bank to have pressed on with the auction? As early as June 2001, the Company was already in default. The Bank's solicitors' letter of demand dated 14 June 2001 had threatened sale of the Property. The Company suggested an instalment scheme to reduce their debt to a manageable level. Although the proposal was accepted by the Bank, it was not honoured. Other promises followed, on each occasion to gain an extension of time for repayment. They were not kept. Similarly, promises of re-financing and redemption were made but not kept. A reading of the affidavit of evidence-in-chief of Margaret Tan Whee Bee, the Bank's assistant manager, provides in detail the delaying tactics employed by the Company through the second defendant. In these circumstances, the refusal of the Bank to believe the second defendant was understandable. If they had thought there was any truth in the second defendant's assurances of a buyer at $1.45m, would they not have waited, given that any additional proceeds of sale would have gone towards reducing the outstandings owed to the Bank? It is noteworthy that the buyer who was allegedly prepared to pay $1.45m for the Property sold the Property in an improved market for only $1.36m. The price at which the property was sold was above the forced sale value of $1,060,000 separately ascribed to the Property by two reputable firms of valuers, *viz*, Jones Lang LaSalle Property Consultants Pte Ltd and Knight Frank Pte Ltd. Although the second defendant challenged the evidence of Tan Keng Chiam, Jones Lang LaSalle's National Director of Advisory Services, the latter maintained that his firm's valuation was correct. Nothing in the cross-examination caused me to believe that the valuation had been wrong.

32 Apart from obtaining valuations, the Bank had also approached various property agents to find buyers for the flat, particulars of which efforts were set out in the affidavit of evidence-in-chief of the Bank's assistant manager, Margaret Tan Whee Bee. No one offered more than $1.1m.

33 The auction was preceded by seven newspaper advertisements placed by the auctioneers Colliers International Singapore Pte Ltd. The auction itself drew a crowd of about 100 persons and although the opening bid by the auctioneers was S$1.28m the eventual price at which it was sold was $1.14m, there having been about 13 bids all in.

34 On the above facts, I cannot see how the second defendant could have alleged bad faith on the part of the Bank. Neither have the defendants made out a case for saying the Bank did not use reasonable care to obtain the true market value of the Property at the moment they chose to sell it. Therefore no right of set off arose.

Decision

35 I therefore grant judgment for the plaintiff against the three defendants together with interest and costs. I also dismiss the defendants' counterclaim with costs.

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[1]PW2.