IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 43

CA 225/1998

Between

Teo Siew Har

… *Appellant*

And

Oversea-Chinese Banking Corp Ltd

… *Respondent*

GROUNDS OF DECISION

Banking

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Teo Siew Har v Oversea-Chinese Banking Corp Ltd

[1999] SGCA 43

CA 225/1998
Karthigesu JA; Tan Lee Meng J; L P Thean JA
01 June 1999

Judgment:

LP THEAN JA

(delivering the judgment of the court): This appeal arose from the decision of Chao Hick Tin J, in which he dismissed an appeal from the decision of the Deputy Registrar giving judgment to the respondents in the sum of $3,532,168.67 plus interest from 1 March 1998 until full payment at the rate as claimed in the OS 371/98. The summons was taken out by the respondents against the appellant under O 83 of the Rules of Court.

2. ***The facts***

The appellant is a housewife and was the owner of No 75 Hua Guan Avenue (`the property`), which was given to her by her husband, Mr Tang Liang Hong (`Mr Tang`). By an instrument of mortgage dated 5 October 1993 and registered with the Registry of Titles as No I/47839H, the property was mortgaged to the respondents as security for an overdraft facility. The mortgage payments were made by Mr Tang.

3.During the period approximately between December 1996 and January 1997 several defamation actions were commenced against Mr Tang by several Ministers and Members of Parliament (`PAP leaders`). In January 1997, Mr Tang was unable to continue with the mortgage payments. The appellant being the housewife had no means of making these mortgage payments either. Attempts were made by the appellant to sell the property and the respondents were informed that the appellant wished to sell the property and to use the proceeds to pay off the amount owing and secured by the mortgage. The respondent had no objection to such sale. On 27 January 1997 the PAP leaders joined the appellant as the second defendant in the defamation actions and obtained a Mareva injunction against her and her husband. Thus, she could not sell or in any way deal with the property. On 17 February 1997, the PAP leaders obtained another order, namely, an order appointing a receiver over the appellant`s and Mr Tang`s assets. Under this order, the receiver had the sole right and power to sell or deal with their assets, but the receiver could only sell the appellant`s assets on the joint request of the appellant and Mr Tang.

4.Sometime in March 1997, Mr Tang spoke to Mr Amin, the respondents` branch manager, asking the respondents to sell the property in exercise of their power of sale as mortgagees. The appellant claims that there was no response. On 21 March 1997 she applied to court for an order permitting her to sell the property by public auction but the receiver objected to this on the ground that the sale should be by public tender as this method would fetch a better price. This objection was upheld by the court. On 2 April 1997, the appellant made another application to court for leave to sell the property by private treaty through her firm of solicitors and this was again turned down and the court held that the receiver should retain conduct of the sale. Those applications by the appellant were made in the defamation actions in which she was joined as the

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second defendant and in which the respondents were not a party; they did not concern the respondents at all.

5.No action was taken by the respondents until July 1997. By a letter dated 22 July 1997, the respondents demanded payment of a sum of $3,351,434.96 and $75,000 (but the claim for this latter sum was withdrawn on 20 October 1997). On 29 August 1997, the respondents` solicitors wrote to the appellant again demanding payment. By a letter dated 27 September 1997, the respondents` solicitors required the appellant to deliver possession of the property within one month of receipt of the letter, failing which the respondents would apply for a court order for possession of the property.

6.On 9 October 1997, the receiver`s solicitors wrote to the respondents enquiring whether the respondents might exercise their rights as mortgagees, and if so, when they would do so, and stating that the appellant was keen to sell the property as soon as possible to prevent interest from further accruing. However, on 15 October 1997, the receiver`s solicitors informed the respondents that the receiver would be selling the property and requested the title deeds from the respondents, and in response the respondents forwarded the title deeds to them.

7.On 20 October 1997, the respondents` solicitors wrote to the appellant reminding her of their demand for possession made on 27 September 1997. On 27 January and 9 February 1998, the respondents` solicitors wrote to the receiver`s solicitors requesting an up-date on the intended sale of the property. On 9 February 1998, the latter replied saying that the highest offer he had received was $2.3m to which the appellant was not agreeable, and on 11 February 1998 the receiver enquired if the respondents would like to take over the sale of the property.

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8.The respondents` solicitors subsequently wrote to the appellant`s solicitors on 26 February 1998 seeking possession of the property by 6 March 1998. It also stated that possession was sought with a view to the respondents exercising their right to sell the property. The appellant`s solicitors replied on 5 March 1998, seeking an extension of time to the end of that week to revert on the issue. However, no response was forthcoming, and on 31 March 1998, the respondents` solicitors informed the appellant that they were instituting an action for possession of the property and judgment for payment of what was due. The OS 371/98 was taken out by the respondents. Personal service of the summons could not be effected on the appellant and on 14 May 1998, an order was obtained for substituted service, and this was effected on 15 May 1998.

9.The matter was heard before the Deputy Registrar on 24 June 1998, and an order was granted in terms of the respondents` application. The appellant appealed to a judge in chambers against that part of the order for payment of $3,532,168.67 (as at 28 February 1998), plus interest, but not against the order for possession.

10. ***The decision below***

Chao Hick Tin J found that the proposed sale by the receiver had been delayed because the appellant did not wish to obtain the consent of Mr Tang to the sale, as she took the view that he had nothing to do with the property. The learned judge found this glaringly clear from the appellant`s letter of 30 September 1997 addressed to the receiver. As soon as the appellant and Mr Tang consented to the sale, the receiver proceeded to act on it; he obtained the title deeds from the respondents and took steps to have a sale by public tender. At the same time, instructions were given to James Lang Wootten to prepare a valuation report and the report was prepared on or about 13 November 1997 which ascribed a

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figure of $4.7m as the open market value of the property. Despite the efforts of the receiver and his property agents from October 1997 to February 1998, there were no takers.

11.The learned judge noted that there was no authority that a mortgagee was under a duty to exercise the power of sale upon the request of the mortgagor. Counsel for the appellant was not able to cite any authority to this effect. All the cases cited to the learned judge related to the failure by the mortgagee to exercise proper care in the conduct of the sale. The learned judge referred to **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] Ch 949, 965-966 and **Warner v Jacob** [1882] 20 Ch D 220, 224. Applying the principle that the power of sale was not held by the mortgagee as trustee for the mortgagor, but that instead it was given to the mortgagee for his benefit which could be exercised by him at any time at his discretion, the learned judge held that the mortgagee was not obliged to comply with the request of the mortgagor to exercise the power of sale. A mortgagee could not reasonably owe a mortgagor such a duty. Such an argument was wholly inconsistent with the basic nature of the power and amounted to saying that the mortgagor could unilaterally impose an obligation upon the mortgagee; such a proposition must surely fail.

12.On the facts, Chao Hick Tin J found that the appellant could have had the property sold earlier if she had truly wanted to. She was holding up the sale by the receiver during the period from February to September 1997. During that period, Mr Amin had advised the appellant, through her daughter, to co-operate with the receiver. The appellant had also been informed that the respondents had not yet decided whether or not to exercise their power of sale. From mid-October 1997 to February 1998, the receiver attempted to sell the property but was unsuccessful. The respondents had assisted the receiver`s endeavour by forwarding title deeds of the property. By end March 1998, the respondents

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commenced this action with a view to exercising their power of sale. In the circumstances, the learned judge felt that it was unfair to blame the respondents or to hold that they had acted unreasonably.

13. ***The appeal***

The appellant`s main argument is that the respondents, as the mortgagees, were under a duty to protect the interest of the mortgagor in the very special circumstances of this case, and were in breach of duty when they refused or failed to exercise their power of sale at an early stage at the request of the appellant, thereby sacrificing the interests of the appellant and resulting in loss to her for which the respondents should be held liable. It is submitted that in the very special circumstances of the case the respondents should have exercised their power of sale in March 1997 or thereabouts at the request of the appellant. By virtue of the Mareva injunction and the appointment of a receiver, the appellant could not sell the property despite her intentions to do so from the outset. The appellant`s daughter, Megan Tang Siau Feng (`Ms Tang`), a solicitor in Hong Kong, was in Singapore in January 1997 to arrange for the sale but her attempts were thwarted by the Mareva injunction. There was extensive media coverage of the events, and the respondents clearly knew of the appellant`s dire situation. Interest on the overdraft was steadily accruing and it was expected that the property market would decline further. An early sale, if carried out by the respondents as the mortgagees, would have enabled the appellant to pay off the mortgage debt and interest in full as well as provide surplus for the appellant`s benefit. The appellant applied twice to the court for an order permitting sale, on 21 March and 2 April 1997, but was unsuccessful on both occasions, as the receiver had the sole right and power to sell and deal with the assets of the appellant.

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14. ***Duty of the mortgagee***

The issue here is whether in the circumstances of this case the respondents as the mortgagees were under a duty to exercise the power of sale upon request of the mortgagor or Mr Tang on her behalf. There is no authority directly on the point. However, some assistance may be derived from decided cases relating to the conduct of the mortgagee in the exercise of the power of sale. The leading authority is **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] Ch 949. In that case, the mortgagees in exercise of the power of sale proceeded to sell the mortgaged property by public auction. In the advertisement of the property for sale, the auctioneers failed to describe that there was in existence in relation to the property a planning permission for 100 flats. This was drawn to the attention of the mortgagees before the sale; but, notwithstanding that, they decided to proceed with the sale and at the auction their auctioneers merely mentioned this fact. The property was sold at the price of 44,000 and the mortgagor challenged the propriety of the sale price alleging that the true market value was 75,000. The judge at first instance found that the mortgagees had failed in their duty in the conduct of the sale and his decision on this point was affirmed by the Court of Appeal.

15.This case has been cited with approval and followed by our courts, time and again: see **Ng Mui Mui v Indian Overseas Bank** [1984-1985] SLR 286 [1986] 1 MLJ 203 ; **How Seen Ghee v Development Bank of Singapore Ltd** [1994] 1 SLR 526 , 530-531 and **Malayan Banking Bhd v Hwang Rose & Ors** [1997] 2 SLR 1 , 20-21. Although the actual ratio decidendi in Cuckmere is that a mortgagee in exercising the power of sale is under a duty to take reasonable care to obtain the true market value for the property on the date on which he decides to sell it, there are pronouncements made to the effect that when the power of

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sale has accrued the mortgagee is entitled to exercise the power of sale at such time as he deems fit. Salmon LJ said at pp 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 a 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 these 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.*

Cross LJ, the other member of the court, said at p 969:

> *A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagor for it was given him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise the power.*
>
> *Some points are clear. On the one hand, the mortgagee, when the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at.*

16.There are two other authorities which are more in point. The first is the Privy Council`s decision in **China and South Seas Bank Ltd v Tan Soon Gin George** [1990] 1 AC 536, on appeal from the Court of Appeal in Hong Kong. There, the bank made a huge advance to the debtor secured by quoted shares in a public company and a guarantee executed by the surety. Under the terms of

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the loan agreement the loan was repayable on 18 November 1982, but no payment was made on that date. As of that date, the value of the securities exceeded the amount of the loan payable. The bank, however, did not demand payment until 31 October 1983 by which date the securities had become worthless. As no payment was made by the debtor, the bank took proceedings against the surety to enforce guarantee. Summary judgment was given by the Master in favour of the bank and this was upheld by the judge. The Court of Appeal set aside the judgment and granted the surety unconditional leave to defend, holding that it was arguable that the surety`s liability was extinguished or greatly reduced by the bank`s breach of duty owed to the surety in the exercise of the power of sale over the securities. On further appeal, the Privy Council reversed the decision of the Court of Appeal. Lord Templeman, delivering the judgment of the Board, said p 545:

> *The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagor and to a surety or to either of them for a decline in value of the mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollck CB in* ***Watts v Shuttleworth*** *5 H & N 235, 247, it appears to their Lordships that in the present case the creditor did no act injurious to the surety, did no act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all.*

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17.The next authority is the decision of the Court of Appeal of New Zealand in **Countrywide Banking Corp v Robinson** [1991] NZLR 75. In that case, the defendants executed a mortgage of their property on 14 October 1981 to secure a sum of $70,000. They defaulted in making payment of the instalments due under the mortgage in 1983 and by 31 March 1989, the total amount due was in the region of $144,500. In early 1987, the mortgagee caused to be advertised the sale of the property by auction but the sale was deferred at the request of the mortgagor. Some few months later the mortgagee placed the property in the hands of a number of land agents for sale but no firm decision to sell was made at the time. Eventually on 23 February 1989, in exercise of their power they sold the property for $90,000, and thus there arose a substantial shortfall. The mortgagees commenced an action to recover the shortfall and took out an application for summary judgment. The mortgagors resisted the application on the ground that the mortgagees had acted in breach of duty to take reasonable care. The Master refused to give summary judgment on the ground that there might have been an undue delay in selling the property. On appeal, the Court of Appeal of New Zealand held that it was for a mortgagee contemplating the sale of the property in exercise of their power of sale to decide when to sell and that delay was not a ground upon which the conduct of the mortgagees exercising the power of sale could be impugned. Cooke P said at p 77:

> *The important point is that it is for a mortgagee contemplating selling in the exercise of a power of sale to decide if and when he will sell. In the event of his electing to sell, he does owe a duty to the mortgagor to take reasonable care at that time to obtain the best price. Despite an argument put forward today by Mr Ryan, we are satisfied that it cannot accurately be said that the mortgagee here had decided or chosen to sell at any earlier date than about that of the contract eventually entered into. It is true that early in 1987 the mortgagee caused to be advertised an auction through the Registrar of the High Court, but that was deferred at the request of the mortgagors. It is also true that in October 1988 the mortgagee put the property in the hands of a number of land agents for sale; but no irrevocable decision to sell*

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> *was made at that time and the mortgagee was not bound to commit itself until it did so by the contract in February 1989. It is at and about that date that, in accordance with the principle and the authorities already cited, the mortgagee`s conduct is to be tested in the light of the duty to take reasonable steps to obtain the current market value. As was stated in the* ***China and South Seas Bank*** *case at p 842, `The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all`.*

18.These `cases show that when the power of sale has arisen, the mortgagee is entitled to decide when he should sell the mortgaged property. He is not obliged to act immediately upon such power of sale arising.

19.We revert to the case before us. Assuming what was alleged by the appellant is true, the appellant was in the process of taking steps to sell the property in early January 1997. Her daughter, Ms Tang, who was then in Hong Kong came to Singapore to assist her, and estate agents were instructed to look for buyers and advertisements were placed in the newspapers advertising the property for sale. There were responses to these advertisements and there were indications from interested parties for the purchase of the property at the prices in the region of about $4.5m. At about this time, the respondents were also informed by Mr Tang and Ms Tang on behalf of the appellant that she wished to sell the property and use the proceeds to pay off the amount owing. The respondents have intimated that they had no objection to the sale. Clearly the sale envisaged at that time was a sale by the appellant herself as the proprietor, and there was then no request made to the respondents to sell the property as mortgagees. However, the appellant`s efforts to sell the property were impeded by the Mareva injunction that was made by the High Court against the appellant and Mr Tang. In February 1997, among other things, a receiver was appointed over the property and the receiver was given the sole right and power of sale of the property. The appellant made applications for leave to sell the property but was

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unsuccessful. One of the terms of the order appointing the receiver was that the receiver could only sell the property upon the joint request of the appellant and Mr Tang. The appellant insisted that Mr Tang`s consent was unnecessary as she was the sole and absolute beneficial owner of the property and did not secure his consent till 30 September 1997. Whether an early sale could have been effected, if the appellant had co-operated and obtain the joint consent as required by the order is, at this moment, debatable; but we need not be concerned with that. The respondents did not demand payment of the amount owing until July 1997 and they sought possession of the property only in September 1997. During the period between September 1997 and February 1998 there were attempts made by the receiver to sell the property but without success. Only in March 1998 did the respondents really take action to enforce the mortgage.

20.The question is whether in these circumstances, particularly during the period in or around March 1997 when Mr Tang on behalf of the appellant requested the respondents to sell the property, and over the next two or three months when the appellant was unable to sell the property herself, the respondents as the mortgagees of the property were under a duty to lend their assistance to the appellant and exercise the power of sale. It should be noted that at that time the power of sale had not accrued and no demand for payment had as yet been made by the respondents. In our opinion, on the authority of ***China and South Seas Bank Ltd*** and ***Countrywide Banking Corp*** , the answer is clearly `No`. In the words of Lord Templeman, the respondents as the mortgagees were not obliged to do anything. They did no act injurious to the appellant, did no act inconsistent with the rights of the appellant and did not omit to do any act which their duty enjoined them to do. They were not under any duty to exercise their power of sale over the property at that or any other particular time or at all.

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21.The appellant relies on **Palk & Anor v Mortgage Services Funding plc** [1993] Ch 330. In that case, the mortgagors, husband and wife, took a loan from a finance company secured by a mortgage over their own house. They defaulted in their instalment payments and negotiated for a sale of the property but the expected price was much below the amount secured by the mortgage. The finance company refused to consent to the sale and obtained an order for possession with a view to renting out the house and postponing the sale in order to achieve a better price at a later date. However, the expected annual rent from the house was less than the interest accruing on the outstanding loan. The mortgagors applied to court under s 91(2) of the Law of Property Act 1925 for a sale of the mortgaged property. The judge at first instance refused to grant the order. On appeal the Court of Appeal held, inter alia, that in the circumstances it was just and equitable that a sale should be ordered, notwithstanding the deficiency in the price and made the order accordingly. Sir Donald Nicholls V-C in the course of his judgment made the following observations at pp 337-338:

> *The first observation I make on this argument is to emphasise that a mortgagee does owe some duties to a mortgagor. As Lord Templeman noted in the* ***China and South Seas Bank*** *case, at p 545, a mortgagee can sit back and do nothing. He is not obliged to take steps to realise his security. But if he does take steps to exercise his rights over his security, common law and equity alike have set bounds to the extent to which he can look after himself and ignore the mortgagee`s interests. In the exercise of his rights over his security, the mortgagee must act fairly towards the mortgagor. His interest in the property has priority over the interest of the mortgagor, and he is entitled to proceed on that footing. He can protect his own interest but he is not entitled to conduct himself in a way that unfairly prejudices the mortgagor. If he takes possession he might prefer to do nothing and bide his time, waiting indefinitely for an improvement in the market, with the property empty meanwhile. That he cannot do. He is accountable for his actual receipts from the property. He is also accountable to the mortgagor for what he would have received but for his default. So he must take reasonable care to maximise his return from the property. He must also take reasonable care of the property. Similarly if he sells the property: he cannot sell hastily at a knock-down price sufficient to pay off his debt. The*

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> *mortgagor also has an interest in the property and is under a personal liability for the shortfall. The mortgagee must keep that in mind. He must exercise reasonable care to sell only at the proper market value. As Lord Moulton said in* ***McHugh v Union Bank of Canada*** *[1913] AC 299, 311:*
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> *`It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold.`*

22.It is true that the learned Vice-Chancellor (at p 338) entertained some doubt whether the duties of a mortgagee in or about the exercise of his powers should be confined so narrowly to two duties, namely, if he lets the property he must obtain the proper market rent, and if he sells the property he must obtain the proper market price. The learned Vice-Chancellor gave illustration of a situation where the mortgagor could not raise enough money to pay off the debt or the security available was not adequate, in which case the mortgagor would then be in the hands of the mortgagee. In such a situation, his Lordship questioned whether the mortgagee was at liberty to exercise his rights of leasing and sale in a way that in all likelihood would substantially increase the burden to the mortgagor beyond what otherwise would be the case. But, he expressed no opinion on that issue, except that the mortgagee was not to act in a `cavalier fashion`. However, whatever may be his opinion on that point, clearly he was of the view that when the power of sale arises the mortgagee `can sit back and do nothing` and `is not obliged to take steps to realise his security`.

23.In our opinion, ***Palk*** does not really support the argument of the appellant. That case must be understood in the context of the circumstances of the case. The defaulting mortgagors, unable to cope with the mounting arrears of instalments, managed to negotiate a private sale of the property for 283,000. But at that time, the amount required to redeem the property, including arrears, was 358,587. For this reason, the finance company refused to agree to the sale, and

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instead wished to let the house out on a short term lease and sell it at some future date when the property market improved. However, if the property was let out as suggested by the finance company, the rent generated from the property fell far below the amount of interest the mortgagors would save if the property was sold. What was before the court was not whether the finance company was in breach of its duty in deferring the sale. The mortgagors did not complain that the finance company was in breach and there was no such breach in issue there. The mortgagors invoked the jurisdiction of the court under s 91(2) of the Law of Property Act 1925. That section provides as follows:

> *In an action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding that - (a) any other person dissents; or (b) the mortgagee or any person so interested does not appear in the action; and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale and to secure performance of the terms.*

That section is identical in all material respects with s 30(2) of the Conveyancing and Law of Property Act (Cap 61, 1994 Ed). The question there was whether in all the circumstances it was fair and just that an order for sale should be made. The court, in considering the fairness and justice of the case, held that the court`s statutory powers overrode the right of the mortgagee and decided to exercise its discretion in favour of a sale, despite the fact that the mortgagors could only show a `negative equity`, and the mortgagee would be deprived of its contractual and statutory rights on the disposition of the security with a substantial part of the debt remaining unsecured and outstanding. Sir Donald Nicholls V-C said at p 340:

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> *In my view this is a case in which a sale should be directed even though there will be a deficiency. It is just and equitable to order a sale because otherwise unfairness and injustice will follow. I can summarise the four factors which combine to produce this result. First, there is a substantial income shortfall: the rental under the proposed letting would fall significantly short of the interest Mrs Palk would save if the house were sold. Second, the only prospect of recoupment of the shortfall lies in the hope that there will be a substantial rise in house prices generally. This is not a case where sale is being postponed for a reason specific to this property: for example, pending the outcome of an application for planning permission for development. Following on from this, third, on the scanty evidence before the court the likelihood of Mrs Palk suffering increased loss if the company`s plan proceeds is so high as to make the plan oppressive to her. Her liability is open-ended and will increase indefinitely. This risk of increased loss to her under her repayment obligation far outweighs the prospect of any gain the company may make from its proposed realisation scheme for the house. The one is unacceptably disproportionate to the other. Fourth, directing a sale will not preclude the mortgagee from having the opportunity to wait and see what happens to house prices. The mortgagee can buy the property. A mortgagee cannot buy property from itself, but here the sale is directed by the court; it is not a sale by a mortgagee in exercise of its own power of sale.*

And later he said at p 340:

> *[The mortgagee] is set upon realising its security, but in a way fraught with risks the borrowers ought not fairly to be expected to run. In the absence of a dramatic surge in house prices in the near future, [the mortgagee`s] preferred course will result in an increased deficit. The shortfall will increase every month. [The mortgagor] is personally liable for the whole debt and she will be personally liable for the shortfall. Her personal liability for the shortfall ought not to be increased in this way when there exists a means by which a fairer result can be achieved.*

24.On the facts of the present case, there was no evidence of any breach of any duty of care or failure to exercise prudence on the part of the respondents in relation to the sale of the property. The appellant was not justified in her complaint that the respondents exercised their power of sale much too late. If they had demanded payment of the amount owing in January or February 1997, or for that matter in March 1997, there would be complaint that they were

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unduly harsh, oppressive and unreasonable. It is with the benefit of hindsight that the appellant now says that the sale should have been made much earlier. The fact of the matter was that neither the appellant nor the respondents nor any other parties could have at that time foreseen the drastic decline in the property market which took place subsequently.

25. ***Conclusion***

In the result, this appeal fails and is dismissed with costs. The deposit as security for costs is to be paid to the respondents to account of costs.

Karthigesu JA
Tan Lee Meng J
L P Thean JA

Arthur Leolin Price QC and Jaganathan (JB Jeyaratnam & Co) for the appellant
Woo Bih Li SC and Koh Chia Ling (Bih Li & Lee) for the respondents

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