Sri Jaya (Sendirian) Berhad v RHB Bank Berhad
[2000] SGHC 206

Case Number : Suit 253/1999

Decision Date : 10 October 2000

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Denis Tan and Alvin Chang (Toh Tan & Pnrs) for the plaintiffs; Tan Bar Tien (BT Tan & Co) for the defendants

Parties : Sri Jaya (Sendirian) Berhad — RHB Bank Berhad

Companies – Lifting corporate veil – Whether plaintiffs' claim mala fide

Equity – Estoppel – Whether defence of estoppel made out – Lack of reliance on representation

Land – Mortgages – Mortgagee's sale – Whether mortgagee negligent in conduct of sale of mortgaged property – Whether mortgagee under duty to obtain valuation on "redevelopment basis" – Duty to obtain best price possible – Duty to publicise sale of property

: The plaintiffs, Sri Jaya (Sdn) Bhd (`Sri Jaya`) were the owners of a property in Paya Lebar Close (the `property`). The defendants, RHB Bank Bhd (`RHB Bank`) are a Malaysian bank with a Singapore branch. In October 1969, Sri Jaya mortgaged the property to RHB Bank and obtained a loan of nearly $1.5m to construct two blocks of flats - one consisting of 15 units and the other consisting of 32 units - on the property.

Chip Hua Contractors Pte Ltd (`Chip Hua`), whose shareholders were Ng Kheng Chye, Ng Keng Thye and members of their family (`the Ngs`) were the sub-contractors for the construction of the two blocks of flats. Sri Jaya had difficulty in paying Chip Hua the construction costs. To resolve this difficulty, Sri Jaya, by an agreement for lease dated 11 June 1975 (`lease agreement`) granted to Chip Hua a 199-year lease for the 32-unit block for a consideration of $912,000. Chip Hua, upon obtaining the leasehold interest, sold off the units in the 32-unit block to various purchasers (`the occupants`). It appears that Sri Jaya sold the other block to a Malay co-operative society which in turn sold the 15 units therein to its members (`the occupants`).

Disputes arose between Sri Jaya and Chip Hua over the lease agreement. An action was commenced in the High Court by Sri Jaya which culminated when the Court of Appeal, in 1992, gave judgment in favour of Chip Hua with damages to be assessed.

The sale of the leasehold interest to Chip Hua and the sale of the 15-unit block to members of the Malay co-operative society had, contrary to the terms of the mortgage agreement with RHB Bank, been entered into without the knowledge and consent of RHB Bank. The various sums of moneys received by Sri Jaya from the sales were also, in breach of the mortgage terms, not used to pay off the outstandings under the mortgage. RHB Bank therefore, in October 1983, commenced proceedings against Sri Jaya for these breaches. The suit was heard in October 1991. At the hearing, a consent judgment was entered against Sri Jaya for the sum of $2.8m and an order was made that the property be sold by RHB Bank.

RHB Bank, after obtaining the judgment, tried to negotiate with the occupants to obtain vacant possession. These negotiations were not successful and RHB Bank, in September 1993, commenced legal proceedings to evict the occupants. Soon thereafter RHB Bank decided that, rather than be involved in litigation with the occupants, it would be in RHB Bank`s interest to sell the property on an

`as is` basis.

From the end of 1993, RHB Bank began to receive offers for the sale of the property. RHB Bank did not advertise the property for sale for fear that that might prompt the occupants into taking action to block any sale. On 31 December 1993, Ng Kheng Chye procured Chrisvin, another company which belonged to the Ngs, to write directly to Sri Jaya offering to buy the property at $6.3m. Sometime in early 1994, Ng Kheng Chye learnt from one Lim Fong (whom he knew to be a property speculator) that the latter was negotiating with RHB Bank`s solicitors to buy the property. He therefore instructed his solicitors to make an offer of $6.3m on behalf of Chrisvin to Mr Tan Bar Tien (`Mr Tan`) who was RHB Bank`s solicitor.

Mr Tan indicated a price of $8m for the property. Ng Kheng Chye felt that that price was too high as, to his knowledge, bids for the property were in the region of $6m. Ng Kheng Chye, however, was still interested in purchasing the property. He therefore made another offer of $6.5m through his nominee, Chua Tiong Loo (`Chua`), on 24 May 1994. This was the highest bid received by RHB Bank at that time. RHB Bank informed the next highest bidder, Housing Development Pte Ltd (`Housing Development`), that it had received a higher bid and, as a consequence, Housing Development increased its bid to $6.5m. On 31 May 1994, without reverting to Chua, RHB Bank sold the flats on an `as-is, en bloc` basis to the nominee of Housing Development - Win Supreme Investment (S) Pte Ltd (`Win`) - for $6.5m. At that time there were still some 44 occupants in the two blocks. Unaware that the property had, on 31 May 1994, been sold to Win, Ng Kheng Chye, in June 1994, through Chrisvin, made another written offer to buy the property at $6.3m.

The sale proceeds of $6.5m were not sufficient to discharge Sri Jaya`s outstandings to RHB Bank. In January 1995, RHB Bank sent a letter of demand to Sri Jaya for $795,087.19 being the shortfall and accrued interest due to RHB Bank. As Sri Jaya had no assets RHB Bank did not pursue the matter further.

At the time of the sale to Win, the property had an approved plot ratio of 2.072. In August 1994, the authorities released a new Development Guide Plan under which the plot ratio of the property was increased to 2.8. On 4 August 1994, the Urban Redevelopment Authority granted provisional permission for a 12-storey condominium with an approved plot ratio of 2.9176 on the property.

In August 1994, within three months of the sale by RHB Bank to Win, Win re-sold the property to a Lim Kim Yan for $14m. Lim Kim Yan in turn re-sold the property, the same day, to Hillwood Development Pte Ltd (`Hillwood Development`) for $27m. Hillwood Development was a company owned by the Ngs.

The Ngs remained interested in Sri Jaya as Chip Hua`s judgment against Sri Jaya was still unsatisfied. Ng Kheng Chye told the court that he had heard certain rumours regarding RHB Bank`s sale of the property to Win. He felt that the property had been sold to Win at an under-value. He also felt aggrieved that he had not been given an opportunity to better his bid. He therefore instructed valuers to do a retrospective valuation of the property.

At all relevant times, Sri Jaya had been managed by a prominent Singapore lawyer, Tan Sri Syed Esa Almenoar. It was in evidence that at a meeting with RHB Bank officials (before higher bids came in) Tan Sri Almenoar had indicated his agreement to the property being sold to Chrisvin at $6.3m. Tan Sri Almenoar passed away in November 1994. From about the time of his demise, Sri Jaya was a dormant company.

In April 1998, Ng Kheng Chye approached the two shareholders of Sri Jaya at that time - one Salleh

bin Mat and one Abdul Kadir bin Haji Manjoorshah - and they agreed to transfer their shares in Sri Jaya to the Ngs. The evidence before me was that this transfer was made gratis.

At the time of the trial before me, vacant possession of all the units on the property had been obtained and the development of a condominium was underway.

Lydia Sng, a director of Knight Frank Pte Ltd (`Knight Frank`), a firm of valuers and estate agents, was called by Sri Jaya as an expert witness on property values. She testified that the open market value of the property as at 31 May 1994 on an `encumbered` basis was $25.5m based on its `highest and best use` as a residential redevelopment site. Knight Frank had been informed that there were 47 occupants on the property and that the developer, Hillwood Development, had paid about $5m as compensation to the occupants to vacate the property.

Lydia Sng, in arriving at a valuation at $25.5m on a `highest and best use` basis, used an assumed approved plot density of 2.772, even though the property, as at 31 May 1994, had a lesser approved plot density of 2.072. Lydia Sng had used the higher plot density of 2.772 on the basis that the higher plot density was physically achievable given the plot size and she was of the view that it was a fair basis to adopt for a `highest and best use` valuation given the guidelines from the authorities as to how much one can exceed the approved plot density when applying to the planning authority. In any event, Lydia Sng opined that even if the then existing density of 2.072 was used, the open market value of the property based on `highest and best use` as a residential redevelopment site was $20.5m as at 31 May 1994.

Sri Jaya tendered a second valuation report from Jones Lang Wootton Property Consultants Pte Ltd (`Jones Lang`), another firm of property valuers and consultants. This report valued the property as a redevelopment site at $24.75m as at 31 May 1994 on an `encumbered` basis, assuming a plot density ratio of 2.8 and assuming that $5m was payable to obtain vacant possession. If the then approved plot density of 2.072 was used, Jones Lang valued the property on a `redevelopment` basis at $19.475m as at 31 May 1994.

Conduct of sale

Ong Boon Hoo (`Ong`) was the bank officer in the employ of RHB Bank who overseered the mortgagee sale of the property. He was stationed in Kuala Lumpur, Malaysia. He became involved with the property from about July 1993. Ong, who said that he had some knowledge of the Singapore property market, relied mainly on RHB Bank`s Singapore solicitors and valuation reports on the property given to RHB Bank by the property consultant firm of Richard Ellis (Pte) Ltd (`Richard Ellis`), to form a view as to what price the property could fetch on the market.

In December 1992, RHB Bank had asked for a valuation of the property from Richard Ellis. Richard Ellis had at that time valued the open market value of the property at $4.6m on an `as is, en bloc` basis. As a residential redevelopment site Richard Ellis valued the property at $6.2m (based on the existing plot ratio of 2.072) on a `vacant possession` basis. RHB Bank had, at that time in 1992, asked for a valuation on a `redevelopment` basis as it had considered redeveloping the property itself. By July 1993, when Ong took over the matter, RHB Bank no longer considered redeveloping the property themselves as a viable option.

Ong sought a revaluation of the property in late 1993 and asked Richard Ellis for a desk-top revaluation, both on a with and without vacant possession basis. In Ong`s letter to Richard Ellis, he did not specifically mention that he wanted a revaluation on an `en bloc` basis only. Because of the

uncertainties arising from the fact that the units in the property had been sold, Richard Ellis told Ong that they were unable to provide a valuation on an `encumbered` basis. In March 1993, Richard Ellis revalued the property on an en bloc vacant possession basis at $5.85m.

The only step that Ong took to publicise the fact that RHB Bank wished to sell the property was to inform RHB Bank`s branches in Singapore that the property was for sale. He did not advertise the property as he was afraid that the occupants thereof, if they came to know of any proposed sale, might injunct the sale. No evidence was led as to how many branches RHB Bank had in Singapore or as to what steps those branches took to publicise the sale.

Although Housing Development`s bid of $6.5m was the same as Chua`s bid of $6.5m, Ong recommended to his superiors that the property be sold to Housing Development. He did so because he was satisfied that Housing Development were financially sound and had shown themselves to be serious bidders. Ong told the court that Housing Development had also verbally informed him that $6.5m was their final bid. As for Chua`s offer, Ong said that Chua`s representative, a Mr Lee, had told him at the time of the offer that Chua would not increase his offer beyond $6.5m.

At the time of the sale of the property the two blocks of flats were in a state of disrepair. A statutory notice to repair had been issued by the Building Control Division in May 1990 to rectify the columns but the notice had not been complied with. Shortly before the sale to Win, RHB Bank had also received a letter from the Land Dealings (Approval) Unit on 20 May 1994 asking for their plans for disposing of the property as Sri Jaya were a foreign company. Ong felt that the property was in some danger of repossession. He therefore felt that it was time to close the bidding process as it had been going on for some months.

In December 1999, for purposes of the pending litigation, RHB Bank instructed Richard Ellis to give a retrospective valuation of the property as a residential redevelopment site at May 1994. Richard Ellis valued the property, assuming the benefit of vacant possession, at $15.54m (based on the then existing plot ratio of 2.072).

Sri Jaya`s case

In their amended statement of caim, Sri Jaya pleaded that RHB Bank had been negligent in relying on a valuation of the property based on existing use of the flats as that valuation did not represent its `highest and best use` value. It was pleaded that RHB Bank were negligent in:

(a) failing to take reasonable steps to obtain the true market value of the property;

(b) not reasonably publicising the sale of the property to attract a wider base of potential purchasers;

(c) failing to obtain the best price reasonably possible by considering only five bids; and

(d) in view of the rising market conditions, failing to make reasonable attempts to obtain a higher bid from the last two highest bidders and in not giving an opportunity to the other intending purchasers to make higher bids.

In their closing submissions, Sri Jaya summarised their case of negligence under three main heads. They said RHB Bank had been negligent because:

(a) they failed to obtain a proper valuation of the property based on its true market value. They should have obtained a valuation of the property as a redevelopment site in addition to the valuation of the flats as that would have enabled them to obtain a proper and correct reserve price;

(b) they failed to reasonably publicise the sale of the property to reach a wider market; and

(c) they failed to take reasonable precautions to obtain the best price reasonably possible in rushing to conclude the sale at $6.5m.

RHB Bank`s case

RHB Bank pleaded that they had taken all reasonable steps to obtain the true market value of the property by relying in good faith on an updated valuation report valuing the flats on an `en bloc and vacant possession` basis at $5.85m and that they had properly conducted themselves in the sale. They also said that Sri Jaya`s claim should fail because:

(a) Sri Jaya had consented to a sale at $6.3m to their nominated purchasers Chrisvin and were estopped from alleging negligence; and

(b) the present shareholders of Sri Jaya are related to the shareholders of Chip Hua and Chrisvin and they were using Sri Jaya`s name to conduct a mala fide claim against RHB Bank. In closing, they re-framed this argument and submitted that the court should lift the corporate veil and make a finding that Sri Jaya to the action was Chip Hua.

The issues

The issues before the court were:

(a) whether RHB Bank were negligent in relying on a valuation of the property on an `en bloc existing use` basis and in not obtaining a valuation on a `redevelopment` basis;

(b) whether RHB Bank were negligent in the manner in which they conducted the sale of the property and in selling the property for $6.5m;

(c) whether Sri Jaya were estopped from raising negligence; and

(d) whether the court should lift the corporate veil on the basis that the claim was a mala fide claim by Sri Jaya`s present shareholders who had a collateral interest in commencing the suit.

The law

Mortgagee`s duty when exercising power of sale

In **Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd** [1971] Ch 949[1971] 2 All ER 633, Salmon LJ laid down the scope of a mortgagee`s duty when exercising his power of sale (at [1971] Ch 949, 968-969; [1971] 2 All ER 633, 646):

> *... a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.*

The principle in ***Cuckmere*** `s case has been cited and approved in many local cases (**Good Property Land Development Pte Ltd v Societe Generale** [1989] SLR 229 [1989] 2 MLJ 14 and **Lee Nyet Khiong v Lee Nyet Yun Janet** [1997] 2 SLR 713).

Salmon LJ in ***Cuckmere*** `s case also stated that a mortgagee is not a trustee of the power of sale for the mortgagor. If the mortgagee`s interests conflict with those of the mortgagor, the mortgagee is entitled to give preference to his own interest. Where the mortgagee`s interest is not at risk, the mortgagee is not entitled to act in a manner that sacrifices the interests of the mortgagor (**Forsyth & Anor v Blundell & Anor** [1972-73] 129 CLR 477, cited with approval by the Singapore Court of Appeal in **How Seen Ghee v Development Bank of Singapore Ltd** [1994] 1 SLR 526 .

Sale by private treaty

When the power of sale has arisen, the mortgagee may sell the property by public auction or by private treaty (s 24(1)(a), Conveyancing and Law of Property Act (Cap 61)). In ***How Seen Ghee*** `s case, the Court of Appeal observed that an auction is not always the best way of securing a good price. In the Singapore Court of Appeal decision of **Ng Mui Mui v Indian Overseas Bank** [1984-1985] SLR 286 [1986] 1 MLJ 203 , it was held that the mortgagees are not obliged before a sale by private treaty to advertise the property for sale.

Reasonable precautions to obtain the true market value

An overview of some of the leading cases as to the factors taken into account by the courts in considering whether the mortgagee had acted reasonably in a mortgagee sale is instructive. In the Australian case of ***Forsyth v Blundell*** , the Australian High Court granted an injunction to restrain a mortgagee sale on the basis that the mortgagee had not acted in good faith. Although the mortgagor could not show that the sale was at an undervalue, the court found that the mortgagee has acted with calculated indifference to the interests of the mortgagor. The mortgagor had sold the property by private treaty when another genuinely interested bidder had expressed its intention to bid at a higher price at a proposed auction which was never held. The court held that the mortgagee had breached its duty to seek the best price available by failing to put the two potential buyers in competition with each other. This could have been done at the proposed auction or by giving the second interested buyer an opportunity to improve on the offer which had been received.

The Singapore High Court decision in ***Good Property Land*** concerned the mortgagee sale of the Meridien Hotel. The hotel had been valued at $147.6m and was tied to a long-term hotel management contract. It was sold by private treaty at $180.2m to Hotel Properties Ltd. The mortgagees had negotiated with various buyers and eventually decided to sell the property by closed tender to 43 selected brokers and hotel owners and operators at an undisclosed reserved price which would have covered the mortgagees` outstandings. While the tender was still open, the mortgagees cancelled the tender and sold the property for $180.2m. The other potential buyer, Forbin Ltd, offered to

increase their offer from $180m to $186m upon learning of the sale to Hotel Properties Ltd.

Chan Sek Keong J (as he then was), in deciding whether to grant an injunction to restrain the completion of the sale, observed that the allegations of the mortgagors (if proved) were capable of giving rise to a finding that the defendants had not acted merely negligently but also in bad faith. In holding that there was prima facie evidence of a breach by the mortgagees, he took into account the following:

(a) the mortgagees had sold the property without first obtaining a reliable valuation of the property from valuers with expertise in valuing a first-class hotel;

(b) there had been a phenomenal rise in the valuation and bids received for the property in the space of six months; and

(c) the mortgagees had failed to pit Hotel Properties Ltd against Forbin Ltd and there was the unnecessary and premature closing of the tender.

In ***Lee Nyet Khiong*** `s case, the sale by tender was advertised once in ***The Straits Times*** with a bare description of the property. At the close of the tender only one offer at $6.85m was received. The property was valued at $7m in the open market and $5.95m on a forced sale. After the close of the offer the mortgagor`s solicitors wrote to the mortgagees saying that they had received an offer of $7.1m from another buyer who was willing to pay an option fee of $100,000 with an option period of one month (which was not in accordance with the terms and conditions of the tender). The Singapore Court of Appeal held that the mortgagee had failed to take reasonable steps to obtain the best price and had acted with calculated indifference to the mortgagor`s interest:

(a) the fact that $6.85m was very near the valuation of the property was irrelevant as the issue was not whether the price at which the property was sold was reasonable but whether the mortgagee had taken reasonable efforts to obtain the best price in the circumstances;

(b) the efforts taken by the mortgagees to publicise the sale were wholly inadequate. The advertisement appeared only once and with a bare minimum of the description of the property. The mortgagees ought to have increased the number of advertisements and provide more details of the property as that would have attracted a wider pool of interested purchasers;

(c) as there were two interested purchasers, the mortgagees should have brought them into competition with each other to obtain the highest price and the mortgagees ought not to have discarded the $7.1m offer simply because they did not want to contract on the mortgagees` terms; and

(d) there was no risk of any loss to the mortgagees when they rushed to close the sale. The property market was healthy and, even if the option was not exercised by the bidder offering $7.1m, the mortgagees could put the property up for tender or auction again.

Failure to obtain a proper valuation

Sri Jaya`s case was that RHB Bank were negligent in failing to obtain a revaluation of the property on a `redevelopment` basis to determine the true market value of the property and that RHB Bank were negligent in relying only on a valuation based on an `en bloc existing use` basis. Sri Jaya`s case was not founded on any negligence on the part of the Richard Ellis valuation given on an `en bloc existing

use` basis and their case did not turn on the wide disparities in the various valuations of the property. There was no suggestion that RHB Bank`s valuer was negligent or the valuation not reliable. It is therefore not useful to go into a detailed analysis as to whether or which of the assumptions, data and variables on which the experts based their valuation were correct or which valuation should be preferred. Bearing in mind that valuation was not a science but an art and having regard to the evidence of the valuers as to how they arrived at their valuations, none of them could be said to be wrong or faulted in their methodology or valuations.

Having regard to all circumstances, I am of the view that RHB Bank were not under a duty to obtain a valuation on a `redevelopment` basis. The flats were in a run-down state at the time of the sale and it had not escaped the attention of RHB Bank that the property had redevelopment potential. However, this was quite a different thing from finding that RHB Bank, as mortgagees, were under a duty to require a valuation on a `redevelopment` basis before considering the price at which they were to sell the property.

Lydia Sng said that her valuation was based on Sri Jaya`s specific instructions to value on a `highest and best use` basis. When asked whether she would have used the `redevelopment` basis if the mortgagees had asked for a valuation for the purposes of a mortgagee`s sake, she was non-committal and said that as there would be such a wide disparity between the two bases of valuation she would discuss with the client which approach to take.

On a valuation on a `redevelopment` basis and using the same plot density ratio of 2.072, all the three valuers who testified (Knight Frank, Jones Lang and Richard Ellis) gave vastly different valuations of the property as at 31 May 1994. The valuations ranged from $15.54m (on a `vacant possession` basis) to $20.5m (on an `encumbered` basis). Ong said that he did not ask for a revaluation on a `redevelopment` basis as he found the methodology unreliable. I was of the view that Ong did not act unreasonably in coming to this conclusion and in not seeking a valuation on a `redevelopment` basis.

The issue here was whether RHB Bank (as mortgagees) should as reasonable mortgagees have obtained a valuation on a `redevelopment` basis before proceeding to sell the property. I am of the view that they were not in this case under any such obligation. To require a mortgagee to obtain a valuation on a `redevelopment` basis which requires various assumptions to be made on the variables and then to require the mortgagee to have regard to such a valuation before selling the property goes far beyond the scope of a mortgagee`s duty as set out in the existing case law and is unduly onerous on a mortgagee.

Failure to publicise sale/negligence in conduct of sale.

Sri Jaya`s case was that RHB Bank had failed to reasonably publicise the sale or to take reasonable precautions to obtain the best price before concluding the sale. Sri Jaya, in their closing submission, also argued that there had been a lack of transparency in RHB Bank`s dealings with the potential purchasers which gave rise to a suspicion of fraud. However, fraud had not been pleaded and I disregarded Sri Jaya`s arguments founded on this head and evaluated the evidence on the basis that Ong had not acted fraudulently.

I accepted Ong`s evidence describing the offers received. Some of the offers and revised offers were made to Sri Jaya directly and others to RHB Bank or their solicitors. It seemed also some of the revised offers emanated from the same principals but were made through different entities. The following is a summary of the offers received for the property from November 1994:

Date	Offeror	Bid	Details
8.11.93	Mod-Rise Construction Pte Ltd	$6m	Offer on a `vacant possession` basis first made to Sri Jaya by Hussein Abdullah.After discussion with RHB Bank, parties considered redeeming the property at $3.5m on an `as-is` basis. No earnest moneys paid.
22.11.93	Rawmat Sdn Bhd	$6m	Offer on a `vacant possession` basis. No earnest moneys paid.
29.12.93	Chrisvin Construction Pte Ltd	$6.3m	Offer first made to Sri Jayadirectly. No earnest moneys paid.
31.1.94	Tan Koo Chuan	$3.5m	Offer made to RHB Bank on an`as-is` basis. Earnest moneys paid.
2.2.94	Lim Fong	$3.5m	Offer made to RHB Bank on an `as-is` basis through Hussein Abdullah on behalf of Lim Fong. Earnest moneys paid.
1.3.94	Housing Development Pte Ltd	$4m	This was a revised offer from Tan Soo Chuan made through Housing Development.

7.3.94	Lim Fong	$4.1m	This was a revised offer made toRHB Bank through Hussein Abdullah. Earnest moneys topped up.
18.3.94	Chrisvin	$6.3m	This was a follow-up from Construction Chrisvin`s earlier offer to Sri Jaya Pte Ltd directly. This offer was made through Chrisvin`s solicitors to RHB Bank. No earnest moneys paid.
19.4.94	Housing Development Pte Ltd	$5.5m	Revised offer on an `as-is` basis. Earnest moneys topped up.
30.4.94	Eu Lu Fa	$6.32m	Offeror introduced by Lim Fong.Earnest moneys paid.
17.5.94	Housing Development Pte Ltd	$6.35m	Revised offer.
24.5.94	Chua Tiong Loo	$6.5m	Offer made to RHB Bank`ssolicitors on an `as-is` basis. Ng Kheng Chye said Chua was his nominee. Earnest moneys paid.
30.5.94	Housing Development Pte Ltd	$6.5m	Revised offer made. Earnest moneys topped up.

Ong said that Lim Fong`s offer of $4.1m made on 7 March 1994 was rejected by RHB Bank after Lim Fong refused to increase it. As regards Eu Lu Fa Development Pte Ltd`s (`Eu Lu Fa`) $6.32m offer, he had asked them to come up with a higher bid as their offer had been superseded but he was told that they were not prepared to bid higher. In Chua`s case, Ong had spoken to Chua`s representative

when the offer was first made and the representative had told him that $6.5m was the highest he would offer. Ong did not minute any of the telephone conversations nor was there any correspondence on these matters.

Ong recommended to his superiors that they accept Housing Development`s offer on 30 May 1994 as they had been the most sincere about pursuing the property since January 1994 and he had visited their other development sites in Singapore. On 31 May 1993, RHB Bank`s solicitors forwarded Chua`s offer and the earnest moneys to RHB Bank. The same day, the Sale and Purchase Agreement with Housing Development`s nominee, Win, was executed by RHB Bank.

Sri Jaya had sought to challenge Ong`s evidence mainly on the basis that Lim Fong, Eu Lu Fa and Chua were not given any opportunity to increase their offers for $4.1m, $6.32m and $6.5m respectively each time Housing Development made a better counter-offer.

I proceeded on the basis that Ong had acted honestly. Although I found him to be a truthful witness, he was recounting events that had taken place some six years back. There were no call memos or minute sheets that would provide evidence of his conversations with the various offerors or to refresh his memory. He was relying solely on his ability to recall the sequence of events and his tele-conversations from his memory. Various conversations would no doubt have taken place between Ong and various parties on the offers and counter-offers and it would be surprising if Ong could, some six years later, remember them in accurate detail.

In the case of Chua`s $6.5m offer, it seemed to me unlikely that Ong would, in his first conversation, ask Chua`s representative if he would bid higher, especially as at that time Chua`s $6.5m bid was the highest received thus far. I accepted Ng Kheng Chye`s evidence that Chua was his nominee, although RHB Bank were unaware of this. Ng Kheng Chye said that Ong did not give them a chance to improve on the $6.5m offer and they were unaware that the property had been sold to Win on 31 May 1994. Chrisvin`s offer of $6.3m, made after the sale to Win, was consistent with Ng Kheng Chye`s evidence that he was unaware of the counter-bid by Housing Development at $6.5m and the eventual sale to Win.

Having regard to all circumstances, I was not satisfied that Ong`s recollection of events was a reliable account of whom he had spoken to and what had been said in 1994, particularly of what had taken place in that period between Chua`s offer and the sale to Win. Having regard to all matters, it was doubtful that Ong had in fact approached Chua or his representative to seek a higher bid or that Eu Lu Fa had in fact been offered a chance to improve on their $6.32m offer after Housing Development made an improved bid of $6.35m.

In ***Ng Mui Mui*** `s case, the Court of Appeal held that there was no obligation on the part of the mortgagees to advertise the property before a sale by private treaty. In ***Lee Nyet Khiong*** `s case, the Court of Appeal held that the efforts taken by the mortgagees to publicise the property fell short of the standard expected from a mortgagee acting reasonably, as the mortgagees ought to have advertised more than just once and included a fuller description of the property in the advertisement to attract a wider pool of potential purchasers. It would appear that although there is no requirement for a mortgagee to advertise the property for sale, a mortgagee who chooses to proceed to sell has to take reasonable steps to obtain the best price possible in the circumstances.

In the present case, the fact that RHB Bank had relied on Richard Ellis`s desk-top valuation of $5.85m and that the property was sold above that valuation cannot, per se, absolve them from liability. ***Lee Nyet Khiong*** `s case made that clear. The issue to be addressed was whether RHB Bank had taken reasonable precautions to obtain the true market value in the circumstances.

In this case, all that RHB Bank had done to publicise the property was to ask RHB Bank`s branches to spread the word around that the property was for sale. While I accepted Ong`s explanation that he did not want to advertise the property as that might alert the occupants, there were other ways Ong could have publicised the property for sale. He could, for instance, have entrusted the sale to firms such as Richard Ellis, Knight Frank and Jones Lang and with their experience and knowledge of likely buyers of such a property, those firms could have undertaken the task without public advertising. In my view, Ong took too passive a stance by waiting to be approached with offers. The passive approach adopted by RHB Bank resulted in a rather limited pool of buyers tendering for the property.

From the serious offers that were received (those where earnest moneys were paid), it would seem that many of the offers and revised offers were from a small pool of offerors. Some of the offerors were brought into the picture through other offerors or the same broker and it was difficult to say how many independent offerors there were. Hussein Abdullah first emerged as Mod-Rise Construction Pte Ltd`s representative and later on behalf of Lim Fong, and Lim Fong himself subsequently brought Eu Lu Fa into the picture. Housing Development was connected to Tan Koo Chuan, the first offeror at $3.5m to deposit earnest moneys. Chrisvin and Chua were connected to the Ngs.

There was no evidence that these offerors came to know that the property was for sale through any efforts of RHB Bank to publicise the property and it appeared that they came to know of the property through their own channels. Ong himself conceded that his Singapore branches told him that there were no interested parties as the property was encumbered. Ng Kheng Chye said he knew that the property was for sale through Lim Fong, one of the early bidders, and there was some evidence from the correspondence that Housing Development were first brought in through RHB Bank`s solicitors.

In February 1994, the land next to the property had been offered for tender by the government with a plot ratio of 2.5. This was a development that could be material to the price of the property but Ong was not aware of this. Ong was at all times stationed in Kuala Lumpur and had little knowledge of the Singapore property market. He also had limited experience in conducting mortgagee sales. Had the sale been entrusted to professional agents due note would have been taken of such factors.

Although there were other ways to sell the property other than handling it internally, Ong, despite his lack of familiarity and knowledge of the Singapore property market, could not be said to be negligent because he chose to handle the sale internally and sell by private treaty. However, in so proceeding, it was incumbent on Ong to take reasonable precautions to obtain the true market value of the property. This he failed to do. Merely spreading the information by word of mouth through RHB Bank`s branches was not sufficient as banks are not in the property business and the pool of interested purchasers would be limited.

Aside from the lack of efforts to publicise the property for sale, Ong also failed to give Chua an opportunity to improve on his $6.5m offer when Housing Development revised their offer to $6.5m the same day. Even if Chua`s representative had indicated to Ong at the outset that they were not willing to offer higher than $6.5m, I was of the view that when Ong received Housing Development`s rival bid which matched Chua`s bid, Ong (as a reasonable mortgagee) ought to have told Chua that his bid had been matched and give Chua an opportunity to improve on his offer. Even though Chua had come into the picture only in late May 1994, Chua was clearly a serious offeror as he had, upon request, deposited the earnest moneys and the other terms of his offer matched Housing Development`s.

Although Ong had perceived a risk of repossession from the Land Dealings (Approval) Unit, in my view this was more a perceived than real risk as the letter from said Unit quite clearly asked only for their

plans for disposal of the property. From Ong`s conduct at the end of May 1994, it seemed to me that he was waiting to close the matter with Housing Development so long as they emerged as the highest offeror. On 30 May 1994 itself, when Housing Development made a bid equal to Chua`s, the sale to Housing Development was approved on Ong`s recommendation and the sale agreement was signed the very next day. It was true that RHB Bank had been considering offers for some months and there would come a point where RHB Bank would be entitled to bring the bidding to a close. However, objectively, there was no real urgency to close the sale on 31 May 1994 itself.

Ong had also not given due consideration to the significance of the phenomenal rise in the amounts offered for the property over the short space of time. Housing Development had increased their offer from $3.5m at the end of January 1994 (first made through Tan Koo Chuan) to $6.5m in the space of four months. Although there was insufficient evidence to support Sri Jaya`s contention that there was a rising property market, I was satisfied that it would have been clear to a reasonable mortgagee that there was a healthy demand for the property.

Estoppel

RHB Bank raised a number of defences to Sri Jaya`s negligence claim. RHB Bank pointed out that in a letter dated 7 March 1994 Sri Jaya had requested RHB Bank to sell the property to Chrisvin for $6.3m without vacant possession. RHB Bank`s call memorandum dated 22 March 1994 also recorded a meeting between Sri Jaya and RHB Bank`s representatives whereby Tan Sri Almenoar had agreed to sell the property to Chrisvin for $6.3m. It was submitted on behalf of RHB Bank that as Sri Jaya had consented to the property being sold for $6.3m, Sri Jaya should now be estopped from saying that RHB Bank were negligent when they later sold the property at the higher price of $6.5m to Win.

For estoppel to arise the representation must be clear and unequivocal, the other party must have relied on the representation in the sense that the representation influenced his conduct and the parties cannot be restored to their original positions (***Chitty on Contracts*** (28th Ed), Vol 1, 3-080 to 3-092). Sri Jaya in their closing submissions conceded that if RHB Bank had in fact sold to Chrisvin at $6.3m, they would be estopped from suing RHB Bank.

I can dispose of RHB Bank`s estoppel defence on the `reliance` limb only. It was not any part of RHB Bank`s case that Sri Jaya`s consent to sell the property at $6.3m to Chrisvin had influenced the way RHB Bank had conducted the sale or the eventual sale to Win at $6.5m. The issue of Sri Jaya`s consent for the $6.3m sale appeared to be an ex post facto rationalisation as there was no evidence that Sri Jaya`s consent to sell the property at $6.3m to Chrisvin was a consideration at the time RHB Bank sold the property to Win for $6.5m. It would seem from Ong`s evidence that his main reasons for concluding the sale on 31 May 1994 at $6.5m to Win was that as the bidding had been going on for some time he wanted the bidding to come to a close to avoid losing the existing offerors and he had also perceived some threat of repossession in the letter from the Land Dealings (Approval) Unit. In such circumstances, RHB Bank could not avail themselves of the estoppel defence.

Lifting the corporate veil.

RHB Bank argued that Ng Kheng Chye had an ulterior motive in assuming control of Sri Jaya. The Chip Hua judgment against Sri Jaya arising from the Lease Agreement was still outstanding. It was submitted that Ng Kheng Chye`s claim, through Sri Jaya, was therefore a mala fide one as Ng Kheng Chye wanted to exert pressure on RHB Bank to make payment on a false allegation of negligence. It was also pointed out that the Ngs were associated with Chrisvin which was one of the unsuccessful

bidders for the property in 1994.

Apart from the statutory exceptions to the rule that the company is a separate legal entity from its shareholders and directors, the courts have, in limited circumstances, lifted the corporate veil. It would appear that this power is exercised sparingly and although the ambit of exceptions is not closed, the case law authorities as to when the courts have in fact lifted the corporate veil can be broadly classified as cases where the corporate entity is being used to evade legal obligations (**Gilford Motor Co Ltd v Horne** [1933] Ch 935) and where the corporate entity is used to perpetrate a fraud (**Re Darby** [1911] 1 KB 95).

Sri Jaya had been a dormant company from about the time Tan Sri Almenoar died in late 1994. It was a fair conclusion that Ng Kheng Chye, being the shrewd businessman that he was, assumed control of Sri Jaya with a view to commencing the present action against RHB Bank. However, even as such, Ng Kheng Chye`s actions and motives in assuming control of RHB Bank and commencing the present suit against RHB Bank cannot be characterised as fraudulent. Sri Jaya were not being used to evade any legal obligations or to perpetrate a fraud. If RHB Bank were negligent, Sri Jaya were fully entitled to pursue their legal rights even though its directors and shareholders were no longer the same and even though the present shareholders might have a collateral purpose in commencing the suit. The situation here did not fall within the existing principles of when a court will lift the corporate veil nor were there any compelling reasons advanced as to why I should, in this particular case, extend the ambit of the established exceptions.

Conclusion

Having regard to all the circumstances, I was of the view that RHB Bank had not taken reasonable precautions to obtain the true market value of the property and Ong`s handling of the sale fell below the standard of care required of reasonable mortgagees handling a mortgagee sale. In particular, I find that RHB Bank should have but failed to:

(a) conduct the sale in a manner that would attract a wider pool of potential purchasers; and

(b) put Chua in competition with Housing Development after Housing Development made the $6.5m offer that equalled Chua`s $6.5m offer.

I therefore give judgment for Sri Jaya.

Damages

The damages payable in a case like this can be somewhat difficult to assess. It was submitted on behalf of RHB Bank that because damages are difficult to assess only nominal damages should be awarded. I rejected that submission. Difficulty in assessing damages is not, by itself, a reason to award nominal damages. The court, from the material available, must strive to arrive at a measure of damages that would be fair to the parties.

In this case, it is reasonably clear, even from the identities of the parties who in fact bid for the property, that the property, encumbered as it was with occupants who had paid for their respective units but who would have to be evicted, would be of very little interest to individual buyers but would be of interest mainly to developers who would want to redevelop the site. Valuation on a `redevelopment` basis would therefore be an appropriate method, in this particular case, of obtaining

the true market value of the property. That the property`s maximum value was as a redevelopment site was, in this case, demonstrated (albeit after the event) by the fact that, Win, the initial buyer at $6.5m was a developer and the property was re-sold three months later to another developer, Hillwood Development, for $27m.

On a `redevelopment` basis and on the existing density, Richard Ellis, the expert valuer called by RHB Bank, valued the property at $15.54m on a `vacant possession` basis. This was the lowest of the valuations presented to the court. Mr Denis Tan, in his closing submission, told the court that he was prepared to accept that valuation of $15.54m as reflective of the true market value. RHB Bank was, however, selling the property on an `encumbered` basis and not on a `vacant possession` basis. It would therefore be necessary to discount from the vacant possession value the amount required to obtain vacant possession.

To estimate the amount required to obtain vacant possession can be a very difficult and highly speculative exercise. In 1994, just prior to the sale, Richard Ellis, when asked to give a desk-top value of the property if sold as individual units, had estimated the average value of each unit in the 32-unit block to be $140,000 and the average value of each unit in the 15-unit block to be $160,000 thus arriving at a figure of $5.85m (after discounting 15% for en bloc sale). This valuation was on the basis that RHB Bank was selling the units unencumbered with freehold title and with vacant possession. But RHB Bank was, however, in no position to effect any sales on that basis as the occupants had yet to be evicted.

Mr Denis Tan suggested that this figure of $5.85m for the en bloc sale of the property on a `vacant possession` basis would provide a generous estimate of the compensation payable to the occupants. These occupants, he submitted, had no title to their units because they had acquired their leasehold interest thereto without the consent of RHB Bank. The occupants would therefore have great difficulty in selling their leasehold interest. The scenario therefore was that for all practical purposes their units were unmarketable. Mr Denis Tan submitted that, in such a scenario, the valuation of $5.85m was a good guide to any purchaser of the property as to what would be the optimum amount they would reasonably have to pay to obtain vacant possession from the occupants as the valuation at $5.85m was on the basis that the units had freehold title, were unencumbered and were freely transferable.

I accept that submission by Mr Denis Tan. Whether the property was valued on a `redevelopment` basis or whether it was valued on an `existing use` basis the difficulty in obtaining vacant possession was a common factor. It is reasonable to assume, for the purposes of assessing damages, that occupants saddled with units that they cannot readily market would be willing to dispose of their units if the price offered was on the basis that the units were readily marketable and with freehold title. It would therefore be reasonable, in these circumstances, to treat the amount of $5.85m (even though it incorporated a 15% en bloc discount) as a sufficient measure of the compensation payable to the occupants in order to obtain vacant possession. Deducting this sum of $5.85m from the $15.54m valuation by Richard Ellis gives us $9.69m. That figure of $9.69m is, in my view, a reasonable estimate of the price that RHB Bank would have obtained for the property had RHB Bank properly marketed the property.

In the present case, RHB Bank had sold the property to Win for $6.5m. The damages suffered by Sri Jaya as a result of the negligent manner in which RHB Bank sold the property is therefore the difference between the two figures, namely, the sum of $3.19m. There is an outstanding amount still due from Sri Jaya to RHB Bank under the judgment obtained against Sri Jaya by RHB Bank. RHB Bank is entitled to deduct that amount (with interest - allowing a period of three months for completion - up to 31 August 1994) from the $3.19m. RHB Bank is to bear the costs of these proceedings and is to

pay interest on the balance due to Sri Jaya under this judgment at the rate of 3% per annum from the date of the writ.

Outcome:

Plaintiffs` claim allowed.