Roberto Building Material Pte Ltd & Others v Oversea-Chinese Banking Corporation Limited & Another
[2002] SGHC 291

Case Number : OS 1889/2000

Decision Date : 09 December 2002

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : N Sreenivasan,Joseph Liow and Cassandra Yak (Straits Law Practice LLC) for the plaintiffs; V K Rajah SC, Lee Eng Beng, Chio Yuen-Lyn and Ms Lynette Koh (Rajah & Tann) for the first defendant; Micheal Hwang SC, Edwin Tong, Prakash Pillai and Loong Tse Chuan (Allen & Gledhill) for the second defendant

Parties : —

Banking – Duty of mortgagee to mortgagor – Duty to act in good faith – Appointment of receiver and manager – Whether mortgagee acted in good faith in appointment of receiver and manager

Banking – Duty of mortgagee to mortgagor – Reasonable time to effect payment – The test of reasonable time – Whether mortgagee gave sufficient time to mortgagor to effect payment

Insolvency Law – Receiver and manager – Duty of receiver and manager – Equitable duty of care – Qualification of receiver and manager – Competence of receiver and manager

Judgment

GROUNDS OF DECISION

Introduction

1 This is an action commenced by a corporate borrower and mortgagor, and the guarantors who are shareholders in the corporate borrower owning all its issued and paid up shares. They claim damages against their bankers for allegedly breaching their equitable duty to act in good faith. They also claim against the receiver and manager for allegedly breaching his equitable duty of care when exercising the power of sale in relation to the manner in which he did so. At the conclusion of the trial, I dismissed the action against both defendants, the bank and the Receiver and Manager appointed by the bank. I ordered that the costs of the first defendants be on an indemnity basis and I issued a certificate for two solicitors in respect of the costs of both defendants. I now set out the material circumstances and the reasons for my decisions.

Parties

2 The 1st plaintiff ("the company") is a company incorporated in Singapore. Its primary business is the supply of building materials, tiles in particular, to local and foreign construction companies. The 2nd, 3rd and 4th plaintiffs are directors of the company. The 2nd, 3rd and 4th plaintiffs collectively own 100% of the paid up of $5 million of the company. Prior to the receivership of the company, the 2nd plaintiff, Mr Tan Heng Yong, was in control of the business of the company. The 3rd and 4th plaintiffs are the wife and brother respectively of Mr Tan Heng Yong.

3 The 1st defendant, ("OCBC") is an established bank in Singapore, appointed the 2nd defendant ("Mr Don Ho") on 22 April 2000 April 2000 to be the Receiver and Manager ("R&M") of the company in respect of the property, assets and undertakings charged under a Deed of Debenture dated 8 May 1999.

The factual matrix

4 The factual matrix was not substantially disputed and in my view it is accurately set out in the closing submissions of OCBC as follows. Sometime in November 1995, Four Seas Bank Ltd granted banking facilities of $31 million to the company. As security, the company executed a first mortgage over the property at 7 Tai Seng Drive, Singapore ("the mortgaged property") which was built to house the company's business operations. The banking facilities were also personally guaranteed by the Mr Tan Heng Yong, 3rd and 4th defendants pursuant to a joint and several letter of guarantee dated 13 March 1996. On 12 May 1998 Four Seas Bank Ltd was merged with OCBC; it is not disputed that all rights and interests of Four Seas Bank Ltd were vested in OCBC.

5 In May 1998 the sums owed by the company stood at $33,100,000.00 which was about $2 million above the limit of $31 million. In June and July 1998, at the request of OCBC, the company managed to reduce the outstanding sums to about $31 million.

6 Subsequently, OCBC required the liabilities to be reduced by a further $3 million by way of a monthly reduction of $600,000.00 for 5 months, commencing 31 August 1998. The company accepted this requirement and stated that it was committed to lowering its borrowing by a further $3 million, but requested that the monthly reductions should start on 30 September 1998 instead of 31 August 1998. OCBC agreed to this request. The company also requested that there be no further reduction of the credit line. However, OCBC expressly declined to give any such commitment.

7 On 16 December 1998 the company appointed Price Waterhouse ("PW") as its financial consultant to conduct a financial evaluation of the company. On 5 March 1999, OCBC"s Mr Martin Chua attended a meeting with representatives of PW. PW reported that there were major operational and financial issues in relation to the company's business, including an excessive level of stocks and lack of proper cash flow management.

8 OCBC concluded that the company should provide further security in addition to the mortgage over the mortgaged property. As the company was holding vast quantities of stocks and a high level of uncollected receivables, the most obvious and appropriate form of additional security the company could provide was to grant a fixed and floating charge over the assets of the company in favour of OCBC. The grant of the fixed and floating charge was also recommended by PW.

9 At a meeting on 6 March 1999, OCBC informed the company that it required the company to execute a debenture giving fixed and floating charges over its assets and undertaking in favour of OCBC. OCBC also emphasized to Mr Tan Heng Yong of the company that he needed to urgently look into improving the cash flows of the company and that the company's high levels of stock had to be reduced. The debenture was executed by the company on 5 May 1999.

10 On 1 April 1999 OCBC internally decided on a strategy in relation to the management of the company's account. It was decided that the company would restructure the banking facilities granted to the company subject to the company committing to take the action steps recommended by PW.

1 1 Contemporaneously or thereabouts, PW's Financial Evaluation Report dated 31 March 1999 had made the following recommendations:

> (a) Implementation of new inventory holding policies to reduce the level of inventory and avoid stock obsolescence;
>
> (b) implementation of additional credit controls to reduce the bad and doubtful debts;
>
> (c) a fixed and floating charge over the company's remaining assets should be granted to OCBC to enhance security cover and avoid penalty interest being payable; and
>
> (d) certain initiatives were to be put in place to generate additional funds of $3.9 million which were to be used to repay OCBC.

12 At a meeting on 5 May 1999 Mr Tan Heng Yong of the company and representatives of PW and OCBC discussed PW's recommendations that the company should look into improving the cash flows for the business through a stock reduction programme and a more stringent credit control policy to recover the company's receivables. PW informed the company that OCBC would consider restructuring the banking facilities in due course if the company continued to take steps recommended by PW and reasonably met the targets and/or objectives set, when there were stock reductions and improved collection of receivables.

13 On the evidence, in May and June 1999, OCBC's intention was to monitor the situation and, if the company implemented the recommendations of PW and reduced the outstanding sums by at least $950,000 by the end of the September 1999 through run down of old inventory and collection of overdue receivables, OCBC would consider restructuring of part of the overdraft facility into a term loan in the latter part of 1999. This strategy was recorded in OCBC's credit strategy memorandum dated 1 June 1999. As recommended by PW, the company executed a debenture on 5 May 1999 in favour of OCBC to improve the security cover to OCBC.

14 I now come to the company's failure to comply with the PW recommendations. At the next meeting on 4 June 1999, PW's representatives had a discussion with OCBC's officers prior to the arrival of Mr Tan Heng Yong and advised that the company's stocks had actually increased and that, although the amount owed by debtors had decreased, such decreased was attributable to write-offs rather than actual collections. When Mr Tan Heng Yong joined the meeting, he was informed that OCBC was not happy with the progress of the stock reduction and was shocked to hear that, instead of stock reduction, there had been new purchases of $3.8 million. The representatives of OCBC reminded Mr Tan Heng Yong that OCBC would not continue to support the company if no significant reduction in stocks was made, and told the company that OCBC wanted the stocks to be reduced by at least $750,000 per month commencing June 1999.

15 On 29 June 1999, OCBC's officers had a meeting with PW and was informed that the company would be purchasing another $3 million in stocks. This was contrary to the reduction of $750,000 per month required by OCBC and advice to the company at its previous meeting. On 1 July 1999 OCBC concluded that the company was not serious in implementing the PW recommendations and OCBC suspended the credit line of the company.

16 Mr Tan Heng Yong and OCBC's officers met on 5 July 1999. He asked if OCBC would support the company and look into the restructuring of the banking facilities. OCBC's officers replied that it had yet to see the company implementing the recommendations of PW. According to Ms Goh Hooi Khim, the then Head of the Non-Performing Asset Management Unit of OCBC, Mr Tan Heng Yong then asked whether OCBC would agree to another bank taking over the company's banking facilities and OCBC officers replied that OCBC would be happy for the company to do so. Mr Tan on the other hand claimed that it was a requirement of Ms Goh. I am persuaded to accept Ms Goh's version: the contemporaneous minute reflected this and this was consistent with a letter of 16 July 1999 written by OCBC. A time frame of 6 months was indicated. By letter of 16 July 1999 OCBC granted the company till 30 September 1999 to provide OCBC with satisfactory evidence of a commitment from another financial institution for the full refinancing of all amounts owing by the company to OCBC.

17 In August, 1999 another piece unsatisfactory news, hardly capable of inspiring confidence in any banker, came to the notice of OCBC. The company's Directors' Report and Audited Financial Statements for the year ended 31 March 1998 were issued. In the report of the company's auditors, Ernst & Young, on the company's financial statements, it was stated that the auditors could not satisfy themselves as to the stock quantities and their value as at 31 March 1998 and the adequacy of the provision for stock obsolescence by other audit procedures. It was also pointed out that the company had incurred a net loss of $4.8 million for the year ended 31 March 1998 and its current liabilities exceeded its current assets by $13.2 million, and that these factors raised substantial doubt that the company would be able to continue as a going concern. The Notes to the Accounts further stated that $469,293.00 in bad debts had been written off and a substantial provision of $5.5 million had been made for doubtful debts.

18 The company was reminded in late September, 1999 to reduce the levels of inventory and the receivables and was informed that OCBC was willing to consider restructuring the banking facilities only if the company took steps to address the issue. By 30 September, 1999 the company failed to procure alternative refinancing and sought an extension to 30 November 1999. OCBC agreed.

19 On or about June 1999 the company appointed Mr Francis Lee from Corporate Venture Pte Ltd as its consultant. His mandate was to rescue the company and in his meeting with OCBC he indicated that he was studying the company's financials before he could work towards obtaining a firm commitment from potential bankers or investors. On 9 November 1999, Mr Tan Heng Yong met with

representatives from PW and OCBC and again they requested for extension of time to procure alternative re-financing. OCBC informed the company verbally through Mr Tan Heng Yong and in a letter that refinancing had to be secured by 31 December 1999. By 31 December 1999, however, the company failed to provide any evidence and the company did not give any explanation for its failure to do so.

20 In early 2000 two developments placed OCBC's security in the mortgage in jeopardy. On 15 January 2000 OCBC received a letter from the Inland Revenue Authority of Singapore ("IRAS") that there was outstanding property tax of $884,102.91 in respect of the mortgaged property and that, if no payment of the tax arrears of $664,862.91 was received by 21 January 2000, action would be taken to sell the mortgaged property. On 22 February 2000 OCBC also received another letter from Jurong Town Corporation ("JTC"), the lessor of the mortgaged property, that if the sum of $366,766.53 in arrears of rent was not paid within 48 hours, JTC would assume that OCBC was forfeiting its rights as mortgages and legal proceedings would be instituted against the company to recover all sums due and to take possession of the mortgage property. As JTC was legally entitled to forfeit the lease and extinguish OCBC's security over the mortgaged property OCBC had no alternative but to pay the outstanding rent arrears of $366,766.53.

21 The company failed to keep their commitments. It had written to PW on 26 December 1999 indicating that it would be receiving the sum of $1,061,984.49 by the end of January 2000 and the sum of $1,973,169.04 by the end of March 2000 and that it would forward these sums directly to OCBC. ON 6 March 2000 the company wrote to OCBC and informed OCBC that it was expecting the sum of $150,000 on or about 15 March 2000 from one of its customers. The company also provided OCBC a schedule of expected collections of its receivables for the period from 4 February 2000 to 31 March 2000. Apart from two payments totaling $66,000.00 the company failed to make any of the payments promised. In the circumstances, OCBC wrote to the company firmly indicating that if the company failed to pay the sum of $2,998,840.31 being the total collections indicated by the company less the payments by 31 March 2000, failing which OCBC would have no alternative but to take steps to protect their interests. The company failed to comply with the notice.

22 When the company failed to pay the promised sums, OCBC decided to enforce its rights as mortgagee and appoint a receiver and manager. The reasons behind the decision was recorded in an internal memorandum. By letters dated 3 April 2000 to the company OCBC made demands against the plaintiffs for the outstanding sum of $32,921,485.06 as at 31 March 2000. It gave the plaintiffs 14 days to make payment. Not unexpectedly, the company and the individual guarantors, namely the 1st, 2nd, 3rd and 4th plaintiffs, failed to pay.

23 By letter of 11 April 2000 Ernst & Young ("EY"), who had been appointed as the company's auditors in March/April 1998, informed OCBC that DTZ Debenham Yie Leung ("DTZ") had been appointed to sell the mortgaged property and that there was a potential purchaser. By a further letter of 17 April 2000 EY informed OCBC that DTZ found two prospective purchasers for the mortgaged property, namely Singapore Telecommunication Ltd and Chelsfield plc, acting on behalf of Global Switch s.a.r.l. EY informed OCBC that the company had advised it that Chelsfield was scheduled to revert with an offer for the mortgaged property on Thursday, 20 April 2000. However, OCBC did not receive any offer from Chelsfield plc on 20 April 2000 nor any other serious indication of interest.

24 On 22 April 2000 (Saturday), OCBC exercised its rights under the debenture and appointed the 2nd defendant, Mr Don Ho Mun-Tuke.

25 The plaintiffs alleged in this case that OCBC had been so recklessly indifferent that such reckless indifference amounted to bad faith on its part. They further made the crucial allegation that the appointment of the receiver and manager caused Chelsfield plc to loose complete interest in the mortgaged property. This basic allegation of the plaintiffs was not at all borne out by the evidence. The truth of the matter was that according to Mr Shaun Poh of DTZ, who were marketing the mortgaged property for the company, Chelsfield plc bought a neighbouring building instead. Chelsfield plc was in Singapore to buy more than one industrial building. In my judgment, the appointment of the receiver and manager did not derail the prospective sale to Chelsfield plc; at the worst, the appointment might have depressed the price, but that was not the basis of the complaint of the plaintiffs.

26 The evidence disclosed that appointment of the receiver and manager was made after all relevant considerations were taken into account. In my view, OCBC had no viable alternative and had to protect its own interest. On behalf of the plaintiffs, attention was drawn to an internal e-mail of 26 April 2000 sent by Mr Gregory Pau to Ms Goh Hooi Kim. That e-mail contained an analysis of the issues by Mr Pau and he engaged in scenario planning when he stated that OCBC would still recover if the sale price was to fall as low as $23 million. Upon this narrow basis, the submission was made that OCBC did not care if it "spooked" the prospective sale so long as it obtained $23 million for the mortgaged property.

27 Mr Francis Lee, in giving evidence for the plaintiffs, testified that on 24 April 2000 he met with Mr Don Ho and suggested that OCBC withdrew the appointment of the receiver and manager to enable the prospective sale of the mortgaged property to Chelsfield plc to materialize. He also suggested that Mr Don Ho could be constituted a 'Special Accountant' with special powers to protect the interests of OCBC. OCBC took legal advice and rejected the suggestion. It was seen as an private arrangement which did not satisfy OCBC's desire to seek protection under the statutory scheme of receivership and it was not prepared to be a party to such an alternative arrangement. In any case, Mr Lee's suggestion had a rather short life-span because the company and the other plaintiffs by their solicitors' letter of 27 April 2000 offered the payment of $1 million to OCBC by cashier's order if OCBC would in return terminate the receivership for a period of 45 days in order to secure the sale of the mortgaged property to Chelsfield plc's principal, Global Switch. OCBC explained that it was not prepared to undertake that exposure.

28 Following his appointment as receiver and manager, Mr Don Ho examined the financial state of affairs of the company and considered the future course of the receivership. Very quickly, he came to the conclusion that the company was a loss-making concern, as it had been for a few years preceding his appointment. The management accounts made up to 30 March 2000 showed that the company had net book current liabilities amounting to $3,592,714.68. The audited accounts and the draft audited accounts for the years 1998 and 1999 showed that the company had made losses of $4,819,198.00 and $4,574,089.00 respectively. Further, the company's sales orders were declining and from October 2000 onwards, the sales of the company did not even match the overheads of the company. According to PW's Information Memorandum the following were the financial data of the company:

> (a) though the stock had a book value of $20.7 million, a provision of $4.6 million had to be made for stock obsolesce;
>
> (b) $5.1 million or 42% of the total trade debts of $12.1 million were doubtful debts and had to be provided for against the backdrop of poor credit controls and poor recoverability of export sales;
>
> (c) there were receivables amounting to $2.2 million (half of which had been outstanding by more than 720 days) owed by Roberto Building Material (Brunei) Sdn Bhd and Roberto Cambodia Co Ltd [Mr Tan had a personal interest in these debtors as he was prepared to provide a personal guarantee for the outstanding amounts];
>
> (d) the company's turnover had declined significantly from $42.7 million for year ended 31 March 1998 to a projected $27 million for the ensuing financial year ended; and
>
> (e) trust receipts had been overdue since September 1997 and the total amount of $14.3 million was owing on such overdue trust receipts.

29 It is settled law that the receiver is not obliged to carry on business. He can decide instead to close it down. In making these decisions he is entitled to have regard to the interests of the debenture holder. As stated in *Medforth v Blake* [2000] Ch 86 at 93: "Provided he acts in good faith, he is entitled to sacrifice the interests of the mortgagee in pursuit of that end". The same principle applies in the case of the debenture holder. There is no evidence of any lack of good faith on the part of Mr Don Ho. He sold the stocks according to expert auctioneer advice at public auctions. Mr Tan gave such assistance as he could. Mr Don Ho wound up the business of the company as efficiently as he could. It was further alleged that he had failed to realize payment of concluded contracts for the sale of tiles to one Top Treasure International Ltd ("Top Treasure") of US$1.2 million and US$1.8 million dated 18 April 2000. The plaintiffs further alleged that Mr Don Ho failed to realise payment on an outstanding letter of credit of $1,982,400.00. The two contracts were not disclosed by Mr Tan and Mr Don Ho did not know anything about them at the material time. I am of the view that Mr Tan must bear responsibility if the contracts were valid and enforceable. As for the letter of credit, the credit would only be available if the company had delivered the tiles to the warehouse nominated by the accountee of the letter of credit. No such delivery by the company had been effected for the simple reason that the alleged buyers did not nominate the warehouse to which delivery of the tiles could be made. As this pre-condition was not satisfied, there was no question of

Mr Don Ho having failed to negotiate the letter of credit. Nor could Mr Don Ho be criticised for not taking any legal action. Mr Tan's reliability as an ally in any such litigation was in doubt and it was reasonable to have entertained such doubts. To say the least, Mr Tan was in a state of denial so far as the parlous financial affairs of the company were concerned.

30 Turning to the plaintiffs' case against OCBC, it has been pared down substantially at the trial. In summary, there were three complaints. First, OCBC had acted with reckless indifference to the rights and interests of the plaintiffs when it decided to appoint the receiver and manager. Alternatively, its decision was outside the range of decisions a reasonable commercial man would have made. On either or both bases, OCBC did not act in good faith. The second complaint was that in serving the letter of demand on 3 April 2000 and appointing the receiver and manager on 22 April 2000, OCBC did not give the company reasonable time to repay the sums owed to it. This complaint raises the important issue whether the law in Singapore is predicated upon the stricter and more certain 'mechanics of payment' test or a more malleable concept of 'reasonable time' which should be defined by reference to all the circumstances. Thirdly, the plaintiffs alleged that in choosing to appoint Mr Don Ho as the receiver and manager OCBC was liable to the plaintiffs for not appointing a competent and qualified person possessing the special skills required to run and manage the company's business which was highly specialised.

31 I turn to the first complaint. It was common ground that a mortgagee or security holder, in exercising his powers under the mortgage or security, owes a general duty of good faith. It was also common ground that there was no general duty of reasonable care to consider or have regard to the interests of the mortgagor or its guarantors. A useful summary is in the judgment of the Privy Council in *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, 312:

> "Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is Security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower."

32 The duty to exercise his powers in good faith applies to a debenture holder when appointing a receiver and manager. *In Shamji v Johnson Matthey Bankers Ltd* [1991] BCLC 36, it was alleged that on the day that the debenture holder appointed a receiver or on the day before, the borrower had informed the debenture holder that another bank was prepared to provide funds of 14,600,000 to partially discharge the debt of 22 million. The guarantor of the loan sued the debenture holder and applied to amend his statement of claim to incorporate the following contentions:

> (a) the debenture holder was under a duty of care to consider all relevant matters before appointing any receiver and manager;
>
> (b) no reasonable banker would have refused to allow negotiations with the other bank to continue with a view to that bank discharging the liability of 14,600,000 and to postpone until that date appointing a receiver and manager;
>
> (c) the debenture holder owed the guarantor of the loan a duty of care to take reasonable steps to ensure that its recovery against the corporate borrower was maximised and so its recovery against the guarantee was minimized; and
>
> (d) the debenture holder, in failing to consider the information as to the refinancing, breached its duty of care in that the likely recovery against the corporate borrower would be less than the sum available from the refinancing.

33 The trial judge in refusing the amendments drew a clear line between a mortgagee or security holder exercising the power to appoint a receiver on the one hand and a mortgagee or receiver exercising the power to sell the property under mortgage on the other hand. He noted that

the former situation involved a conflict of interests between those of the mortgagee on the one hand and those of the borrower on the other. The mortgagee or security holder has to take steps to protect its interest whereas the mortgagor or borrower would attempt to retain possession of the property or business charged under the security. It must follow that that the mortgagee or security holder is entitled to have regard only to his own interests. In the latter scenario, both the mortgagee and the mortgagor share the common interest of wanting to secure the highest possible price that the market would pay for the property or business mortgaged or charged. The trial judge said: "The appointment of a receiver seems to me to involve an inherent conflict of interest. The purpose of the power is to enable the mortgagee to take the management of the company's property out of the hands of the directors and entrust it to a person of the mortgagee's choice. That power is granted to the mortgagee by the security documents in completely unqualified terms. *It seems to me that a decision by the mortgagee to exercise the power cannot be challenged except perhaps on grounds of bad faith. There is no room for the implication of a term that the mortgagee shall be under a duty to the mortgagor to "consider all relevant matters" before exercising the power."*

34 I was told that Hoffmann J (as he then was) had earlier made pronouncements to the like effect in the *Re Porters Oils Ltd* [1986] 1 WLR 201, 206: "The debenture holder is under no duty to refrain from exercising his rights merely because to exercise them may cause loss to the company or its unsecured creditors. He owes a duty of care to the company but this duty is qualified by being subordinated to the protection of his own interest."

35 With regard to the concept of good faith, the following passage of Sir Richard Scott in *Medforth v Blake* [1999] 3 WLR 922 bears reminder:

> "I do not think that the concept of good faith should be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith. It is sometimes said that recklessness is equivalent to intent. Shutting one's eyes deliberately to the consequences of what one is doing may make it impossible to deny an intention to bring about those consequences. Thereapart, however, the concepts of negligence on the one hand and fraud or bad faith on the other ought, in my view, to be kept strictly apart. Equity has always done so. The equitable doctrine of 'fraud upon the power' has little, if anything to do with fraud. Lord Herschell in *Kennedy v De Trafford* [1897] AV 180 gave an explanation of a lack of good faith that would have allowed conduct that was grossly negligent to have qualified notwithstanding that the consequences of the conduct were not intended. In my judgment, the breach of good faith should, in his area as in all others, require some dishonestly or improper motive, some element of bad faith, to be established."

36 As I had found earlier, the matters relied on by the plaintiffs to ground their allegations of bad faith on the part of OCBC when appointing the receiver and manager were insufficient. OCBC had to appoint as a matter of last resort; its security was being seriously jeopardised.

37 I turn next to the duty on the part of OCBC to give reasonable time to the company to effect payment. Otherwise, it could not be said that the company had failed to comply with the demand. Without that default, the power to appoint a receiver under the debenture could not have arisen and any appointment could not have been valid. In the context of this case, there was some dispute on what was meant by a reasonable time. Based on the Canadian case of *Mister Broadloom Corporation (1968) Ltd v Bank of Montreal* (1979) 25 OR (2d) 198, which was approved by the Supreme Court of Canada in *Ronald Elwyn Lister Ltd v Dunlop Canada Ltd* (1982) 135 DLR (3d) 1, it was submitted on behalf of the plaintiffs that what constituted a reasonable time for the purposes of a demand by a debenture holder depended on seven factors: (a) the amount of the loan; (b) the risk to the creditor of losing his money or security; (c) the length of the relationship between the debtor and the creditor; (d) the character and reputation of the debtor; (e) the potential ability to raise the money required in a short period; (f) the circumstances surrounding the demand for payment; and (g) any other relevant factors. The plaintiffs rely on *Moase Produce Ltd v Royal Bank of Canada* (1986) 50 Nfld & PEIR 168. But that case is miles away from the facts in this case. The facts in that case are self-evidently entirely exceptional. The bank had approved the debtors' repayment plan two days before the demand was served. There was only half an hour between the service of the demand and the seizure of the debtor's assets by the receiver. The debtor had not defaulted on any of its loans at the time the receiver was appointed. All these things happened against the background that the bank had applied pressure on the debtor to

execute an acknowledgement waiving its right to have reasonable time to pay and the debtor had executed the acknowledgement under duress.

38 As to the position under English law, which is dealt with in *Cripps (Pharmacenticals) Ltd v Wickenden* [1973] 1 WLR 944 and *Bank of Baroda v Panessar* [1987] 1 Ch 335, it is conveniently summarised in Lightman & Moss, The Law of Receivers and Administrators of Companies para 4-040 as follows:

> "Under English law, a series of first instance decisions have determined that a debenture-holder in respect of an 'on demand' facility need not give the company a reasonable time to pay before appointing a receiver. The company is merely to be allowed the necessary time during banking hours to implement the mechanics of payment by collecting or arranging for the transfer of the money from its bank or some other 'convenient place'. The company is not entitled to time to raise such money either from its bank or other sources unless such a right is expressly conferred or must necessarily be implied to give business efficacy to the loan agreement."

39 The Canadian approach, as has been pointed out in English and Australian cases, suffers from the difficulties and uncertainties in the formulation of what is unreasonable time in a commercial matter. The implementation of the 'mechanics of payment' test, which requires a short but adequate period, commends itself to the test of a 'reasonable time depending on all the circumstances of the case'. The latter test is imprecise and obviously capable of great controversy in implementation. To the creditor, the danger or risk of underestimating what is reasonable time is considerable; the consequences of such underestimation would mean the invalidity of any appointment of a receiver.

40 On the evidence, there was no doubt in my mind that the time given by OCBC to the company and the guarantors was entirely sufficient for them to have arranged repayment. That they failed to do so is no warrant for concluding that for that reason the time was not sufficient.

41 In relation to the third complaint, I have to say that this was the most unmeritorious assertion. Mr Don Ho is a Certified Public Accountant and an 'approved liquidator' as defined under section 4(1) of the Companies Act. As such he was qualified to be appointed a receiver and manager. He had acted in several cases as receivers and manager. He acted competently throughout the period of the receivership and management. In none of the instances complained of by the plaintiffs could I find any evidence that Mr Don Ho had fallen short of the standards and duty of care which he ought to have observed.

42 It was therefore in these circumstances and for these reasons that I dismissed the claims of the plaintiffs against both defendants.

Sgd:

Lai Kew Chai
Judge

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