Roberto Building Material Pte Ltd and Others v Oversea-Chinese Banking Corp and Another (No 2)
[2003] SGCA 30

Case Number : CA 100/2002

Decision Date : 16 July 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Tan Lee Meng J

Counsel Name(s) : Kenneth Tan SC, Ms Foo Jien Huei (Kenneth Tan Partnership) for Appellants; V K Rajah SC, Lee Eng Beng, Ms Chio Yuen Lyn (Rajah & Tann) for first Respondent; Michael Hwang SC, Edwin Tong (Allen & Gledhill) for second Respondent

Parties : Roberto Building Material Pte Ltd — Oversea-Chinese Banking Corp; Another respondent

Credit and Security – Remedies – Receivership – Scope of duties of lender owed towards debtor when appointing a receiver and manager

Credit and Security – Remedies – Receivership – Amount of time that lender must give debtor before appointing a receiver and manager

Companies – Receiver and manager – Scope of duties of receiver and manager owed towards mortgagor company

Delivered by Chao Hick Tin JA

1 This was an appeal by a borrower and three guarantors against a decision of the High Court dismissing their claims against the lender bank and the Receiver & Manager appointed by the bank pursuant to rights under a deed of debenture. The claims were in negligence. We heard the appeal on 19 May 2003 and dismissed it for lack of merit. We now give our reasons.

Background

2 The first appellant, Roberto Building Material Pte Ltd (Roberto), was a Singapore company previously engaged in the business of supplying materials to the building industry. The second, third and fourth appellants were the directors of Roberto and were also the guarantors of the debts owed by Roberto to the first respondent, the Oversea-Chinese Banking Corporation (OCBC), a local bank. The third and fourth appellants were the wife and brother respectively of the second appellant. The second respondent, Mr Don Ho, was the receiver and manager (hereinafter referred to as "the Receiver" or "Mr Ho" as may be appropriate), appointed by OCBC pursuant to powers under a deed of debenture.

3 Under a loan arrangement made with OCBC, Roberto was granted credit facilities of up to $31 million, in the form of overdraft, letters of credit and trust receipts. It was a term of the arrangement that the facilities were repayable upon demand. As agreed, two forms of security were furnished. First, Roberto mortgaged its property at No 7 Tai Seng Drive to OCBC. Second, on 13 March 1996, the second to fourth appellants gave a joint and several letter of guarantee to the bank.

4 The borrowing by Roberto escalated so much that by May 1998, the total facilities overdrawn reached $33.1 million, exceeding the agreed limit. At the bank's request, Roberto brought the amount owing down to the agreed level. Later, still being concerned, OCBC wanted Roberto to reduce the outstanding further to $28 million, which Roberto agreed.

5 There were discussions between the parties to restructure the loan. In December 1998, Price Waterhouse (PW) was appointed as Roberto's financial consultants. In their initial report made in March 1999, PW remarked that the problem with the company was that there was an excessive level of stocks and a lack of proper cash flow management. Another problem was that it had used short term borrowing to fund long term assets, which was not the appropriate thing to do. In its final report, PW recommended that a fixed and floating charge over its remaining assets be granted in favour of OCBC and that some measures be taken to address the ills of the company. Accordingly, a fixed and floating charge was duly executed on 5 May 1999.

6 However, OCBC was only prepared to restructure the debts if the measures recommended by PW to reduce the level of stocks and bad/doubtful debts were carried out. OCBC duly informed Roberto that unless stocks were reduced, the bank would not be able to continue to support the company. But, as it turned out, not only did Roberto not reduce the stock level, it increased stocks by new purchases, some even as late as on 29 June 1999. Moreover, while arithmetically the debts owing had come down, the decrease was due to write-offs rather than actual collections. Thus, on 1 July 1999, OCBC suspended the credit line.

7 Thereafter, Roberto asked for a six month period to obtain refinancing. OCBC was, however, only prepared to give it up till end September 1999. When this deadline was not met, it was eventually extended to 31 December 1999. Roberto still did not manage to obtain refinancing.

8 In the meantime in August 1999, Roberto issued its audited financial statement for the year ended 31 March 1998 which showed that its current liabilities exceeded its current assets by $13.2 million. The company was already in pretty bad shape. There were serious doubts that Roberto would be able to continue as a going concern.

9 In early 2000, Roberto owed Jurong Town Corporation the sum of $366,766.63 as arrears in rental in respect of the mortgaged property. There was also outstanding property tax due to the Inland Revenue Authority of Singapore in the sum of $884,102.91 and Roberto was warned that if $664,862.91 was not received by 21 January 2000, action would be taken to sell the mortgaged property. OCBC, to protect its interest, paid up the outstanding rent due to the landlord, Jurong Town Corporation.

10 Also in early 2000, indications were given by Roberto that it would be collecting two substantial sums from its trade debtors, $1,061,984.49 by January 2000 and $1,973,189.04 by March 2000, and that these sums, when received, would be channelled towards reducing the outstanding owing to OCBC. Other than two small sums totalling $66,000 which came in to reduce the outstandings, none of the promised amounts was received. Therefore, on 3 April 2000, OCBC demanded repayment of the total outstanding sum, which, as at 31 March 2000, stood at $32,921,485.06, from Roberto and the guarantors. Before this recall was made by OCBC, there was an internal review of the loan situation.

11 On 17 April 2000, Roberto's auditors, Ernst and Young (EY) informed OCBC that the company's property agents, DTZ Debenham Tie Leung (DTZ) had found two potential buyers for the mortgaged property – first, Chelsfield plc, a UK company, and second, Singapore Telecommunication Ltd. OCBC was made to understand that Chelsfield would revert with an offer on 20 April 2000. As on 22 April 2000 (a Saturday following Good Friday) there was still no indication of an offer, OCBC proceeded to appoint Mr Ho as the Receiver over the assets secured under the debenture.

12 It was only on the evening of 22 April 2000 that Roberto's solicitors faxed to OCBC's solicitors a copy of Chelsfield's letter making an offer to purchase the mortgaged property at $36.5 million. The offer, besides being subject to contract, was also subject to, *inter alia*, two important conditions:-

(i) Approval of the offer from the board of Chelsfield's parent company, Global Switch, an English listed company;

(ii) Global Switch be given four weeks to conduct due diligence.

13 This offer, which at best could only be described as tentative, came to the notice of OCBC's solicitors on the Monday morning of 24 April 2000. Thereafter, the second to fourth appellants requested OCBC to revoke the appointment of Mr Ho, which the bank refused unless there was a serious and firm offer at an acceptable price. Some other proposals were also made by the appellants to induce OCBC to revoke the appointment, without success.

14 On 26 April 2000, the second appellant, Mr Tan, met with OCBC's representatives, asking for time and the revocation of the appointment of the Receiver. An internal memorandum of the same day showed that a great deal of consideration was given to the request for revocation before it was rejected. With reference to Chelsfield's offer, these comments appeared in the memorandum:-

"The intended purchase of the mortgaged property by the UK buyer (Global Switch, a listed company in London) at this point remains an expressed interest rather than a firm committed purchase. The interest is subject to due diligence, survey, JTC approval and Board approval of the Global Switch. The purchase price of SGD 36.5 m is substantially above the latest valuation obtained of SGD 31m in Q1/2000. Both Mr Ho and I have reservation that being a listed company, Global Switch will have to get an updated valuation of the property and then justify to the board and shareholder why the purchase price of SGD 5 m over valuation is still a good buy. This will either take some time or result in Global Switch lowering the offer price to closer to valuation."

15 After his appointment, Mr Ho followed up on the Chelsfield's offer. On 7 June 2000 Chelsfield reduced its offer to $31 million, that being the forced sale value. Mr Ho duly informed OCBC of this reduced offer. A meeting was held between Chelsfield and Mr Ho on 16 June 2000 but no agreement could be reached on the price. Chelsfield was not willing to offer anything higher. Eventually, on or about 9 August 2000, Chelsfield bought a neighbouring building.

16 Shortly after the 16 June 2000 meeting, interest in the mortgaged property was shown by another party, Bandury Development Company Ltd (Bandury). It offered $33 million. The negotiations proceeded to quite an advanced stage with an initial deposit of $495,000 being, on 18 July 2000, paid over and held by the Receiver's solicitors as stakeholders. However in late July 2000, Bandury changed its mind and wanted the sale to be a mortgagee sale rather than one conducted by the Receiver so that it could obtain the property free from subsequent encumbrances. Further negotiations ensued between OCBC and Bandury with a view to finalising the written contract. On 5 September 2000, Bandury decided not to proceed with the purchase.

17 Subsequently, in spite of further efforts made by Mr Ho, no new offers were received from any party to purchase the property and it had, up to the date of trial, remained unsold. We should add that soon after Mr Ho's appointment as Receiver, he contacted all the reputable property agents in Singapore seeking their services to sell the property.

Complaints against the respondents

18 The appellants alleged that both OCBC and Mr Ho had breached their duties of care as mortgagee and receiver respectively: the former in relation to the appointment of the Receiver and the latter, in the way in which Mr Ho went about selling the mortgaged property. Thus the institution of the

present proceedings.

19 The complaints made by the appellants against OCBC may be broadly categorised under the following two main heads:-

(i) OCBC did not act in good faith when it appointed Mr Ho as Receiver and further, when it subsequently refused to revoke the appointment when requested;

(ii) OCBC did not give Roberto sufficient time to repay the debt before appointing Mr Ho as Receiver and the appointment was, therefore, invalid.

20 The allegations of breach of duty against the Receiver fell under the following heads:-

(i) failure to pursue the offers from Chelsfield and Bandury in good faith and with due diligence;

(ii) failure to conduct the sale of stocks in the proper manner resulting in not obtaining the appropriate value for the same;

(iii) failure to put the mortgaged property to profitable use, i.e., renting out the premises on short term.

(iv) failure to diligently act on a letter of credit which was tendered pursuant to two contracts of sale.

21 The trial judge found no merits in any of the allegations made against either OCBC or the Receiver. Before us, largely, the same issues were canvassed. We shall now deal briefly with each in turn.

The appointment of Receiver

22 Under the terms of the debenture, the right of OCBC to appoint a Receiver in the event of default by Roberto was quite clear. Clause 13.1 of the debenture provided:-

"At any time after the occurrence of an event of default, the Lender may appoint one or more persons to be a Receiver (which by definition in an earlier clause included "Manager") of the charged property."

23 All that the law requires of the lender before exercising his power of appointing a Receiver is that he must act in good faith. The lender is entitled to act in his own interest. There is no general duty of reasonable care to consider or have regard to the interests of the debtor. While in most cases the appointment of a Receiver will not be in the interest of the borrower company, that cannot defeat the right of the lender to make the appointment. In the words of Oliver LJ in *Shamji v Johnson Matthey Bankers Ltd* [1991] BCLC 36 (at 42):-

"… the appointment of a receiver seems to me to involve an inherent conflict of interests. 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 on grounds of bad faith. There is no room for the implication of a term that the mortgagee shall be under a duty to 'consider all relevant matters' before exercising the power."

24 In order to show bad faith, there must be dishonesty or improper motive on the part of the lender. Even where there is negligence, that fact *per se* would not be sufficient to establish dishonesty or improper motive.

25 While accepting that they had not been able to adduce any direct evidence showing that OCBC had acted dishonestly or with improper motive, the appellants argued that the appointment of Mr Ho as Receiver, and the refusal to revoke that appointment, was in all the circumstances so commercially unreasonable as to evidence bad faith. The argument went as follows. At the time, the outstanding loan was only $31 million. The offer from Chelsfield was for $36.5 million, which was more than sufficient to clear the outstanding debt to OCBC. In addition, there were also other securities such as stock-in-trade. Time should have been given to Roberto to pursue Chelsfield's offer. Any reasonable person would have known that the appointment of a receiver would jeopardise or depress the offer from Chelsfield. The internal memorandum showed that OCBC did not care how much the mortgaged property would fetch as long as it was over $23 million as OCBC had other securities such as stocks and other receivables to make up for the difference. Moreover, OCBC did not act in good faith when it rejected an Indonesian investor's (CSA) proposal of injecting some capital into the company and that Mr Ho be appointed as "Special Accountant and Manager" instead of Receiver.

26 The considerations which were taken into account by OCBC in making the appointment of Mr Ho as Receiver, and its refusal to revoke that appointment, were set out in the internal memorandum. In ¶14 above, we have quoted a paragraph from the memorandum explaining why OCBC thought the offer from Chelsfield was not satisfactory. It was not true that OCBC did not care how much the property would fetch. The internal memorandum must be looked as a whole. As the trial judge rightly noted, it "contained an analysis of the issues by Mr Pau (the writer) 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." If OCBC did not care, they would have asked Mr Ho to release the property to Chelsfield at $31 million, which they did not. Of course, at all times OCBC's main concern was to protect its own interest. But it was also concerned about the weak financial system in place at Roberto as can be seen from the following remarks in the internal memorandum:-

> "According to Mr Ho who has gone into the company as a receiver since last Saturday, the receivable monitoring, billing tracking and collection system is weak and he can only rely on the latest account record as at 3/31/2000 to send out collection demand to the buyers. In addition, the company is over-stocked and some of the materials are exposed to the open since the warehouse, is already fully used. Staff turnover in the company's account department in the past year has probably contributed to the problem …
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> ….
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> According to … Mr Ho, records show that SGD 3 million of receivables were collected in the past 2 months and that was not channelled for loan repayment."

27 With regard to CSA's proposal that Mr Ho be appointed a "Special Accountant and Manager", rather than "Receiver", OCBC took into account Mr Ho's views that unless he was appointed Receiver he would not be able to legally protect OCBC's interests under the debenture "since channelling of funds liquidated to repay (OCBC's) loan could be challenged by other creditors of Roberto (CPF, Inland Revenue and suppliers) as preferential treatment." Furthermore, as Roberto owed money to CPF and possibly to the Inland Revenue Authority, OCBC noted that "there (was) a good chance that the two government departments will send in their own receiver to protect their interests". At the time, there had already been market talk that Roberto was in financial difficulties.

28 In the light of the above, we did not see how it could be alleged that OCBC had acted dishonestly or that there was any bad faith. Furthermore, there was nothing to suggest that the bank had acted recklessly as to amount to bad faith. The bank was entitled to exercise the rights conferred upon it in its own interest after having given Roberto considerable time to put its house in order. We accepted that the bank could have granted further indulgence to Roberto by either not appointing the Receiver, or revoking the appointment. The fact that it refused to do so in its own self or commercial interest could not amount to dishonesty or bad faith. Even if the bank had not quite accurately assessed its own interest in refusing further indulgence (we are not here suggesting that there was any such appreciation on the bank's part), that could not turn a honestly held view into bad faith. Neither was a refusal to grant further indulgence, or to accept an alternative proposal (which had drawbacks), an act of bad faith. We should add that the CSA's proposal was subject to a condition that there should be a moratorium of 45 days during which OCBC could not appoint a receiver and it was understandable that OCBC had found this difficult to accept.

29 Here we would like to cite the following instructive passage of Sir Richard Scott VC in the case of *Medforth v Blake* [2000] CH 86:-

> "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 … In my judgment, the breach of a duty of good faith should, in this area as in all others, require some dishonesty or improper motive, some element of bad faith, to be established."

30 Although the appointment of a receiver would depress the market, that should, however, have been a consequence within the contemplation of the parties when they entered into a deed of debenture providing for the appointment of a receiver. Having lost faith in the management of Roberto, OCBC acted reasonably in preferring an independent person to conduct the prospective sale. In any event, the evidence showed that Chelsfield's eventual decision not to proceed with the purchase of the mortgaged property had nothing to do with the appointment of the Receiver. Chelsfield decided to buy a neighbouring property instead because it was newer and more suitable for their business. More will be said later about Mr Ho's effort(s) in this regard.

31 Accordingly, we held that there were no merits in the complaints under this head.

Was the appointment of Mr Ho as Receiver valid?

32 It would be recalled that it was on 3 April 2003 that OCBC, through its solicitors, gave notice to Roberto to repay the outstanding debt of $32.9 million within 14 days from the date of receipt of that letter.

33 The appellants argued that even where a debt was repayable upon demand, as in this case, the debtor must be given a "reasonable time" to meet that demand before the lender may appoint a receiver pursuant to a contractual right. The appellants alleged that in the present instance the 14-day notice given was not reasonable and therefore the appointment of Mr Ho as Receiver was bad in law.

34 The appellants recognised that under English law, where money was payable on demand, a debtor was only entitled to such time as might be necessary to implement the "mechanics of payment" and

"all the creditor has to do is to give the debtor time to get (the money) from some convenient place (and) not to negotiate a deal which he hopes will produce the money": see e.g., *Cripps (Pharmaceuticals) v Wickenden* [1973] 1 WLR 944 per Goff J at 955. Under this test, a debtor was only permitted to have such time as was necessary to enable him to implement the mechanics of payment. He was not entitled to any time to raise the funds, either from other banks or from other sources. A couple of later first instance cases in England also adopted this test: see *Lightman & Moss, The Law of Receivers and Administrators of Companies (3rd Edn)* at 106.

35 The appellants urged this Court not to adopt the approach taken in the English first instance cases but to follow the Canadian approach which held that the debtor should be given a reasonable time to meet the demand. In *Ronald Elwyn Lister Ltd v Dunlop Canada Ltd* (1982) 135 DLR (3d) 1, Rutherford J rejected the test propounded by Goff J in *Cripps* and held that a reasonable time must be given to the debtor to meet the demand. The case eventually came before the Canadian Supreme Court which affirmed the principle that reasonable time should be given to the debtor to pay up. While the Canadian Supreme Court did not attempt to define what was a "reasonable time" it approved the factors enumerated by Linden J in *Mister Broadloom Corporation (1968) Ltd v Bank of Montreal* (1979) 25 OR (2d) 198:-

> "… in assessing what length of time is reasonable in a particular fact situation various factors must be analysed: (1) the amount of the loan; (2) the risk to the creditor of losing his money or security; (3) the length of the relationship between the debtor and the creditor; (4) the character and reputation of the debtor; (5) the potential ability to raise the money required in a short period; (6) the circumstances surrounding the demand for payment; and (7) any other relevant factors."

36 It is of interest to note that in the later English case of *Bank of Baroda v Panessar* [1987] 2 WLR 208, Walton J, after an extensive review of the cases, including the Canadian and Australian cases, declined to follow *Ronald Elwyn Lister*. He said (at 349) –

> "… it appears to me that a time limited to the implementation of the mechanics of payment, a short but adequate period, is to be preferred to the test of a 'reasonable time depending on all the circumstances of the case,' as this would appear to be wholly imprecise, and the danger of underestimating the period from the creditor's point of view would be considerable. Moreover, it would appear to be wholly unfair to the creditor that the period should depend on all the circumstances of the case, since he may very well not know, and have no means of knowing, all such circumstances. If this test does prove to be the one ultimately adopted, it must surely depend on all such circumstances as are known to the creditor."

37 Notwithstanding Walton J's refusal to follow the Canadian approach, the appellants pointed out that the "reasonable time" test had been applied in Australia, New Zealand and Malaysia. The appellants further relied on the fact that the English Court of Appeal in *Sheppard & Cooper Ltd v TSB Bank plc* [1996] BCC 653 declined to express a view on this issue stating that "it would be wholly inappropriate for this court to express a view on an issue which is both complex and of general importance when it cannot, by the very necessity of time limits, have had full opportunity for consideration."

38 Counsel for the appellants submitted that the "mechanics of payment" test ignored the practical and commercial reality that the purpose of borrowing was, in the first place, to fund an opportunity which the debtor could not otherwise fund out of cash holdings. All the more so in a situation when there was demand for repayment of a substantial sum, like the present case, reasonable time must be accorded to the debtor to convert resources available to him into cash.

39 Counsel also referred to *Waldron v Royal Bank of Canada* [1991] 4 WWR 289 where the Court of Appeal of British Columbia observed that the duty to give reasonable time to the debtor was "not merely a presumptive rule of construction of the security instrument, but (was) founded on the twin concepts of public policy and unconscionability."

40 We will now turn to consider the Australian High Court case of *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd* (1984) 51 ALR 609. The main issue there was whether a demand made was invalid because it did not specify the amount payable by the debtor. The court ruled it was not invalid. It then proceeded to consider the question of whether sufficient time was given to the debtor to make payment. The court apparently applied the "reasonable time" test. The pertinent passage, in an unanimous judgment, was the following (at 618-9):-

> "It will be noticed that the proposition advanced by Cleasby B was expressed to relate to the case where the demand was to pay the debt instanter, no time being allowed to the debtor to comply before the security was enforced against him. The proposition is designed to afford some protection to a debtor against the oppressive operation of a provision entitling a creditor to enforce a security on the debtor's failure to make a payment immediately once demand is made for a debt expressed to be payable on demand. However, it is now a well established principle of law that a debtor required to pay a debt payable on demand must be allowed a reasonable time to meet the demand. Even in a case where a deed provided that the debt was payable 'immediately upon demand thereof in writing' it was held that the provision must be given a reasonable construction so that the debtor had a reasonable time to get the money from some convenient place (*Toms v Wilson* (1862) 4 B&S 442 at 453-5; 122 ER 524 at 529). This does not mean that the notice calling up the debt is invalid unless it requires payment 'within a reasonable time'. It means no more than that the debtor must be allowed a reasonable opportunity to pay before it can be said that he has failed to comply with the demand. A notice requiring payment forthwith will be regarded as allowing the debtor a reasonable time within which to comply. Until a reasonable time in the sense discussed has elapsed the creditor cannot enforce his security."

41 We note, in particular, that the Australian High Court had relied on *Toms v Wilson* (1862) 4B&S 442 at 453-5 and stated that the reasonable time was to enable the debtor "to get the money from some convenient place." This is not the sort of consideration which Linden J identified to be pertinent in *Mister Broadloom Corporation*; it is really similar to the "mechanics of payment" test. The difficulty with the *Bunbury Foods* case lies in the fact that it also cited *Ronald Elwyn Lister Ltd v Dunlop Canada Ltd* without comment even though the test adopted in *Ronald Elwyn Lister* was different from that in *Toms v Wilson*.

42 Be that as it may, in the later decision of New South Wales Court of Appeal, *Bond v Hong Kong Bank of Australia Ltd* (1991) 25 NSWLR 286, the case of *Bunbury Foods* was considered and the court held that under a contract of guarantee to pay "on demand", the guarantor was only entitled to such time as was reasonably necessary for implementing whatever reasonable mechanics of payment needed to be employed to discharge the debt and no more. In the circumstances of that case, five days were held to be a reasonable time to allow for payment of a multi-million dollar debt. We have pointed out the difficulties in the *Bunbury* case and it should be noted that Kirby P in the *Bond* case thought that the "reasonable time" approach in *Bunbury* was consistent with the "mechanics of payment" test. Recent cases in New Zealand had also reverted to the restrictive test e.g., *ANZ Banking Group (New Zealand) Ltd v Gibson* (1981) 2 NZLR 513.

43 As we saw it, and here we agreed with the court below, the concept of "reasonable time" as enunciated by the Canadian cases would introduce uncertainty into a commercial arrangement where it was essential that there should be clarity. The sort of factors which the Canadian cases said

should be taken into account, would leave the issue completely open-ended, as it would appear that almost anything can be taken into consideration, making invocation of the right to enforce the security absolutely hazardous. It would not promote business efficacy. As Walton J rightly asked in *Panessar* (at 349):

> "The difficulty inherent in this formulation is that the test of reasonableness is left wholly imprecise: reasonable for doing what?"

44 It seemed to us that where the parties had voluntarily entered into an arrangement which provided that in the event of a default the lender was entitled to recall the entire loan and ask for the immediate repayment of it, it was not for the court to rewrite the terms or to imply terms which would be inconsistent with the spirit of the express terms.

45 The argument was made that unless "reasonable time" in the wider sense was given, there would be no protection for the borrower who would be at the mercy of the lender. This was hardly correct. It was not a power which could be invoked at the whim and fancy of the lender. The cause for the invocation of the enforcement rights of the lender would always be contingent on the commission of a default which the parties had agreed and as defined in the debenture. The vast majority of the events of default as defined in the present debenture would arise from an act or omission of the debtor.

46 In the light of our views above, we rejected the allegation that insufficient notice was given to Roberto to pay up the outstanding debt. The appointment of Mr Ho was in no way premature and was valid.

47 However, notwithstanding the foregoing, even if we were to apply the wider sense of "reasonable time", we were of the opinion that in all the circumstances of the present case, such a time had, in fact, been accorded. Besides the 14 days specified in the letter of demand, ample warning was given by OCBC to Roberto that, unless corrective steps were taken, the loan would be recalled. Furthermore, OCBC did not act immediately upon the expiry of 14 days. It acted only after some 18 days. It must be noted that the Canadian cases involved notices of very much shorter duration. In *Lloyds Bank plc v Jeffrey Lampert & Anor* [1999] 3 Lloyd's Rep 138, while the English Court of Appeal on the facts did not think it was necessary to determine which was the correct test to adopt, Kennedy LJ, in commenting on the Canadian cases, said (at 142):-

> … the liberality of the Commonwealth approach must not be overstated. In *Whonnock Industries v National Bank* (1987) 42 DLR (4^{th}) 1 the British Columbia Court of Appeal reviewed the authorities, and concluded that where the amount owing is very large Canadian law now requires that lenders should give "at least a few days" in which to meet the demand. Reasonable notice, it was said, may range from a few days to no time at all. In that case seven days had been allowed by the lender, and the judge at first instance held that to be insufficient. On appeal his decision was reversed, the court saying at p 11:
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> > "The Canadian law demonstrated in the decisions does not contemplate more than a few days and cannot encompass anything approaching 30 days. In the decisions noted nothing approaching the seven days permitted here has been classed as unreasonable. The cases in which the requirement for reasonable notice evolved deal with notices of an hour or less. None of them holds that a notice of more than one day was inadequate and none refers to the need for a notice of more than a few days."

48 Viewing all the circumstances of the present case, it could not be said that OCBC had acted

abruptly or did not give Roberto sufficient time to take corrective measures or make payment.

Failure to pursue offers to purchase

49 We now turn to consider the allegations made against the Receiver, Mr Ho. The first was that he did not diligently pursue the offers made by Chelsfield and Bandury to purchase the mortgaged property.

50 As regards the Chelsfield offer, the crux of the complaint related to what happened at the meeting on 16 June 2000. Mr Ho's solicitor was informed that Chelsfield's Chief Executive Officer would be coming down from London and would be attending the meeting to conclude the deal and Mr Ho was requested to arrange "for the decision-makers of the parties to the Sale & Purchase Agreement to be present at the said meeting". However, no one from OCBC turned up for the meeting because Mr Ho did not inform OCBC that its presence was requested by Chelsfield. It was also said that even after the 16 June 2000 meeting Mr Ho did not follow up diligently with Chelsfield.

51 At this juncture, we will examine the law to determine what duty of care is owed by a Receiver to the mortgagor company. From the authorities it would appear that there is no general duty of care on the part of the Receiver to the company. The primary duty of the Receiver is to the debenture holders and not to the company. There is no duty to exercise the power of sale. The mortgagee (thus the Receiver) is not a trustee of the power of sale for the mortgagor. The mortgagee/receiver is entitled to determine the time for sale so long as he acts in good faith.

52 In *In re B Johnson & Co (Builders) Ltd* [1955] CH 634, Jenkin LJ said (at 662):-

> "But the whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers … He is under no obligation to carry on the company's business at the expense of the debenture holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee, and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though, from the point of view of the company, as distinct from the debenture holders, the terms might be regarded as disadvantageous. In a word, in the absence of fraud or mala fides (of which there is not the faintest suggestion here), the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do, and omits nothing that he is enjoined to do by the terms of his appointment."

53 This proposition of law by Jenkin LJ was considered and adopted by a decision of the Privy Council on an appeal from New Zealand in the case of *Downsview Nominees Ltd v First City Corporation* [1993] AC 295 where Lord Templeman, delivering the judgment of the Board, said (at 315):-

> "*Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] CH 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition. A receiver exercising his power of sale also owes the same specific duties as the mortgagee. But that apart, the general duty of a receiver and manager appointed by a debenture holder, as defined by Jenkins LJ in *In re B Johnson & Co (Builders) Ltd* [1955] CH 634, 661, leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company. The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there

existed a general duty in negligence to take reasonable care in the exercise of powers and to take reasonable care in dealing with the assets of the mortgagor company."

54 It would be noted that the Privy Council had slightly varied the proposition of Jenkin LJ by requiring the receiver in selling the mortgaged property to exercise reasonable care to obtain the proper price for it, following *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] CH 949.

55 Following the reasoning that in selling a property the mortgagee or receiver must exercise reasonable care to obtain a proper price for it, the court in *Medforth v Blake & Ors* [2000] CH 86 extended that duty of care to the situation where the Receiver carried on the business of the company. Sir Richard Scott V-C, felt that this extension was justified because (at p.99):-

"Why should the approach be any different if what is under review is not the conduct of a sale but conduct in carrying on a business? If a receiver exercises this power, why does not a specific duty, corresponding to the duty to take reasonable steps to obtain a proper price, arise? If the business is being carried on by a mortgagee, the mortgagee will be liable, as a mortgagee in possession, for loss caused by his failure to do so with due diligence. Why should not the receiver/manager, who, as Lord Templeman held, owes the same specific duties as the mortgagee when selling, owe comparable specific duties when conducting the mortgaged business? It may be that the particularly onerous duties constructed by courts of equity for mortgagees in possession would not be appropriate to apply to a receiver. But, no duties at all save a duty of good faith? That does not seem to me to make commercial sense nor, more importantly, to correspond with the principles expressed in the bulk of the authorities."

56 We would hasten to add that due diligence does not oblige the receiver to continue to carry on a business of the mortgagor/debtor, but if the receiver should choose to carry on the business, then he must exercise due care to run it properly and profitably.

57 Here, Mr Ho was seeking to sell the mortgaged property. He was not seeking to run any business of Roberto. But eventually he did not manage to sell the property. So there could be no question of him having sold the property at an undervalue.

58 In any case, the facts did not demonstrate that the sale to Chelsfield fell through because of the fault or neglect, if any, of Mr Ho. It was clear that the meeting of 16 June 2000 did not conclude successfully because of the price. All other matters were resolved. Chelsfield stuck to its offer of $31 million, a forced sale value, while Mr Ho was trying to persuade Chelsfield to keep to their original offer of $36.5 million. The meeting ended with both Mr Ho and Chelsfield's Chief Executive Officer agreeing to conduct separate valuations of the property to determine a fair price. On 19 June 2000 Chelsfield notified Mr Ho that they would maintain their offer at $31 million. The fact of the matter was that the second appellant, Mr Tan, had objected to a sale at $31 million and so Mr Ho was trying to get something better.

59 Soon after the meeting of 16 June 2000, there was another potential buyer, Bandury, who offered $33 million. This being a higher offer than Chelsfield, it was understandable that Mr Ho concentrated more on this. Things were moving quite nicely. In late July 2000, Bandury wanted the sale to be a mortgagee sale. Thereafter, Bandury dealt directly with OCBC and the two parties negotiated on the contract of sale. Mr Ho was no longer involved. On or about 5 September 2000 Mr Ho was informed that Bandury had decided not to proceed with the purchase.

60 It seemed to us clear that much of the contentions of the appellants were based on hindsight wisdom, e.g., why did Mr Ho not sell the property to Chelsfield at $31 million? Why did Mr Ho not put

Chelsfield and Bandury in competition with each other? The question of putting the two potential buyers in competition was never put to Mr Ho in cross-examination. Further, such a strategy could backfire. At no time did Mr Tan insist that Mr Ho sell the property to Chelsfield at $31 million. In fact, he opposed it. If Mr Tan had felt so strongly about selling at $31 million, why was there not a single written communication? It seemed to us that this was a typical case of fault-finding after the event. It was really an *ex post facto* rationalization to say that "all parties were aware that the property market then was a fast declining one." Then, why did Mr Tan object to the sale at $31 million in the first place?

61 Accordingly, we also held that this head of complaint had no merit.

Disposing of stocks inappropriately

62 The complaint here was that (i) Mr Ho sold the company's stocks at an undervalue of 15% over their book values; (ii) Mr Ho effected the sale by public auction instead of by private treaty; (iii) Though Mr Ho had no relevant experience, he effected the sale without seeking specialist advice; (iv) Mr Ho erroneously stated in an advertisement that the company was in liquidation rather than in receivership.

63 It is settled law that in effecting a sale of mortgaged property, the receiver must exercise reasonable care as to the manner in which the sale is carried out so as to obtain its true market value. Just because the sale price obtained is 15% less than their book values is neither here nor there. That does not *per se* suggest a lack of reasonable care. It is the process of effecting the sale which is critical. As this court stated in *Lee Nyet Khiong v Lee Nyet Yun Janet* [1997] 2 SLR 713 at 72,

> "the relevant question is not whether the price for which the property was sold by the appellant was reasonable but whether the appellant as a mortgagee, in exercise of the power of sale, had taken reasonable efforts to obtain the best price that was available in the circumstances."

64 In any event, the evidence tendered to court to substantiate the book value of the stocks left doubts as to its accuracy. Moreover, that valuation was as at 31 December 1998. The sale by Mr Ho of the stocks which stretched over a long period, commenced only in June 2000. We did not see how this proved the alleged undervalue.

65 As regards the method adopted by Mr Ho to effect the sale, which was by public auction, it did not lie in the mouths of the appellants to barely assert that he should have carried out the sale by private treaty. No expert evidence had been adduced to show that in respect of sale of building materials, it should be by private treaty. Moreover there is no principle of law which lays down that a sale by private treaty is to be preferred over public auction. If at all, one would imagine that sale by public auction is to be preferred as it provides a forum for open competitive bidding, thus ensuring transparency. *Fisher and Lightwood's Law of Mortgage (11th Edn)* states that (at 570) "The mortgagee will need to consider whether a sale by auction, or tender, or by private treaty would be more appropriate, where appropriate seeking expert advice. Sale by auction is the usual method". The following comment from *Lightman and Moss on the Laws of Receivers and Administrators of Companies, 3rd Edn* (at 155) is also illuminating: "Likewise the duty may be broken if the receiver or mortgagee selects an inappropriate method of sale by private treaty rather than some form of public auction or following a public tender process". This again suggests that public auction is preferable.

66 In effecting the sale, Mr Ho took care to appoint two different professional firms, one to value the stocks and the other to conduct the auction. There was also evidence showing that most of the

stocks were, in fact, sold by the second or third appellants by private treaty. For the remaining stocks, Mr Ho consulted Mr Robert Chan from M/s Jones Lang La Salle as to the best method for their disposal. Having considered, *inter alia*, the quantity and quality of the stocks and the market condition, Mr Chan recommended sale by auction. Four auctions, which stretched over a period of 15 months, from December 2000 to March 2002, and which were duly advertised, were carried out. Reserve prices were set for the first two auctions. However, no reserve price was set for the last two on the advice of Jones Lang La Lalle and the valuers (Victor Morris). Mr Ho and Mr Chan also made concurrent attempts to sell the remaining stocks by private treaty.

67 It was true that in one of the advertisements placed by Jones Lang La Salle on 4 December 2000 it was erroneously stated that Roberto was in liquidation rather than in receivership. But in the next advertisement, the error was put right; it did not mention anything about liquidation or receivership. In any case, the erroneous advertisement was made in relation to the first auction where reserve prices were set. All the stocks sold at that auction were above the reserve prices. The error was of no consequence.

68 In our judgment, Mr Ho had taken all reasonable steps to effect the sale of the stocks and had obtained the best price possible. He had also, following expert advice, exposed the stocks to as wide a market as possible.

Failure to rent out the property

69 We now turn to the next complaint against Mr Ho. The appellants alleged that from the time the deal with Bandury fell through, i.e., from September 2000 to November 2001, Mr Ho did nothing to find short term tenants for the property. They argued that such a failure on Mr Ho's part to put the property to profitable use amounted to wilful neglect and a breach of his duty of good faith: see *Palk v Mortgage Services Funding plc* [1993] CH 330 at 337-338. While it was common ground that he had been advised by Knight Frank and DTZ not to let out the premises as prospective buyers would probably prefer to acquire the property on a vacant basis, the appellant contended that it was only after 13 November 2001 that Mr Ho started to advertise for short-term tenants. The appellants also referred to the refusal by Mr Ho at the end of October 2001 to rent some 24,000 square feet of space to Noel Gifts International Ltd (Noel).

70 The fact of the matter was that even after the Bandury deal fell through, Mr Ho's objective was still to sell the property. It was understandable if he had concentrated on that. Various property agents were involved. Offers at unacceptable prices were received in February and June 2001. Moreover, there was evidence that during the period in question, other than the 6th floor, the rest of the building was occupied by floor and wall tiles – the stocks. Noel, in fact, rented the 6th floor from 13 November 2000 to 12 February 2001. In October 2001, Mr Ho was also negotiating with Singapore National Printers (SNP) to let out some space to them; this fell through because SNP wanted a three-year lease.

71 It was true that in November 2001 Noel wanted a short term tenancy again. But they offered only $40,000 for a total period of 3½ months, well below market value and below what they had paid on the previous occasion. Mr Ho asked DTZ to try to get Noel to raise their offer. Apparently, the person in charge of this matter at Noel had a strict budget of $40,000. He could not increase the offer whatsoever and thus did not get back to Mr Ho. After ten days of no response, Mr Ho changed his mind. But by then Noel had found somewhere else within their budget.

72 Furthermore, even after Mr Ho had in November 2001 actively sought property agents to find short-term tenants, there was no success.

73 The trial judge found that Mr Ho had acted reasonably and with due diligence. In the light of the circumstances we have enumerated above, there was certainly no basis for us to disturb the determination of the court below.

Bungling two transactions

74 We now turn to the last complaint against Mr Ho. The allegation here was that Mr Ho did not diligently follow up on two contracts which Roberto had on 18 April 2000 concluded with an entity called, Top Treasures, of a value of $1.2 million and $1.8 million respectively. Mr Tan said that for the two contracts, an LC of $1,982,400 was opened in favour of Roberto. Mr Tan claimed that Mr Ho was told of the contracts. The LC had an expiry date of 26 June 2000. The applicant of the LC was Telesonic Singapore (Pte) Ltd, who, Mr Tan alleged, was the agent of Top Treasures and that the LC was tendered pursuant to the two contracts.

75 However, the evidence of Mr Ho was that he did not know of the alleged contracts with Top Treasures until copies of the same were exhibited in Mr Tan's affidavit of 9 January 2002 filed in relation to Mr Ho's application for security for costs. He denied that Mr Tan handed to him the two contracts with Top Treasures. While admitting receiving the LC on 2 May 2000, he did not know it related to the alleged two contracts. The finding of the trial judge was:-

> "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."

76 There would be no basis for this court to say that this finding was wrong, far less clearly wrong, which is the test upon which a finding of fact of the trial court could be upset. This would suffice to dispose of this complaint.

77 In any case, to draw on the LC, certain documents had to be produced: signed invoices, delivery order (DO) and certificate of Italian origin issued by the manufacturers. None of these was in the possession of Mr Ho. It was also necessary as a pre-condition of drawing upon the LC that the goods be delivered to a warehouse designated by the applicant of the LC. In fact, Mr Ho wrote to Telesonic to obtain the particulars but received no response. Even Mr Tan did not know to which warehouse the goods should be delivered. Therefore, no goods of Roberto were delivered to any address. Furthermore, the LC required that the DO be countersigned by two authorised signatories of the applicant, and again no one knew who the two authorised signatories were. Mr Ho was chasing Mr Tan on these documents without success. Here the comments of the trial judge were germane:-

> "As for the letter of credit, the credit would only be available if the company had delivered the tiles to 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."

There was no way in which Mr Ho could have carried out the two contracts and converted the LC into cash.

Judgment

78 In the premises, we did not think that the complaints of the appellants against OCBC and Mr Ho had any merits in law. We thus affirmed the decision of the court below. We also ordered that the appellants bear the costs of the respondents. The security for costs, together with any accrued interest, was ordered to be released to the respondents to account of their costs.

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