

## THE EXERCISE OF THE MORTGAGEE'S RIGHTS OF SALE AND TO POSSESSION – TWO RECENT CASES

*Teo Siew Har v Oversea Chinese Banking Corporation Ltd*<sup>1</sup>  
*Hong Leong Finance Ltd v Tan Gin Huay*<sup>2</sup>

IT is well accepted law in Singapore that while a mortgagee is not a trustee in respect of his right to sell the mortgaged property when the mortgagor is in breach of his obligations, he nevertheless has equitable duties to the mortgagor with respect to the manner of the exercise of his power of sale. The sale must be a *bona fide* one and he must take reasonable steps to secure the true market value.<sup>3</sup> These duties however do not impinge on his right as a person who looks to the property as security, to determine, in his own interest, when he should sell the property. This point was brought out in a stark manner in the Privy Council decision *China and South Seas Bank v Tan Soon Gim*.<sup>4</sup> In that case the mortgagee did not exercise his power of sale but waited; the property (shares) eventually became worthless and the mortgagee then sued on the guarantee to recover what was due to him. The Privy Council held that the mortgagee owed no duty to the surety in regard to when he should exercise his power of sale. It would seem that the mortgagee's equitable duties to the mortgagor only arise when he has decided to exercise his power of sale. Then he must have regard to the interest of the mortgagor as well as his own.

The seemingly unfettered right of the mortgagee to decide if he wanted to sell and if so when, was clipped in *Palk v Mortgage Services Funding*.<sup>5</sup> In that case the English Court of Appeal, in an application by the mortgagor for sale of the property against the wishes of the mortgagee under section

<sup>1</sup> [1999] 3 SLR 129 (“*Teo Siew Har*”).

<sup>2</sup> [1999] 2 SLR 153 (“*Hong Leong Finance Ltd*”).

<sup>3</sup> *Cuckmere Brick Co v Mutual Finance* [1971] Ch 949; *How Seen Ghee v Development Bank of Singapore* [1994] 1 SLR 526; *Lee Nyet Khiong v Lee Nyet Yun* [1997] 2 SLR 713.

<sup>4</sup> [1990] 1 AC 536 (“*South Seas Bank*”).

<sup>5</sup> [1993] 2 WLR 415 (“*Palk*”).

91(2) Law of Property Act 1925 (similar to section 30(2) Conveyancing and Law of Property Act) exercised its discretion in favour of the mortgagor and ordered a sale despite the objections of the mortgagee. The Court of Appeal did caution that this discretion would be exercised but rarely and then only when it is just and equitable to do so. This would be when otherwise injustice and unfairness would be suffered by the mortgagor.

The position after this decision is that while a mortgagee can generally decide in his own best interests whether and if so when to exercise his power of sale, if the circumstances so warrant the mortgagor may obtain a court order for the sale in the face of the mortgagee's objections. The circumstances which justify the court's intervention would have to be very unusual as they were in *Palk*. There due to the happenings of the property market, the mortgagor who had defaulted was suffering a 'financial haemorrhage'.<sup>6</sup> Even if the premises were leased the rental paid would not be sufficient to pay the interest on the loan. Thus with the passing of each day his burden grew, while if the property were sold the mortgagor's losses on this transaction would be limited and actualised. The mortgagee however considered that it was in its interest to take possession and let the property until property prices improved. Sir Donald Nicholls VC considered that if the mortgagee had its way, the effect on the mortgagor would be 'oppressive'.<sup>7</sup>

What is meant by 'just and equitable'? When would circumstances so justify? Obviously this would depend on the factual matrix of each case. If a mortgagor did not apply to the court under section 30(2) Conveyancing and Law of Property Act but waited till the mortgagee actually sold the property and then sued him for breach of duty in the exercise of his power of sale, would it be relevant that the court might have intervened under section 30(2) had such an application been made?

In *Teo Siew Har*<sup>8</sup> the mortgagor did not apply to the court under section 30(2) Conveyancing and Law of Property Act but sued the mortgagee for breach of his equitable duties to the mortgagor by not selling the property when asked by the mortgagor to do so. The Court of Appeal affirmed the decision of the court below and held that there was no breach of duty because the mortgagee had no duty to follow the instructions of the mortgagor in the timing of the exercise of his power of sale.

The facts in brief are that Teo, a housewife and the sole owner of the house in question, mortgaged it to the Oversea-Chinese Banking Corporation Ltd. The mortgage payments had been met by her husband until December 1996 and January 1997 when he was unable to do so. Teo decided in January

<sup>6</sup> *Ibid*, per Kerr LJ at 427.

<sup>7</sup> *Ibid*, at 423.

<sup>8</sup> *Supra*, note 1.

1997 to sell the property to pay up the loan. But before this could be done her husband was involved in a defamation suit and a Mareva injunction was imposed on all their assets. Consequent on this a receiver was appointed to manage their assets and they were unable to deal with any of their assets themselves. All powers of management were in the hands of the receiver who however could only dispose of the assets at the request of the owners. In March 1997 Teo's husband spoke to a representative of the mortgagee asking them to exercise their power of sale. But there was no response. Between March and July 1997 Teo applied to the court in connection with the defamation suit and Mareva injunction to sell the property but was unsuccessful.<sup>9</sup> Then in July 1997 the mortgagee demanded payment of the sums owing and two months later asked for possession of the property. This was followed by discussions between the receiver and the mortgagee as to the sale of the property. The efforts of the receiver to sell the property between November 1997 and February 1998 were unsuccessful. The mortgagee then instituted proceedings for an order of possession in connection with the subsequent sale of the property.

The issue that was before the High Court and the Court of Appeal was whether the mortgagee was obliged to sell when the mortgagor asked him to. In the light of the authorities, there could be but only one response which was the one the Court of Appeal and the High Court gave. This is quite clear from *South Seas Bank*. But the Court of Appeal also considered *Palk* which it distinguished by stating that the circumstances in the case at hand were far different from those in *Palk*.<sup>10</sup> I venture to submit that *Palk* was not really relevant at all.

*Palk* was concerned with the exercise of the court's discretion under section 91(2) Law of Property Act 1925 (similar to section 30(2) Conveyancing and Law of Property Act) to order a sale at the instance of the mortgagor over the objections of the mortgagee. The mortgagee's concern is with his own interests but the court's concern is that this exercise of power must not be unfair and unjust to the mortgagor as well as the mortgagee. The court's exercise of discretion is concerned with what is just and equitable to both parties. Thus on the facts in *Palk* the Court of Appeal took into consideration *inter alia* the fact that if it ordered a sale, the mortgagee could buy the property and so benefit from the subsequent rise in price should this happen. It is evident that the Court in this exercise is not concerned with any breach of duty by the mortgagee.<sup>11</sup>

<sup>9</sup> The Oversea-Chinese Bank Corporation Ltd was not involved as this was not a s 30(2) Conveyancing and Law of Property Act application.

<sup>10</sup> *Supra*, note 1, at 137-139.

<sup>11</sup> This was adverted to in Sir Donald Nicholls' VC's judgment *supra*, note 5, at 412.

While the law remains that the mortgagee can decide in his own best interests if and when he should sell the property, *Palk* shows that the mortgagor can apply to the Court under section 91(2) Law of Property Act 1925 in England or section 30 Conveyancing and Law of Property Act in Singapore for the Court to order a sale. Should the Court be of the view that justice and fairness requires that a sale be ordered it would do so. At this point it would be going too far to say that the mortgagee is under a duty to consider the mortgagor's position in regard to the decision to exercise his powers. *Teo Siew Har* would confirm the conventional view.

Another recent Court of Appeal decision concerning the exercise by the mortgagee of his powers is *Hong Leong Finance Ltd.*<sup>12</sup> The power concerned was the power to enter into possession. In this case the mortgagee decided to enter into possession on the mortgagor defaulting, but the mortgagor sought the court's aid to prevent the mortgagee from doing so. The facts involved two illiterate old ladies who took a loan from an established finance company to finance their purchasing a hawker stall for \$116,000. The loan of \$115,000 was secured by a mortgage of the stall for 15 years. The terms of the mortgage included the repayment of the loan by monthly instalments of \$936.65 for 2 years and then \$1,017.65 thereafter. After a few months the old ladies defaulted on the monthly payments and when they were seven months in arrears, the mortgagee decided to call in the loan and also gave notice to take possession of the property. The mortgagees then began court proceedings to enforce their security. The old ladies resisted the mortgagee's action. At first instance the Warren Khoo J gave judgment for the old ladies. In fact he went so far as to vary the terms of repayment.<sup>13</sup> On appeal the Court of Appeal reversed the judgment of the court below inasmuch as it rewrote the terms of the repayment. The Court of Appeal followed English authorities<sup>14</sup> and held that where the mortgagee has exercised his power to possess the property according to the terms of the contract then the court has no right to interfere. But the Court of Appeal did relieve the mortgagors from their plight by staying the execution of the order, thus effectively giving the mortgagors a second chance to pay up the instalments due and owing.<sup>15</sup>

<sup>12</sup> *Supra*, note 2.

<sup>13</sup> There was also an issue about whether the interest payable when instalments fell into arrears was a penalty, but this does not come within this comment.

<sup>14</sup> *Four-Maids v Dudley Marshall (Properties)* [1957] Ch 317; *Robertson v Cilia* [1956] 1 WLR 1502; *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883.

<sup>15</sup> *Cf* the court's power to give relief in forfeiture proceedings in leases. See also the English courts' power under section 36 Administration of Justice Act 1970 to grant relief to mortgagors of residential premises.

These two Court of Appeal decisions underscore the security aspect of a mortgage from the point of view of the mortgagee. He may exercise his powers as given to him under the contract and the law. In deciding whether to exercise and, if so, when to do so, he need not have regard to the interests of the mortgagor. However with *Palk* there is no doubt that a shadow has been cast on the hitherto unfettered right of the mortgagee, by giving the court a discretion to order a sale when justice and fairness so requires. *Palk* was decided under section 91(2) LPA 1925 which refers only to the power to order sale. Therefore the right of the mortgagee to enter into possession is not directly affected. Still in *Palk* Sir Donald Nicholls VC did say that he would find unattractive a situation where the mortgagee exercised his powers in a way which would add to the burden of the mortgagor. 'That he can act in such a cavalier fashion is not a proposition that I find attractive'.<sup>16</sup> *Palk* has a resonance in *Hong Leong Finance Ltd* where the Court of Appeal stayed the execution of its order for possession, a gentle reminder of the court's equitable jurisdiction to give relief.<sup>17</sup> This reflects the tension inherent in a mortgage, between the interest of the mortgagor having the equity of redemption and the mortgagee looking to the property as security for the loan, between property and contract.

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<sup>16</sup> *Supra*, note 5, at 421. Similar sentiments have been expressed in other cases, *eg, per* Walsh J in *Forsyth v Blundell* (1973) 129 CLR 477 at 493 and *per* Warren Khoo in *How Seen Ghee v Development Bank of Singapore* [1994] 1 SLR 526 at 531. Both cases concerned the manner in which the mortgagee exercised his power of sale rather than the timing of it.

<sup>17</sup> See *supra*, note 15.

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