Singapore Journal of Legal Studies
[2009] 567–591

# MORTGAGEES' DUTY OF CARE IN SINGAPORE: STAYING THE COURSE

KELRY C.F. **LOI***

Whilst mortgagees do not owe mortgagors any *general* duty of care, they may come under specific duties of care, such as the duty to take reasonable steps to obtain the market price *when they exercise their power of sale*. This is trite law in Singapore. However, it has recently been suggested that mortgagees ought to owe mortgagors a general duty of care whenever there is no conflict of interest between them. This would effectively impose upon mortgagees a duty of care in deciding whether and when to sell the mortgaged asset. This article supports the status quo on grounds of precedent, principle and policy. The case for a *general* duty of care is flawed. This article argues that no general duty of care ought to be imposed on mortgagees; in particular, mortgagees should owe mortgagors no duty of care in deciding whether and when to sell.

## I. MORTGAGEES' POWER OF SALE

Under Singapore law, a mortgagee has power to sell the mortgaged asset if such power is stipulated in the mortgage.[1] Alternatively, where the mortgage is in deed form, such power would be statutorily implied as if it had "been in terms conferred by the mortgage deed".[2] Furthermore, the Singapore Court of Appeal has held in *Malayan Banking v. Hwang Rose*[3] that a power of sale would be implied *at common law* in favour of a mortgagee.

In a series of Singapore decisions, including the Court of Appeal judgments in *Beckett Pte. Ltd. v. Deutsche Bank AG*[4], *Ng Eng Ghee v. Mamata Kapildev Dave (Horizon Partners Pte. Ltd., intervener)*,[5] *Roberto Building Material v. Oversea-Chinese Banking Corp. (No. 2)*[6] and *How Seen Ghee v. Development Bank of*

---

* Faculty of Law, University of Hong Kong. The writer thanks Kelvin F.K. Low (HKU) and Tang Hang Wu (NUS) for reading an earlier draft and is grateful for the comments of an anonymous referee. The usual caveats apply.

1 Tan Sook Yee, *Principles of Singapore Land Law*, 2d ed. (Singapore: Butterworths Asia, 2001) at 455. Readers should refer to the forthcoming: Tan Sook Yee, Tang Hang Wu & Kelvin F.K. Low, eds., *Tan Sook Yee's Principles of Singapore Land Law*, 3d ed. (Singapore: Lexis Nexis, scheduled for publication in 2009) c. 18, for relevant updates on mortgages.

2 *Conveyancing and Law of Property Act* (Cap. 61, 1994 Rev. Ed. Sing.), s. 24(1)(a).

3 [1997] 2 S.L.R. 1 at 19 (C.A.), *per* L.P. Thean J.A. [*Malayan Banking Berhad*], citing *Re Morritt; ex p Official Receiver* (1887) 18 Q.B.D. 222 at 233 (C.A.) and *Deverges v. Sandeman, Clark & Co* [1902] 1 Ch. 579 at 588-589 (C.A.).

4 [2009] SGCA 18 at para. 27 *et seq*, *per* Chan Sek Keong C.J. [*Beckett Pte. Ltd.*].

5 [2009] SGCA 14 at para. 120, *per* V.K. Rajah J.A. [*Ng Eng Ghee*].

6 [2003] SGCA 30, [2003] 3 S.L.R. 217 at paras. 51-54 [*Roberto Building Material*].

*Singapore*,[7] two well established propositions of English law were accepted as part of Singapore law. First, although a mortgagee must act in good faith and for proper purposes in exercising his powers of security, he owes no general duty of care to the mortgagor.[8] It follows that the mortgagee owes the mortgagor no duty at any time to exercise his power of sale or other powers comprised in his security. It matters not that the mortgagee might have been able to help the mortgagor avert financial loss if the mortgagee had decided to exercise his power at some earlier or later time. Secondly, in exercising his power of sale, the mortgagee owes the mortgagor a specific equitable duty of care to obtain a proper price for the mortgaged asset.[9] This specific duty, requiring the mortgagee to undertake reasonable efforts to obtain the best price available, is directed at the *process* of effecting the sale,[10] not at the reasonableness of the price or the timing of the sale.[11]

In an admirably thorough article, drawing heavily on Sir Gavin Lightman and Gabriel Moss's seminal work,[12] Dr. Wee Meng Seng undertook a broad survey of receivers' and mortgagees' duties, and argued *inter alia* that the existing law on mortgagees' and receivers' duties ought to be reformed in Singapore by imposing a general duty to exercise care.[13] Other leading insolvency commentators who appear to support the imposition of such a general duty of care, and who have been cited by Dr. Wee, include Professor Vanessa Finch[14] and Sir Roy Goode.[15]

This article deals with the duty of care of mortgagees and chargees. For the sake of convenience, the term 'mortgagees' will be used to refer to both, unless the context otherwise requires. Although a receiver's powers are in a sense derived from the mortgagee who appointed him,[16] there are significant differences between them and it has been suggested that a receiver owes a mortgagor more onerous duties than a mortgagee under some circumstances.[17] Although couched in terms of a general duty of care, the recent movement in favour of expanding mortgagees' duties of care is primarily concerned with requiring mortgagees to exercise care in considering whether and when to exercise their power of sale. In this respect, a mortgagee's power of sale is contextually very different from that of a receiver's, even if the

---

7 [1994] 1 S.L.R. 526 at 531 (C.A.) [*How Seen Ghee*].

8 *Downsview Nominees v. First City Corp.* [1993] A.C. 295 at 315 (P.C.) [*Downsview Nominees*]; *Medforth v. Blake* [2000] Ch. 86 at 98 (C.A.) [*Medforth*].

9 *Downsview Nominees*, *ibid.* at 315; *Silven Properties v. Royal Bank of Scotland* [2004] 1 W.L.R. 997 at para. 19 (C.A.) [*Silven Properties*].

10 *Roberto Building Material*, *supra* note 6 at para. 63, citing *Lee Nyet Khiong v. Lee Nyet Yun Janet* [1997] 2 S.L.R. 713 at para. 36 (C.A.) [*Lee Nyet Khiong*].

11 *Roberto Building Material, ibid.* at para. 51. See also *Silven Properties, supra* note 9 at para. 14; *China & South Sea Bank v. Tan Soon Gin (alias George Tan)* [1990] 1 A.C. 536 (P.C.) [*China & South Sea Bank*]; *Tse Kwong Lam v. Wong Chit Sen* [1983] 1 W.L.R. 1349 at 1355 (P.C.) [*Tse Kwong Lam*].

12 Sir Gavin Lightman & Gabriel Moss, *The Law of Administrators and Receivers of Companies*, 4th ed. (London: Sweet & Maxwell, 2007) c. 10.

13 Wee Meng Seng, "Duties of a Mortgagee and a Receiver: Where Singapore Should and Should Not Follow English Law" (2008) 20 Sing. Ac. L.J. 559 at para. 6.

14 Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge: Cambridge University Press, 2002) at 251-252 and 261-272.

15 Roy Goode, *Principles of Corporate Insolvency Law*, 3d ed. (London: Sweet & Maxwell, 2005) at para. 9.48.

16 See *e.g.*, *In re B Johnson & Co (Builders)* [1955] 1 Ch. 634 at 662 (C.A.), *per* Jenkins L.J. [*In re B Johnson*].

17 See *e.g.*, *Silven Properties*, *supra* note 9 at para. 23; Wee, *supra* note 13 at para. 10.

latter's power is derived from the former. Allegations of failure to exercise due care made of the former typically arise in cases where no steps have been taken to realise the security. In contrast, the appointment of a receiver is itself a step, albeit not the only possible one, towards realisation. Given this distinction, it is *not* proposed to address Dr. Wee's other argument—that *receivers* ought to owe mortgagors a general duty of care—in this article. Different considerations arise and receivers' duties should be discussed separately.

This article argues, in spite of an impassioned appeal to sympathy for mortgagors, that no sufficient reason has been put forth to justify departing from the existing law relating to mortgagees' duty of care. As such, the orthodox view that mortgagees do not owe mortgagors a general duty of care ought to be maintained. In particular, mortgagees do not owe mortgagors a duty of care to consider whether or when to sell mortgaged assets, whether independently or upon an appeal to do so by mortgagors.

There is no need in this article to justify the existing state of the law on mortgagees' duty of care. This is because the existing law is well-established and reasonably clear; and it is for those who advocate change to justify it. The doctrine of judicial precedent demands nothing less.

## II. Judicial Precedent

The first objection to the proposition that a mortgagee ought to owe a mortgagor a general duty of care is that it contradicts authority. In Dr. Wee's view, two principles emerge from the cases in support of such a general duty of care.[18] First, provided a mortgagee or receiver acts in good faith, the mortgagee is entitled, and the receiver is bound, to subordinate any conflicting interests of the mortgagor to what the mortgagee or receiver genuinely perceives to be the mortgagee's interest in securing repayment. Secondly, where there is no conflict of interest between mortgagor and mortgagee, the mortgagee and receiver are not entitled to override or ignore the interests of the mortgagor and come under a duty to exercise reasonable care.

It is fundamental that, throughout this exercise, we bear in mind the relevant operational scope of this proposed general duty of care. The existing law already imposes specific duties of care on the mortgagee to take reasonable steps in effecting a sale to obtain a proper price for the mortgaged asset. The existing law also imposes on a *mortgagee in possession* specific duties to take reasonable care of the mortgaged asset, to be active in protecting and exploiting the mortgaged asset, maximise returns without taking undue risks, and generally to exercise 'due diligence'.[19] This means that, in reality, the most significant consequence, if not the whole objective, of imposing a novel 'general' duty of care is that the mortgagee would come under a novel duty of care in *deciding whether and when to exercise* his powers of security as mortgagee, such as his power of sale.[20] A sample of this emphasis is evident in

---

18 Wee, *supra* note 13 at para. 61.

19 Lightman & Moss, *supra* note 12 at paras. 10.012–10.013; Wee, *supra* note 13 at paras. 18–19: "Nevertheless, although the precise meaning of wilful default is not clear, the commentators are agreed that it does not amount to strict liability, and means no more than that the mortgagee [in possession] should exercise 'due diligence'."

20 Or, *inter alia*, his power to enter into possession or to appoint a receiver.

Sir Roy Goode's account *in relation to mortgagees* where he appeared to single out the mortgagee's decision whether and when to sell:

> A review of legal policy in this area is now overdue. There is little doubt that the dangers involved in imposing a more generalized duty on receivers and their debenture holders have been exaggerated, whilst insufficient regard has been paid to *recurrent criticisms by companies in receivership and junior incumbrancers that their interests are not adequately safeguarded by the present law relating to sales by mortgagees and receivers. Thus the company is not entitled to complain about the decision of a mortgagee or receiver not to sell or about the timing of any sale, even if it can be demonstrated that the debenture holder would lose nothing, and the company might gain a great deal, from a temporary deferment of the sale.* The receiver is under no obligation to improve the mortgaged property or to increase its value, nor is he obliged to pursue, or continue the pursuit of, an application for planning permission to develop the property instead of proceeding with an immediate sale…[21]

For simplicity, it is proposed to take the cue from Sir Roy Goode and confine ourselves to the specific, paradigmatic, case of the mortgagee's power of sale. Hence, the main, if not the whole, point of recognising a novel general duty of care would be to impose on the mortgagee a duty to exercise reasonable care in deciding whether and when he wants to exercise *inter alia* his power of sale. It follows that unless it can be shown that the mortgagee ought to owe the mortgagor a duty to take care in deciding *whether or when to exercise his power of sale*, both the proposed general duty of care and Dr. Wee's second principle would be pointless.

Although Dr. Wee's first principle is well-founded, his second, crucial, principle is clearly inconsistent with existing authorities such as *Roberto Building Material*[22] and *Yorkshire Bank v. Hall*.[23] As Dr. Wee admitted, *Yorkshire Bank* "spells the end" of his second principle and proposed general duty.[24] A long line of Privy Council and English Court of Appeal authorities such as *Downsview Nominees*,[25] *Parker-Tweedale v. Dunbar Bank*,[26] *Cuckmere Brick v. Mutual Finance*,[27]

---

21 Goode, *supra* note 15 at para. 9.48 (emphasis added).

22 *Roberto Building Material*, *supra* note 6 at paras. 51–54. As Chao Hick Tin J.A. said at para. 51:

> From the authorities, it would appear that there is no general duty of care on the part of the receiver 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 or receiver is entitled to determine the time for sale so long as he acts in good faith.

23 [1999] 1 W.L.R. 1713 at 1729 (C.A.), *per* Robert Walker L.J. [*Yorkshire Bank*].

24 See Wee, *supra* note 13 at 46:

> Unfortunately, Robert Walker LJ, in addition to approving the law as set out in *Tan* and *Downsview*, went further and strengthened the pro-mortgagee bias of the classical approach.… He accepted that it is true that the authorities can be seen as establishing that a mortgagee may, within limits, prefer its own interest to that of the mortgagor where they conflict. But, according to him, that is no basis for imposing "undefined and novel duties" merely because there is for the time being no such conflict.… But whatever the truth is, the dictum effectively spells the end of both the new approach and the second principle.

25 *Downsview Nominees*, *supra* note 8 at 315.

26 [1991] Ch. 12 at 18 (C.A.).

27 [1971] Ch. 949 at 966 (C.A.) [*Cuckmere Brick*].

*Tse Kwong Lam*,[28] *China & South Sea Bank*,[29] *Silven Properties*,[30] *Palk v. Mortgage Services Funding*,[31] *Den Norske Bank v. Acemex Management (The 'Tropical Reefer')*[32] and *Yorkshire Bank*,[33] have established or confirmed that although a mortgagee owes a duty of care in obtaining a proper price in selling the mortgaged asset, he owes no general duty of care to the mortgagor and is free to decide in his own interest whether or when to exercise his power of sale even if the timing of his decision were disadvantageous to the mortgagor.[34] The Singapore Court of Appeal in *Roberto Building Material*,[35] in approving *Downsview Nominees* and *Cuckmere Brick*, accepted that the mortgagee owes the mortgagor no general duty of care and may choose to exercise his power of sale at any time. *Tse Kwong Lam* and *Cuckmere Brick* have been accepted by the Singapore Court of Appeal in *Ng Mui Mui v. Indian Overseas Bank*,[36] *How Seen Ghee*,[37] *Malayan Banking Berhad*[38] and *Lee Nyet Khiong*.[39]

We must now turn our attention to two recent judgments of the Singapore Court of Appeal. Although the Singapore Court of Appeal in *Ng Eng Ghee*[40] noted, without comment, that the existing law has been criticised in Dr. Wee's article, the existing law was again *reiterated without criticism* by the Singapore Court of Appeal in its subsequent decision of *Beckett Pte. Ltd.*[41] Delivering the judgment of the Singapore Court of Appeal in that case, Chan Sek Keong C.J. reiterated the existing law in the following terms:

> It is settled law that a mortgagee, in exercising his power of sale, has a duty to act in good faith and also a duty to take reasonable care to obtain the true market value or the proper price of the mortgaged property *at the date on which he decides to sell* the property. In *Good Property Land Development Pte Ltd v Societe General* [1989] SLR 229 ("*Good Property Land*"), the High Court held … following the decision of the English Court of Appeal in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 ("*Cuckmere*"), which was approved by the Privy Council in *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349,

---

28 *Tse Kwong Lam*, *supra* note 11 at 1355.

29 *China & South Sea Bank*, *supra* note 11 at 545.

30 *Silven Properties*, *supra* note 9 at paras. 13-15 and 20.

31 [1993] Ch. 330 at 337-338 (C.A.).

32 [2004] 1 Lloyd's Rep. 1 at para. 23.

33 *Supra* note 23 at 1729.

34 Hugh Beale, Michael Bridge, Louise Gullifer & Eva Lomnicka, *The Law of Personal Property Security* (Oxford: Oxford University Press, 2007) at para. 17.38.

35 *Supra* note 6 at paras. 51-54. On receivers, see Tan Cheng Han, SC, ed, *Walter Woon on Company Law*, 3d ed. (Singapore: Sweet & Maxwell Asia, 2005) at para. 13.45:

> A receiver must act in good faith and take reasonable precautions to obtain the true market value at the date on which he decides to sell. However he may sell when he feels the time is ripe and need not delay so as to obtain the highest price.

36 [1986] 1 M.L.J. 203; [1984-1985] S.L.R. 286 (C.A.).

37 *Supra* note 7 at 531.

38 *Malayan Banking Berhad*, *supra* note 3 at 21.

39 *Lee Nyet Khiong*, *supra* note 10 at 722.

40 *Supra* note 5 at para. 123.

41 *Supra* note 4 at para. 27, citing *inter alia Good Property Land Development v. Societe General* [1989] S.L.R. 229 (H.C.); *How Seen Ghee*, *supra* note 7; *Tse Kwong Lam*, *supra* note 11; and *Cuckmere Brick*, *supra* note 27.

that:

> …He is not a trustee of his power of sale vis-à-vis the mortgagor. Thus *the mortgagee is not required to wait for the most propitious market conditions to sell or to delay a sale* in the hope of obtaining a better price. He is also not required to consult the mortgagor as to the time and manner of sale.…
>
> *Good Property Land* was followed in several High Court decisions … and approved by this court in *How Seen Ghee v Development Bank of Singapore Ltd* [1994] 1 SLR 526. *Cuckmere* was earlier followed by this court in *Ng Mui Mui v Indian Overseas Bank Ltd* [1984-1985] SLR 286, *Malayan Banking Berhad v Hwang Rose* [1997] 2 SLR 1 and *Lee Nyuet Khiong v Lee Nyet Yun Janet* [1997] 2 SLR 713 ("*Lee Nyet Khiong*").[42]

The existing law relating to a mortgagee's duties to a mortgagor in exercising his power of sale appears to be clear. It has been stated authoritatively by the Singapore courts, and it would be a mistake to assume that the reception of the Privy Council and English authorities in that process was merely the result of the Singapore courts' unthinking importation of foreign law. Experience has shown that the Singapore courts can and will depart from precedents (whether local or otherwise) where justice and the development of Singapore law requires it.[43] Nor can *Beckett Pte. Ltd.*, the Singapore Court of Appeal's latest pronouncement on mortgagees' duty of care, be dismissed as rubber-stamping of orthodoxy in ignorance. This is because *Beckett Pte. Ltd.* was decided a *mere 25 days after* Dr. Wee's criticisms of the scope of mortgagees' duties were noted in *Ng Eng Ghee*, and both Chan Sek Keong C.J. and Andrew Phang J.A. were on the judicial panels in both cases of the Singapore Court of Appeal.

Although it must be true that rules which contradict commercial sense may require reconsideration, it must be the case that such rules would not be commonly encountered, much less with as distinguished a pedigree as the existing law currently under attack. There is no need in this article to try justifying the existing state of the law as it appears to be. The burden is on those who seek change to justify it. This conclusion is necessitated by the doctrine of precedent. This is not an arid technical point of distinguishing between binding precedent and persuasive authority or between *ratio* and *dictum*.[44] It is a matter of upholding substantive justice underpinned by consistency and certainty. It is also about protecting legitimate expectations bargained for pursuant to the generally accepted understanding of what the law appears to be. All this is reflected in the Singapore Court of Appeal's Practice Statement (Judicial Precedent) of 1994 in which the court declared that although it reserved the power to depart from prior decisions, it will only exercise its power "sparingly" in view of the "danger of retrospectively disturbing contractual, proprietary and other legal

---

42 *Beckett Pte. Ltd. supra* note 4 at para. 27 (emphasis added).

43 See *e.g.*, the Singapore Court of Appeal decisions in *Spandeck Engineering v. Defence Science & Technology Agency* [2007] 4 S.L.R. 100 (duty of care in tort of negligence) and *Xpress Print Pte. Ltd. v. Monocraft Pte. Ltd.* [2000] 3 S.L.R. 545 (natural right of support).

44 In the light of the Singapore Court of Appeal's power to depart from previous precedent, it is more fruitful to speak in terms of whether there are good reasons for the Court of Appeal to preserve or depart from what was previously *perceived* to be the law. To this extent, the distinction between binding and merely persuasive authority and between *ratio* and *dictum* would only make a difference in litigation below the Court of Appeal.

rights".[45] The extent of a mortgagee's duties in exercising his power of sale concerns contractual and proprietary rights of security holders. These rights have been bargained for by parties to mortgages on the understanding that the existing law is what it appeared to be. These rights fall squarely within the ambit of the Court of Appeal's expressed reservations in its Practice Statement.

This is not to say that there is no room for change. It simply means that sufficient justification for departure from existing law is necessary, and as the rest of this article will show, none has been offered.

## III. Principle & Policy

### A. *Receivers*

Under existing law, a mortgagee does not owe a mortgagor any general duty of care, but he comes under specific duties of care when he takes active steps to enforce his security (for example, by taking possession of or by selling the mortgaged assets).[46] This, in a way, reflects the relative position of mortgagees and receivers. In his opening paragraphs, it is not entirely clear whether Dr. Wee intended to rely on the arguments in favour of expanding receivers' duties as arguments in favour of expanding mortgagees' duties, or whether he was merely setting out the reasons for expanding receivers' duties.[47] As Dr. Wee is one of the leading insolvency commentators in Singapore, it is most unlikely that he would have intended such misplaced reliance. It is also unlikely that Sir Roy Goode, the foremost corporate insolvency commentator, would have intended to equate mortgagees and receivers despite having placed them both in the same discussion.[48]

In any event, it is respectfully submitted that the second objection to the imposition of a novel general duty on *mortgagees* is that its reliance, if any, on arguments in favour of expanding *receivers'* duties is misplaced. In *Downsview Nominees*,[49] it was accepted that both mortgagee and receiver are free to decide in the mortgagee's interest whether and when to sell the mortgaged asset because the receiver's power of sale "is, in effect, that of a mortgagee".[50] Despite the fact that receivers' duties

---

[45] The Singapore Court of Appeal's *Practice Statement (Judicial Precedent)* [1994] SGCA 148, [1994] 2 S.L.R. 689 (dated 11 July 1994).

[46] Beale, Bridge, Gullifer & Lomnicka, *supra* note 34 at para. 17.38.

[47] Wee, *supra* note 13 at paras. 1, 2 and 5:

> 1. In 2002, the UK Parliament passed the Enterprise Act 2002 … The Act virtually abolishes administrative receivership, an enhanced form of receivership, in favour of the wider application of administration.…
> 2. The reasons for the dissatisfaction with administrative receivership were set out succinctly in a white paper published by the UK Government… It can be seen that the crux of the criticisms is that the duties that mortgagees and receivers owed to mortgagors and other interested parties are minimal and very lax.…
> 5. … Therefore, at least for the interim, it would seem that the better solution for Singapore is to take the bull by the horns and address the criticisms of receivership identified in the UK white paper … in particular, the lax duties that mortgagees and receivers owed to mortgagors.

[48] Goode, *supra* note 15 at para. 9.04 and para. 9.48.

[49] *Downsview Nominees*, *supra* note 8 at 312.

[50] *In re B Johnson*, *supra* note 16 at 662, *per* Jenkins L.J.

may, to a large extent, overlap with those of mortgagees, there are some fundamental differences.[51] The law relating to mortgagees' duties ought to be considered separately from that relating to receivers' duties. Different considerations may apply and the two cannot be elided.

A mortgagee *simpliciter* who has yet to decide whether and when to exercise his powers of security has not yet acted. He therefore cannot come under a duty to act with care. On the other hand, a *mortgagee in possession* owes a duty to act with due care for he *has already began exercising his powers of security by acting in enforcement of his security*.[52] Similarly, the appointment of a receiver by a mortgagee means that the mortgagee has already exercised his security powers and taken active steps to enforce his security by putting the receiver in possession of the mortgaged assets, *in lieu* of the mortgagee taking possession[53] personally. As a result, whilst a mortgagee *simpliciter* is not obliged at any time to exercise his powers to enforce his security, a receiver has no right to remain passive if that would damage the mortgagor or mortgagee.[54] Therefore, it is no wonder that some commentators[55] regard the receiver's position as being more analogous to that of a mortgagee *in possession*, rather than a mortgagee *simpliciter*. As the appointment of a receiver is a recognised form of enforcement, either by way of an equitable judicial remedy or by out-of-court appointment pursuant to the consensual arrangement of mortgagee and mortgagor,[56] resulting in the receiver taking possession of the mortgaged asset, this conclusion is hardly surprising.

Furthermore, mortgage instruments commonly stipulate that a receiver appointed by the mortgagee be deemed the mortgagor's agent so that the mortgagor would be solely responsible for the receiver's acts, defaults and remuneration.[57] This 'agency' gives rise to a dilemma in legal policy[58]:

> On the one hand … the courts typified what might be characterized as the "fictional" approach in that they viewed such a clause as a mere expedient ploy with the result that they refused to incorporate wholesale into the receiver/company [*i.e.*, receiver/mortgagor] tie the full implications of an agency nexus.… To be contrasted with this is the judicial attitude which may be termed the "realist" approach. By this it is meant that the courts tend to take the declaration that the receiver is the company's agent to its natural conclusion, even though the parties

---

51 See *e.g.*, *Silven Properties*, *supra* note 9 at para. 23.

52 *Cf.* Beale, Bridge, Gullifer & Lomnicka, *supra* note 34 at para. 17.38.

53 *Cf. Downsview Nominees*, *supra* note 8 at 315; and see Lightman & Moss, *supra* note 12 at paras. 10.011-10.013:

> The appointment of a receiver as agent of the mortgagor and taking possession are alternative remedies: such an appointment cannot remain in force once the mortgagee takes possession, whereupon the receiver becomes the agent of the mortgagee.… By taking possession, the mortgagee becomes the manager of the charged property. The authorities establish that a mortgagee in possession is accountable to the mortgagor for his possession and management of the charged property on the basis of "wilful default".

54 *Silven Properties*, *supra* note 9 at para. 23.

55 *E.g.* Wee, *supra* note 13 at para. 10 (who, in this regard, must, with respect, be right).

56 *Cf.* R.P. Meagher, J.D. Heydon & M.J. Leeming, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies*, 4th ed. (Chatswood: Butterworths, 2002) at para. 28.010.

57 David Milman, "Receivers as Agents" (1981) 44 M.L.R. 658 at 659.

58 Milman, *ibid.* at 670.

> did not envisage that happening.… The widespread adoption of these agency clauses presents an important policy dilemma for English law. To what extent is it possible to manufacture a limited agency relationship with features beneficial to oneself [*i.e.*, the mortgagee] whilst excluding the normal but less advantageous characteristics of agency?

Furthermore, by taking possession of the mortgaged assets, the receiver becomes 'manager' thereof[59] in addition to his status as the mortgagor's 'agent'.[60] Additionally, in the case of a receiver and manager (analogous to administrative receiver in the U.K.) taking control of substantially the entire undertaking of a corporate mortgagor, the mortgagor's directors "will be effectively *functus officio* until the receiver hands back the company".[61]

These particular traits of receivers indicate that there are some arguments which are potentially applicable to receivers but not to mortgagees in general, which may suggest in principle that a receiver ought conceivably to owe *more onerous* duties than a mortgagee *simpliciter*. This may explain why, whereas a mortgagee has no obligation to sell, a receiver (although generally under no obligation to do so) might exceptionally be obliged to exercise the power of sale, if the mortgaged goods are perishable and a failure to do so might cause loss to mortgagor and mortgagee.[62] This article does not purport to deal with that proposition, but the suggestion that special considerations apply to receivers so that they might conceivably owe more onerous duties than mortgagees is certainly arguable. As such, receivers' duties should be considered separately and will not be dealt with in this article. More importantly, it is submitted that it is not appropriate to suggest that the law ought to impose more duties, such as a novel general duty of care, on mortgagees *simpliciter*, by drawing an analogy with arguments in favour of expanding receivers' duties.

Early on in his article, Dr. Wee astutely identified the receiver's position as being more akin to that of a mortgagee in possession, rather than that of a mortgagee

---

[59] *Cf. In re B Johnson*, *supra* note 16 at 662 (*per* Jenkins L.J.) and 644-646 (*per* Evershed M.R.):

> It has long been recognized and established that receivers and managers so appointed are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment; and the powers which are conferred upon him … are really ancillary to the main purpose of the appointment, which is the realization by the mortgagee of the security (in this case, as commonly) by the sale of the assets.… The distinction may at first sight seem fine between a receiver and manager of the property of a company, on the one hand, and a manager of the company, on the other; … but the logic of it and the substance of it is that … a person appointed receiver and manager, so-called, is not managing on the company's behalf but is managing in order to facilitate the exercise by him, for the mortgagees, of the mortgagees' power to enforce the security.

[60] *Cf.* Meagher, Heydon & Leeming, *supra* note 56 at para. 28.225:

> The appointment of a receiver by a mortgagee is a means of realizing the security. Certainly the receiver is usually the agent of the mortgagor, but the agency is "a very special, and I would suggest limited, one" "with some peculiar incidents"… It is, perhaps, the only genuinely non-fiduciary agency.

[61] Tan, *supra* note 35 at para. 13.32.

[62] *Silven Properties*, *supra* note 9 at para. 23.

*simpliciter*.[63] It is therefore surprising that he began his analysis on mortgagees' duties by stating that in the United Kingdom, the demise of administrative receivership under the U.K.'s Enterprise Act 2000 came about in part because of *administrative receivers'* lack of accountability to stakeholders other than his appointor.[64] However, that can be explained on the basis that Dr. Wee was, in that part of his article, arguing for expanding the duties of *receivers*, not mortgagees, in Singapore. Policy considerations pointing towards the imposition of greater duties on an administrative receiver in the United Kingdom might be an indication that greater duties ought to be imposed in Singapore on receivers and managers or receivers, but not necessarily on mortgagees.

Therefore, unless there are reasons justifying the imposition of a novel general duty of care on *mortgagees specifically*, it is difficult to see how an analogy with receivers could support a shift in that direction. The burden, as it were, is on those who propose the imposition of a novel general duty of care on mortgagees to propose specific justifications for mortgagees to owe mortgagors a duty of care in deciding whether and when to exercise his power of sale.

## B. *Mortgagees' Duty of Care*

### 1. *Good Faith & Possession*

In the third and fourth parts of his article, Dr. Wee dealt with the mortgagees' and receivers' general duty of good faith and the specific duties of a mortgagee in possession. His first argument in the third part was that the duty of good faith should be regarded as capturing not only fraudulent conduct, but "also deliberate or reckless conduct in causing harm to the mortgagor's interest gratuitously".[65] This is a controversial point. It is difficult to see how breach of the good faith duty must require "dishonesty, or improper motive, some element of bad faith, to be established";[66] and yet also accept with consistency the expansion of that good faith duty to encompass "intentional or reckless conduct that sacrifices the interests of the mortgagor gratuitously",[67] in the sense that the mortgagee "may have ignored the interests of the mortgagor" where the mortgagee's "own interests are not at risk".[68] His second

---

63 Wee, *supra* note 13 at para. 10.

64 *Ibid*. at paras. 2–5.

65 *Ibid*. at paras. 6 and 13.

66 *Ibid*. at para. 12 discussing *Medforth*, *supra* note 8, which has been accepted by the Singapore Court of Appeal in *Roberto Building Material*, *supra* note 6 at paras. 23, 24 and 28. According to Wee, *supra* note 13 at para. 12:

> In *Medforth v. Blake*, Scott VC emphasized that the concept of good faith must not be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith. Accordingly, breach of a duty of good faith requires some dishonesty, or improper motive, some element of bad faith, to be established. This approach is, it is respectfully submitted, absolutely right. In a legal regime where the only duty owed by a mortgagee is the duty of good faith, courts may feel compelled to expand the boundaries of the duty of good faith, in appropriate cases, to encompass conduct that is grossly negligent. Now that a mortgagee and receiver come under specific duties of care, there is no necessity to engage in such manoeuvres, at least in those instances where the duties of care apply.

67 *Ibid.* at para. 16.

68 *Ibid*. at para. 13.

argument in the fourth part was that although it is commonly said that mortgagees in possession were liable to account on the basis of "wilful default" or were subject to "particularly onerous duties" which were "almost penal", those duties do not amount to "strict liability" and mean no more than that the mortgagee in possession should exercise 'due diligence'.[69]

Those two arguments were put forth after a thorough survey of the relevant authorities, but it is not proposed to revisit the merits of those two arguments. The focus of this article is Dr. Wee's ultimate submission that mortgagees ought to owe mortgagors a general duty of care. It is perhaps closer to the truth that Dr. Wee did not intend to rely on those two arguments in support of his ultimate submission; and that all he intended was to clarify the law in relation to the duty of good faith and the specific duties of mortgagees in possession. Nonetheless, even if it were his intention, it is respectfully submitted that, regardless of their merits, those two arguments cannot advance Dr. Wee's ultimate submission that mortgagees should owe mortgagors a newly expanded general duty of care.[70] This point can be analysed from two angles.

First, mortgagees' duties of good faith and the duties imposed on a mortgagee in possession on the one hand, and the mortgagees' specific duty of care in exercising his power of sale[71] on the other hand, have long been recognised as existing side by side. If any authority is necessary, one need only refer to *Downsview Nominees*[72] as an example. Put simply, no reason has been given to explain why a mortgagee *simpliciter* should owe a novel general duty of care *simply because* his duty of good faith covers reckless as well as fraudulent conduct, or *simply because* a mortgagee in possession's duty of care is pitched at the level of 'due diligence' rather than the 'almost penal' standard of 'strict liability'. No demonstrable causal connection has been proposed to link Dr. Wee's ultimate submission (in support of a novel general duty of care) and his two arguments (on the duty of good faith and on the duties of mortgagees in possession).

Secondly, it can logically be suggested that, in principle, expanding a mortgagees' duty of good faith and the duty of 'due diligence' of a mortgagee in possession should mean that there is no further necessity to extend a mortgagor's protection by recognising a novel general duty of care over and above the present protection available under the existing specific duties. With hindsight, it is therefore no wonder that Lord Templeman had this to say in *Downsview Nominees*:

> 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 … leaves no room for the imposition of a general duty of 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.[73]

---

69 *Ibid*. at paras. 6, 19 and 20; drawing support from Lightman & Moss, *supra* note 12 at para. 10.013.
70 *Ibid*. at paras. 6, 60 and 61.
71 Or other powers of enforcing his security.
72 *Downsview Nominees*, *supra* note 8 at 312 and 315.
73 *Ibid.* (emphasis added).

Although Lord Templeman was responding to an argument to impose a tortious general duty of care on receivers, his rebuttal is similarly forceful against imposing a novel equitable general duty of care on mortgagees: The general equitable duty of good faith as well as the equitable due diligence duty imposed on mortgagees in possession (and the specific duty on care imposed on mortgagees effecting a sale) would all be unnecessary if there existed a general equitable duty of care. A general duty of care liable to be breached by careless conduct must, surely, also be breached by the *same conduct* although that conduct was carried out in bad faith. It follows that the imposition of a novel general duty of care must be precluded by the existence of the general duty of good faith (and the existing specific duties of care or due diligence).

Indeed, it is submitted that the proposed general duty of care would be otiose in the light of an expanded notion of the duty to act in good faith. To illustrate, let us return to the central question of whether a mortgagee should come under a duty of care when deciding whether and when to sell the mortgaged asset. According to Dr. Wee, even if he was not fraudulent, a mortgagee who decides not to sell at a particular time might breach the expanded duty to act in good faith if he has *ignored the mortgagor's interest* recklessly or deliberately where *his own interest is not at risk*.[74] Yet, it was also argued by Dr. Wee that *where there is no conflict* between the mortgagee's and mortgagor's interest, the *mortgagee comes under a general duty of care*;[75] and this would mean that a mortgagee would be liable for breach of the duty of care *if he ignored the mortgagor's interest* in deciding not to sell the property at a particular time.

As formulated by Dr. Wee, these two duties overlap dangerously, with hardly any substantial unoccupied territory between them. Both proposed duties arise in the case of, and can be breached by, a mortgagee who does not sell the mortgaged asset where there is *no conflict* of interest and he ignores the mortgagor's interest, *i.e.*, he does not keep in mind the fact that the mortgagor could benefit if the mortgaged asset were sold earlier. The only difference, as it appears from Dr. Wee's analysis, between a breach of the expanded good faith duty and the general duty of care is that the mortgagee's conduct in one is intentional whereas it is careless in the other. Clearly, that distinction is unsatisfactory, since a duty liable to be breached by careless conduct must, surely, also be breached by the *same conduct* although that conduct was intentional or deliberate. Either the notion of good faith or the duty of care would have to be cut back, for there is a real risk that the latter might substantially swallow up the former. Thus, in his concluding sections, Dr. Wee proceeded to consider *together* conduct breaching *both* the expanded duty of good faith and the general duty of care, without seeming to segregate their analysis except by their requisite mental element:

> … there are a few questions that should be asked to determine whether a mortgagee or receiver had acted in good faith and exercised reasonable care. *The central question is whether the conduct of the mortgagee or receiver is referable to and necessitated by a real conflict between the interests of the mortgagee and mortgagor?* If the conduct may be so justified, that is the end of the enquiry since

---

[74] Wee, *supra* note 13 at para. 13.

[75] *Ibid*. at para. 61.

> the mortgagee or receiver is entitled to prefer the interests of the mortgagee even when this inflicts harm on the mortgagor. If the conduct is not so referable, the receiver or mortgagee has not acted in good faith, as they would have sacrificed the mortgagor's interests gratuitously, and is liable accordingly. In this case, it is irrelevant that the interests of the mortgagee and mortgagor are actually in conflict. This will be rare in practice. *Next, if the conduct is so referable but the alleged conflict of interests turns out on closer analysis to be unreal, the mortgagee or receiver would have either breached the duty of good faith or the duty of care, depending on whether the conduct is intentional or negligent*.[76]

It appears that according to Dr. Wee's thesis, there could be rare cases where *there is in fact a conflict* of interest between mortgagee and mortgagor but the mortgagee's conduct in not selling earlier is *not referable* to that conflict, in the sense that his conduct is *not* motivated by his own interest. In such cases, the mortgagee's conduct could theoretically be regarded as having been motivated by, *inter alia*, ignorance or the desire to gratuitously injure the mortgagor. Dr. Wee states that in such cases, the mortgagee would be "liable accordingly". However, Dr. Wee does not state whether the liability arises under the duty of care or the duty to act in good faith. It is submitted that, again, it is difficult to tell them apart, even though it may be important to do so, not least for remedial reasons.[77] This is a further illustration of the dangerous overlap between the proposed general duty of care and the expanded duty to act in good faith.

On the whole, it is submitted that it will be difficult for the proposed novel general duty of care to co-exist with the proposed *expanded* general duty of good faith. Furthermore, it is difficult to impose a novel general duty of care alongside the *existing* general duty of good faith. The novel general duty of care has the undesirable tendency to eclipse all other duties.

This is not to deny that if legal policy and principle require an expansion of duties on the mortgagee's part, either the duty of good faith or any of the duties of care, or both, could be developed simultaneously to achieve that objective. The questions are whether any justification for expansion has been offered and *how* that expansion should come about.

### 2. *Modern Insolvency Law*

One of the arguments proffered in advancing the imposition of a novel general duty of care is that the existing law has "failed to impose appropriate duties of care on a

---

[76] *Ibid*. at para. 62 (emphasis added). As is apparent from the series of questions posited by Dr. Wee, his thesis is perhaps too complex. Furthermore, his thesis needs to be clarified as to how one decides whether there is a 'real' conflict of interest. For example, it remains to be decided whether the existence of such a real conflict ought to be determined from the mortgagee's or the mortgagor's perspective.

[77] See *e.g*. *Beckett Pte. Ltd.*, *supra* note 4 at para. 28, *per* Chan Sek Keong C.J.:

> A failure to take reasonable steps to obtain the true market value or proper price … will usually lead to a claim for damages, but not a claim to set aside the sale, for the obvious reason that the complaint here would not be that the mortgagee is not entitled to sell but that the mortgagee has sold at an undervalue. On the other hand, where there is a breach of the duty to act in good faith, the sale itself may be bad in law.… Where the purchaser is an independent third party, the mortgagor must prove that the purchaser has notice of bad faith or impropriety on the part of the mortgagee. In such a case, the court may set aside the sale in order to allow the mortgagor to redeem the security.

mortgagee and receiver to meet the needs of a modern insolvency law".[78] It appears that the complaint against the existing law is that[79]:

> The classical approach of equity, as recounted in *Downsview Nominees Ltd v First City Corp Ltd*, is highly indulgent towards the mortgagee and receiver. Neither owes any general duty of care to the mortgagor. The only duty of care they owe is on a sale, and in the case of a mortgagee, in addition the duty to exercise due diligence when it is in possession. Therefore, other than in a sale or when a mortgagee is in possession, a mortgagor cannot hold a mortgagee or receiver accountable for any prejudice it suffers, no matter how unreasonable or negligent the conduct of the mortgagee or receiver may be.

Generally, in principle, it is not possible to label the standard of a mortgagee's conduct as 'unreasonable' or 'negligent' unless he is first under a legal duty to pitch his conduct at some pre-set, higher, standard. Without such duty and absent any legal prohibition against acting in any particular way, it is difficult to see what sort of additional limitations ought to be imposed on a mortgagee's liberty in deciding whether and when to exercise his security rights. Reduced to its simplest terms, the argument here amounts to saying that the law should impose on the mortgagee a novel general duty of care because such general duty does not exist but it ought to. Unless we accept, as received principle or policy, the far-reaching proposition that novel duties of care *ought generally to be imposed* upon defendants *simply because no such duties are imposed* under existing law, this argument cannot succeed. The facts that a mortgagor might suffer loss and that a mortgagee might not be liable under existing law are not in themselves sufficient for making the mortgagee liable. Some additional reason justifying imposition of liability must exist, whether in principle or legal policy.

A second, more specific, point arises in this context. Doubtlessly, there is much to be said in favour of reforming *insolvency laws* to impose additional rules in relation to the duties of mortgagees and receivers so as to bring them in line with the underlying *policies and objectives of a modern insolvency regime*, in cases *where the mortgagor has become insolvent*. Notable insolvency commentators Sir Roy Goode,[80] Vanessa Finch[81] and Dr. Wee[82] have referred to some policy considerations proffered in paragraphs 2.2 and 2.3 of the U.K. Government's White Paper published by its Department of Trade and Industry in 2001,[83] leading to its recommendation in paragraph 2.5. That recommendation, in essence, was to abolish the right of chargees to appoint administrative receivers, except where the appointment is made by the holder of a floating charge granted in connection with capital market transactions. The idea was that "administrative receivership" (roughly equivalent to putting in place a receiver and manager under Singapore law) "should cease to be a major insolvency procedure" and to give "administration" (roughly analogous to

---

78 Wee, *supra* note 13 at para. 24.

79 *Ibid*. at para. 22.

80 Goode, *supra* note 15 at paras. 9.04 and 9.48.

81 Finch, *supra* note 14 at 251-252 and 261-272.

82 Wee, *supra* note 13 at paras. 1, 2 and 5.

83 The U.K. Government's *White Paper* (Department of Trade & Industry, July 2001), *Productivity and Enterprise: Insolvency—A Second Chance* (Cm. 5234) at paras. 2.2–2.5 [*White Paper*]. See Wee, *supra* note 13 at paras. 2 and 23; and Goode, *supra* note 15 at para. 9.04.

judicial management in Singapore) a greater role in the U.K. insolvency regime.[84] Translated roughly into the Singapore context, those are policies directed at enlarging the role of judicial management of insolvent companies and reducing the role of privately appointed receivers and managers.

Those policy considerations arise in a receivership context in the mortgagor's insolvency. They may possibly justify reforming insolvency laws which apply to an insolvent mortgagor in receivership. However, careful consideration and further argument is required before we assume that they are all relevant in the same way to a solvent mortgagor or a mortgagor not in receivership. It must be remembered that the security powers of a mortgagee exist whether or not the mortgagor is insolvent; and apart from the right to appoint a receiver (where the right is available), the mortgagee may have other alternative enforcement rights such as entry into possession or selling the mortgaged asset.[85] Ultimately, insolvency policies do not automatically translate into a general policy to reform the law of property, specifically the law of mortgages, regardless of whether the mortgagor has become insolvent. A more nuanced consideration of those polices may be warranted before drawing any conclusions.

The *White Paper*[86] asserted that there was widespread concern whether "administrative receivership as a procedure provides adequate incentives to maximise economic value" and whether it provided "an acceptable level of transparency and accountability to the range of stakeholders with an interest in a company's affairs, particularly creditors". The perceived grievance reflected in the *White Paper* was that there was "no equivalent of the duty owed by an administrator in an administration procedure to act in the interests of the creditors as a whole".[87] Again, these are clearly concerns which are specific to an insolvent company in receivership, and have no bearing on a solvent mortgagor or even an insolvent mortgagor over whom a receiver and manager has not been appointed.

Insolvency laws and procedures, and hence the *White Paper*, have their peculiar policy slants, emphasising *inter alia* the 'collective' nature of insolvency procedures, the *pari passu* distribution of the insolvent estate and possible rescue of insolvent enterprises, none of which apply to the law of contract or property in general. Beyond pockets of specific instances in the law of insolvency, such as liquidation or administrative receivership of insolvent companies or the administration of a bankrupt's estate, there is no *general* legal policy or principle requiring *creditors* to 'maximise economic value' or to be 'transparent or accountable' to their debtor or to the debtor's other creditors. Neither is there any general duty on *debtors* to maximise economic

---

84 *White Paper*, *ibid.* at para. 2.5.

85 Or simply suing the mortgagor (or a surety, where available) in debt, relying on the *personal* covenant to repay. For example, see *China & South Sea Bank*, *supra* note 11 at 545, *per* Lord Templeman:

> The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.… The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy, the mortgaged securities become valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing'.

86 *Supra* note 83 at para. 2.2.

87 *Ibid.*

value or be transparent or accountable to their creditors. Hence, a solvent corporate debtor is free to make improvident contracts for inadequate consideration.[88] Similarly, at common law, there is no such thing as a general legal policy or principle requiring one creditor 'to act in the interest of the creditors as a whole'; hence it is open to one creditor to initiate suit and enforce judgment without regard to the debtor's other creditors so long as the debtor is not insolvent.

All these points should come as no surprise, since the tenor of the policy statements mentioned in the *White Paper* was directed towards legislative reform making administration the main corporate insolvency procedure *in lieu* of administrative receivership; not whether mortgagees ought to owe a novel general duty in equity, and it does not purport to answer the questions whether and how to impose a general duty of care on mortgagees.

### 3. *Commercial Sense & Mortgagor's Powerlessness*

Perhaps the most intuitively attractive argument in favour of a novel general duty of care is that it 'accords with good commercial sense' and affords some protection to a mortgagor whose interest is affected by the mortgagee's conduct but who would otherwise have "no say in the matter".[89]

Nonetheless, it is submitted that this argument does not stand up to examination. Let us return to the central case of the mortgagee's power of sale. It has already been said that unless it can be shown that the mortgagee ought to owe the mortgagor a duty to take care in deciding *whether or when to exercise his power of sale*, the proposed general duty of care cannot stand. Yet, for various reasons, under existing law, it is entirely up to the mortgagee to decide whether and when he wants to sell.

First, the assertion that a general duty of care being imposed on mortgagees would accord with 'commercial sense' is unsubstantiated. Commercial sense dictates that a creditor be free to exercise any of his alternative or cumulative remedies at any time because these privileges were bargained for by the creditor for his own benefit. As Lord Templeman said in *China & South Sea Bank*[90]:

> The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not all.… If the creditor chooses to exercise his power of sale … he must sell for the current market value but the creditor must decide in his own interest if and when he should sell.… The creditor is not obliged to do anything.

---

88 However, it is conceivable that under some circumstances, the directors of a corporate debtor might arguably be in breach of their duty of diligence towards the corporate debtor under section 157(1) of the *Companies Act* (Cap. 50, 2006 Rev. Ed. Sing.).

89 Wee, *supra* note 13 at para. 25.

90 *China & South Sea Bank*, *supra* note 11 at 545, *per* Lord Templeman. See also Lightman & Moss, *supra* note 12 at para. 10.030:

> … a mortgagee has no duty at any time to exercise his powers as a mortgagee, to take possession or to appoint a receiver and preserve the security or its value or to realize or exploit his security, e.g. by selling securities before they become worthless. The mortgagee is free to exercise the rights and remedies available to him simultaneously or contemporaneously or successively or not at all.

In the contractual relationship between creditor-debtor, Singapore law, reflecting commercial practice and banking usage, is clear in this regard. Although a debt expressed to be repayable on a 'specified due date' is not repayable on demand *prior* to the due date;[91] a debtor is obliged to repay a debt which is 'repayable on demand' at any time when the creditor makes demand.[92] There is no scope for any general duty on a creditor to take reasonable care of the debtor's interest in deciding whether and when to demand repayment[93] and he is free to require repayment without giving the debtor any reasonable time to meet the demand, so long as the debtor is given such time as might be necessary to implement the 'mechanics of payment'.[94] The words of V.K. Rajah J. in *Oversea-Chinese Banking Corp.*[95] deserve quotation *in extenso*:

> I should add that it is also settled law that a bank does not owe any duty of care to a borrower, or indeed any interested third party, when it exercises its discretionary right to withdraw overdraft facilities: *Chapman v Barclays Bank Plc* [1997] 6 Bank LR 315.…
>
> In summary, an overdraft facility is a loan arrangement by a bank to a customer. It can either be an express arrangement or be implied as when a bank without any prior request allows a customer to draw on his account. "A common feature of banking overdraft is that it may be withdrawn at any time by the bank": per Chao Hick Tin J (as he then was) in *Industrial & Commercial Bank Ltd v Li Soon Development Pte Ltd* [1994] 1 SLR 471 at 480-481, [42]. It would, in general terms, be correct to state that overdraft facilities are *prima facie* viewed to be repayable on demand even without an express stipulation spelling this out (per Gibson J [in *Williams & Glyn's Bank Ltd v Barnes* [1981] Com LR 205 at 210]):
>
> > "[T]his custom or usage [of banks lending on overdraft] is no more than recognition of the rule of law which results from the nature of lending money: money lent is repayable without demand, or at latest on demand, unless the lender expressly or impliedly agrees otherwise".
>
> That said, the bank's right to reclaim payment of the overdraft at its pleasure may be abrogated by an agreement, express or implied …
>
> It seems plain to me that whether a facility is recallable on demand or not is in the final analysis simply an issue of interpretation.

It is clear that the law thus stated cannot be confined to overdraft facilities. It is in the very nature of lending money. In all cases of contracted debts in general, the creditor is entitled to repayment without demand, or *at latest* upon demand, unless it has been agreed otherwise. That is the general law, reflecting commercial practice,

---

91 *Damayanti Kantilal Doshi v. Indian Bank* [1999] 4 S.L.R. 1 at para. 45 (C.A.), *per* L.P. Thean J.A.

92 *Oversea-Chinese Banking Corp. Ltd. v. Infocommcentre Pte. Ltd.* [2005] SGHC 134, [2005] 4 S.L.R. 30 at para. 54, *per* V.K. Rajah J. [*Oversea-Chinese Banking Corp.*].

93 *Oversea-Chinese Banking Corp.*, *ibid.* at paras. 52–53, *per* V.K. Rajah J.

94 *Roberto Building Material*, *supra* note 6 at paras. 34–45, *per* Chao Hick Tin J.A.; applying *Cripps (Pharmaceuticals) Ltd. v. Wickenden* [1973] 1 W.L.R. 944 at 955 (Ch.), *per* Goff J.; and *Bank of Baroda v. Panessar* [1987] 2 W.L.R. 208 at 218 (Ch.), *per* Walton J. *Cf. Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* [1982] 135 D.L.R. (3d) 1; and *Bunbury Foods Pty Ltd. v. National Bank of Australasia Ltd.* [1984] 51 A.L.R. 609 at 618-619.

95 *Supra* note 92 at paras. 52–55, *per* V.K. Rajah J.

banking usage and the bargain enshrined in the loan contract freely entered into by creditor and debtor. As any creditor is entitled to repayment *without demand, or at latest upon demand*, it follows that such creditor is not under a duty to undertake any enforcement proceedings at any particular time that the debtor considers more opportune in hindsight. Such enforcement proceedings include:

(a) a simple action on the debt (and consequent execution proceedings);
(b) presentation of a winding-up petition;
(c) exercising the right of set-off or the right to combine accounts (where available); or
(d) taking other enforcement measures (such as exercising the power of sale, appointment of receiver or taking possession of mortgaged assets, where available),

so long as it is clear that his *contractual entitlement to repayment has arisen*.

A discontented debtor could and should simply pay up before demand. If a creditor can demand repayment at any time, it must surely follow that he is similarly entitled to enforce that repayment obligation at any time. Furthermore, no principle or policy has been suggested to justify fettering any particular avenue of enforcement with a duty of care, whilst the most draconian procedure of presenting a winding-up petition does not appear to be so fettered (where the debt is undisputed and remains unpaid after demand).[96] It has in fact been said that, as between creditor and debtor, "the creditor who proves insolvency is, without exception, entitled *ex debito justitiae* to a winding-up order";[97] and that a "creditor was entitled to (a) threaten to and (b) in fact if it chooses present a winding up petition" against a "rich company which could pay an undoubted debt and has chosen … not to do so".[98] It is true that the Singapore Court of Appeal has recently asserted the unfettered nature of the judicial discretion whether to make a winding up order or restrain an unpaid creditor presenting a petition in exceptional circumstances.[99] Nonetheless, the Singapore Court of Appeal also reiterated the general rule that an unpaid creditor retains the

---

[96] Tan, *supra* note 35 at 693–705:

> *Prima facie*, a creditor who is not paid has a right to file a petition for winding up whatever his other motives may be [para 17.23].… If a company does not comply with a statutory demand because of a genuine dispute over liability and a creditor threatens it with liquidation, the company may obtain an injunction to prevent the presentation of a petition. The injunction is issued to prevent an abuse of the winding up process [para 17.46].… If the court finds that the winding up petition is an abuse of process, it may stay all proceedings or dismiss the petition altogether [para 17.50].… The court has no power to order damages to be paid to the company when exercising its jurisdiction to strike out a petition; damages may only be obtained in a separate suit for malicious prosecution or abuse of process if the petition was presented in order to injure the credit of the company so as to put pressure upon it to pay [para 17.51].

See generally Derek French, *Applications to Wind Up Companies*, 2d ed. (Oxford: Oxford University Press, 2008) at 182-186 for the elements constituting the tortious presentment of winding up petitions; and *The Quartz Hill Consolidated Gold Mining Company v. Eyre* (1882-83) L.R. 11 Q.B.D 674 (C.A.) on the tort of malicious prosecution.

[97] *In re Crigglestone Coal Company, Limited* [1906] 2 Ch. 327 at 331-332 (C.A.) (*per* Buckley J., affirmed by C.A.); Mdm Justice Susan Kwan, ed, *Company Law in Hong Kong: Insolvency* (Hong Kong: Sweet & Maxwell, 2005) at para. 4.012.

[98] *Cornhill Insurance v. Improvement Services Ltd.* [1986] 1 W.L.R. 114 at 118 (Ch.), *per* Harman J.

[99] *E.g.*, where the debtor company is temporarily insolvent or where judicial restraint is required in the public interest: see *BNP Paribas v. Jurong Shipyard Pte. Ltd.* [2009] SGCA 11 at paras. 16, 19 and 20, *per* Chan Sek Keong C.J. [*BNP Paribas*].

general right to present a winding up petition at his option and is still *prima facie* entitled to a winding up order *ex debito justitiae*[100] against an insolvent corporate debtor for an undisputed debt.[101]

Not only would it make no commercial sense, it would in fact be indefensible in principle, to suggest that the creditor's decision whether and when to exercise his enforcement rights under (d), such as exercising power of sale, should be fettered by some general duty of care. It has not been suggested that such general duty of care exists to require the creditor to consider the debtor's interest in deciding whether or when to (a) commence suit, (b) present petitions in insolvency, or (c) exercise the right of set-off or the right to combine accounts. *Singling out the particular case of (d)* for the exceptional imposition of such duty would be arbitrary, for (d) is no more than a particular instance of several means by which a creditor obtains repayment.

The mortgagee contracts for the security interest in the mortgaged asset, the power of sale, the power to take possession of the mortgaged asset, the power to appoint a receiver and other security rights for his own benefit, in order to better obtain repayment of his debt, regardless of whether such power was granted expressly or impliedly. For the same reason that a creditor is free to demand repayment anytime, it should be entirely up to the mortgagee to decide whether and when he wants to exercise his security powers in order to obtain repayment. To say that he is bound to take reasonable care of the mortgagor's interest in deciding whether and when to exercise his power of sale makes no commercial sense, in the same way that it is nonsensical to say that a creditor must take reasonable care of the debtor's interest in deciding whether or when to demand repayment of a debt.

Just because a creditor (as in *Oversea-Chinese Banking Corp.*)[102] has the right to require repayment on demand, does not mean that he is under a duty of care to demand repayment earlier or at any particular time. Where creditor and debtor had voluntarily agreed that in the event of a default the creditor had the *right* to recall the entire loan and ask for immediate repayment, it is not for the court to re-write the terms or imply terms which would be inconsistent with the intended effect of the express terms.[103] Amarjeet J.C.'s decision in *Citibank NA v. Lim Tiong Hee*[104] is instructive. In that case, the learned Judicial Commissioner held that the creditor owed the debtor no duty of care to stop the debtor's borrowings at an earlier stage to prevent the debtor over-borrowing from the creditor (by exceeding the agreed credit-limit). Even where a credit-limit is expressly imposed in contract, what it means is that there is a contractual duty *on the debtor* not to exceed the agreed credit limit. It was for the debtor himself to ensure that he did not over-stretch his own finances; whereas the creditor had the right—not duty—to choose at his option whether to stop the debtor over-borrowing above the credit limit or to allow it.

---

[100] See *BNP Paribas, ibid.* at paras. 15 and 16; *Metalform Asia Pte. Ltd. v. Holland Leedon Pte. Ltd.* [2007] 2 S.L.R. 268 at para. 61 (C.A.), *per* Chan Sek Keong C.J.; *Bowes v. Hope Life Insurance & Guarantee Company* (1865) 11 H.L.C 389, 11 E.R. 1383 at 1389, *per* Lord Cranworth.

[101] Exceptionally, where the corporate debtor disputes the debt or where the corporate debtor is solvent and has offered to secure the disputed debt in full, the court will restrain the creditor from presenting a winding up petition: see *BNP Paribas*, *supra* note 99 at para. 2 (specifically para. 11 of the brief grounds for the dismissal of the appeal), 7 and 10.

[102] *Supra* note 92 at para. 53, *per* V.K. Rajah J.

[103] *Roberto Building Material*, *supra* note 6 at para. 44, *per* Chao Hick Tin J.A.

[104] [1994] 2 S.L.R. 614 at 617 (H.C.), *per* Amarjeet J.C.

Once we accept that a creditor has contracted for a *right* for the *creditor's own benefit* to exercise at *his* option, it becomes clear that just because a creditor has *a right* to stop the debtor from incurring further liabilities at an earlier stage does not mean that he therefore owes a *duty* to do so earlier. Reverting again to the central case of the mortgagee's power of sale, a mortgagor in asserting a 'general' duty of care would be doing no more than saying that the mortgagee ought to have exercised the power of sale *earlier* at a time when the market was better so that a higher price could have been obtained. Just as the fact that a mortgagee could have required repayment earlier is no reason for saying that he must demand payment earlier, the fact that a creditor could obtain earlier payment by selling the security is no reason for saying that he must sell that security earlier. The same analysis applies where the complaint is that the mortgagee ought to have delayed selling.

That it would not make commercial sense to impose upon a mortgagee a general duty of care, and hence a duty of care in deciding whether and when to sell, can be put in a different way. It is one that would resonate with contract lawyers. It would be impossible to imply such a duty in fact into the contract between mortgagee and mortgagor. Not only would such an implied term be unnecessary[105] for the contract to be carried out with business efficacy, it would flatly contradict the intentions of (at least one of) the contracting parties.[106] If, while mortgagee and mortgagor were making their bargain, an officious bystander were to suggest some express provision for such duty in the agreement, the mortgagee would certainly have testily suppressed him with a resounding 'Oh, of course *not*!'.[107]

Furthermore, the fact that the mortgagor has no say in the mortgagee's conduct which might affect the mortgagor's financial well-being is not in itself a reason for imposing a general duty of care on the mortgagee. It is fundamental doctrine, and

---

[105] Necessity still remains a pre-requisite for implication of terms in fact: See *Equitable Life v. Hyman* [2002] 1 A.C. 408 at 459 (H.L.), *per* Lord Steyn; Sir Kim Lewison, *The Interpretation of Contracts*, 4th ed. (London: Sweet & Maxwell, 2007) at para. 6.06; Gerard MacMeel, *The Construction of Contracts: Interpretation, Implication & Rectification* (Oxford: Oxford University Press, 2007) at para. 11.12. See also *Ng Giap Hon v. Westcomb Securities Pte. Ltd.* [2009] SGCA 19 at paras. 36, 40 and 95 [*Ng Giap Hon*], *per* Andrew Phang J.A.; *cf. Attorney General of Belize v. Belize Telecom Ltd.* [2009] UKPC 10 at paras. 21–27, *per* Lord Hoffmann [*Attorney General of Belize*].

[106] See *Luxor (Eastbourne) Ltd. v. Cooper* [1941] A.C. 108 at 137 (H.L.); and Edwin Peel, *Treitel: The Law of Contract*, 12th ed (London: Sweet & Maxwell, 2007) at para. 6.031:

> This view in turn gives rise to difficulty where it is clear that one party (at least) would *not* have agreed to the term, even though the other (or the court) would have regarded it as necessary to give business efficacy to the contract. In such a case, the implication would clearly not "give effect to the intention of the parties", so that there would be no room for an implication in fact.

See also *Ng Giap Hon*, *supra* note 105 at paras. 36, 40 and 95, *per* Andrew Phang J.A.; *cf. Attorney General of Belize*, *supra* note 105 at paras. 21–27, *per* Lord Hoffmann.

[107] According to the officious bystander 'test' formulated by MacKinnon L.J. in *Shirlaw v. Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206 at 277 (C.A.) (affirmed [1940] A.C. 701):

> *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course!".

See also *Ng Giap Hon*, *supra* note 105 at para. 95, *per* Andrew Phang J.A.; *cf. Attorney General of Belize*, *supra* note 105 at paras. 21 and 25, *per* Lord Hoffmann.

this has been reiterated by the House of Lords in *Smith v. Littlewoods*,[108] *Stovin v. Wise*[109] and *Mitchell v. Glasgow City Council*,[110] that generally the law imposes neither a positive duty on a person (who did not create the risk of injury) to protect or benefit others[111] nor liability for nonfeasance[112] in the absence of a voluntary assumption of duty.[113]

It follows that as a defendant may without legal liability, when he sees a wounded[114] or drowning[115] person, pass by on the other side instead of rescuing them, it is difficult to see why a mortgagee must take action to safeguard a mortgagor's financial well-being (by selling the mortgaged asset, for instance) merely on

---

[108] [1987] A.C. 241 at 271 (H.L.), *per* Lord Goff of Chieveley.

[109] [1996] A.C. 923 at 943 (H.L.), *per* Lord Hoffmann [*Stovin*].

[110] [2009] UKHL 11 at paras. 19 and 15, *per* Lord Hope of Craighead [*Mitchell*]:

> Three points must be made at the outset to put the submission into its proper context. The first is that foreseeability of harm is not of itself enough for the imposition of a duty of care… Otherwise, … there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning. The second, which flows from the first, is that the law does not normally impose a positive duty on a person to protect others. As Lord Goff of Chieveley explained in *Smith v Littlewoods* … the common law does not impose liability for what, without more, may be called pure omissions. The third, which is a development of the second, is that the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability…

[111] *Cf.* Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 9–10:

> All of us have a liberty to choose to behave as we please, so long as we do not infringe the rights of others. We do not have the right good against the rest of the world to compel others to come to our assistance … This principle is not captured by saying that there is no liability for a "pure" omission or for nonfeasance.… It is preferable to state that the failure to confer a benefit upon someone else does not, alone, constitute the infringement of a right.… It is perhaps indicative of the common law of torts' loss of confidence that the House of Lords in *Stovin v Wise* felt necessary to restate as part of the ratio of its decision that mere failure to confer a benefit is not wrongful.

[112] *Stovin*, *supra* note 109 at 943, *per* Lord Hoffmann.

[113] *Cf.* Stevens, *supra* note 111 at 10–14, especially at 10–11:

> Not all of our rights are exigible against the rest of the world. It is possible to make an undertaking to another which gives rise to a right which is only exigible against the person making the undertaking.… The rights that we have which are good against the rest of the world entitle us to damages to the extent that our position has been worsened by the defendant's conduct. Voluntarily assumed obligations commonly entitle us to be placed in the better position we would have been in if the defendant had taken care.

See *Mitchell*, *supra* note 110 at paras. 83 (*per* Lord Brown of Eaton-under-Heywood) and 19 (*per* Lord Hope of Craighead):

> But it is not so easy to reconcile an approach that relies generally on the likelihood of harm with the general rule that a person is under no legal duty to protect another from harm.… In *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 W.L.R. 1057, para 17 Lord Hoffmann said that reasonable forseeability was insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates a risk not undertakes to do anything to avert it.

[114] *Stovin*, supra note 109 at 943, *per* Lord Hoffmann; see also W.V.H. Rogers, *Winfield & Jolowicz: Tort*, 17th ed. (London: Sweet & Maxwell, 2006) at para. 5.21:

> The basic rule has always been—and seems still to be—that one must take care not to cause injury to others, but there is no general duty to act for the benefit of others. The rule is that I must not harm my neighbour (misfeasance) not that I am required to save him (nonfeasance).

[115] Jeroen Kortmann, *Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio* (Oxford: Oxford University Press, 2005) at 51.

the basis of the mortgagor's 'powerlessness'. It is, in any event, inaccurate to say that the mortgagor has no say in the matter, and we can examine this in relation to the central case of the mortgagee's decision whether and when to exercise his power of sale. It is always open to a mortgagor who is discontent with the mortgagee (for example, where the mortgagee does not exercise his power of sale over the mortgaged asset) to ask the mortgagee to sell it if the mortgagor can find a buyer who will repay the mortgagee, or alternatively the mortgagor himself or a junior mortgagee or surety might be asked to redeem by paying the mortgagee off.[116] Surely what Lord Templeman said in *China & South Sea Bank*[117] in relation to a surety rings just as true for a mortgagor:

> If the surety … is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagor and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline.

### 4. *Absence of Conflict*

It has been argued that a mortgagee ought to owe an equitable duty of care to the mortgagor when there is no conflict between their interests.[118] The idea here, it would seem, is that a mortgagee should therefore owe the mortgagor a novel general duty of care but that it would be excluded where there is a real conflict of interest between them.[119]

It is submitted that there is no basis on which this sweeping 'no conflict' argument can be sustained. It is flawed for pre-supposing that one ought to owe another a duty of care merely *because* there is no conflict of interest between them.

It is, of course, entirely true that the existence of a relevant conflict of interest *might exclude* the imposition of a potential duty of care. Indeed, this sort of *exclusionary* reasoning has found its way into the 2009 House of Lords decision of *Trent Strategic Health Authority v. Jain*,[120] where it was held that a registration authority owed no common law duty of care in tort to *proprietors* of a nursing home in exercising their statutory regulatory powers because such a duty might conflict with the interests

---

116 *China & South Sea Bank*, *supra* note 11 at 545, *per* Lord Templeman.

117 *Ibid.*

118 See Lightman & Moss, *supra* note 12 at para. 10.026:

> Where the interests of the mortgagee and mortgagor are not in conflict, then it is suggested that as a matter of principle the courts should be ready to impose a duty of care upon a mortgagee or receiver in the absence of some relevant countervailing consideration.

See also Wee, *supra* note 13 at paras. 31 and 47: "It is hard to see what the learned judge will regard as adequate to give rise to a duty of care if the lack of conflict of interests is not enough". Wee was criticising Robert Walker L.J.'s refusal to impose a duty of care in the absence of conflict of duty in *Yorkshire Bank*, *supra* note 23 at 1729.

119 Wee, *supra* note 13 at para. 62.

120 [2009] UKHL 4 at paras. 28 and 36, *per* Lord Scott of Foscote.

of the intended beneficiaries of those powers (namely the *residents* of the nursing home).[121]

However, the converse is simply not true. The law does not recognise a general principle or policy that a duty of care (whether equitable or tortious) will be imposed on a defendant *merely because* he has, for the time being, no real conflict of interest with the plaintiff. That is why the 'no conflict' argument was dismissed by Robert Walker L.J. in *Yorkshire Bank*:[122]

> [Counsel] also invited the court to make new law in imposing a wider equitable duty on a mortgagee in circumstances in which there is no conflict between his interests and those of the mortgagor. But such a principle would in my judgment be fraught with uncertainty and difficulty, and I can find no warrant for it in the authorities. It is true that the authorities can be seen as establishing that a mortgagee may … prefer his interest to that of the mortgagor where they conflict; but that is no basis for imposing undefined and novel duties merely because there is for the time being no such conflict.

It might be suggested that the 'no conflict' argument was propounded in the context of a mortgagee-mortgagor relationship and must therefore be understood as being limited to that relationship. That, however, merely restates the conclusion without justifying it. It merely asserts that mortgagees ought to owe mortgagors a general duty of care where there is no conflict, without explaining why such duty ought to exist at all or why it only applies to the parties to a mortgage.

It remains true that no principled method of confining the effect of the 'no conflict' argument to mortgagees has been suggested by its proponents, and it is in any event, difficult to see how one might be devised. There is therefore no warrant for adopting the 'no conflict' argument without further consideration of its potential destabilising effect on the rest of the law when applied beyond mortgagees. Short of drawing an arbitrary circle around mortgagees, it is difficult to see how the 'no conflict' argument could succeed in relation to mortgagees without being extended to all defendants in general. The objection here is not just about controlling the number or range of potential defendants. The objection is that, as a matter of principle, the 'no conflict' argument lacks logical validity as *the touchstone* of duty. What it means, when applied in general, is that *all persons* owe a duty of care to *everyone else* in the world, whenever there is no real conflict of interest between them. Thus exposed, it is immediately apparent that there is just no such thing as a universal duty of care owed by all persons to every other person *simply because* there is, for the time being, no real conflict of interest between them. Viewed in this light, Robert Walker L.J.'s retort seems, with respect, perfectly justified.

---

[121] *Cf.* Wee, *supra* note 13 at para. 64, where Wee suggests that, contrary to what has been assumed, even *after* the mortgagee has decided to sell, whilst the mortgagor might want to obtain the best price, the mortgagee might only be interested in ensuring that a sufficient price to discharge the secured debt is obtained. Nonetheless, it is submitted that this cannot be regarded as a conflict of interest between mortgagor and mortgagee. The mortgagee is not interested in depressing the sale price against the mortgagor's interest. The mortgagee's and mortgagor's interest are aligned in the same direction, although they may not be co-extensive.

[122] *Supra* note 23 at 1729.

## IV. Conclusion

The existing law is well-established and reasonably clear; yet, various notable insolvency commentators have argued that the existing law is outmoded and that mortgagees ought to owe a general equitable duty of care to mortgagors where their interests do not conflict.

The existing law already imposes a general duty to act in good faith for proper purposes, a specific due diligence duty where the mortgagee takes possession and a specific duty of care to take reasonable steps to obtain the market value when the mortgagee sells the mortgaged asset. The central case where the novel general duty on a mortgagee would make a significant difference is in relation to the mortgagee's decision *whether and when* to exercise his powers as mortgagee to sell. Unless it can be shown that the mortgagee ought to owe the mortgagor a duty of care in deciding whether and when to sell, imposition of a novel general duty of care cannot be justified. The power of sale is merely one of the security powers bargained for in the mortgagee's own interest as a means to better obtain repayment. It can be seen as one of the enforcement processes over which he has the option to choose whether, when and which to exercise in his own interest. No satisfactory reason has been given to show why his choice should be fettered in any of those options.

Arguments in favour of a novel general duty of care are fundamentally flawed. None of them are properly grounded in principle or legal policy. Expanding (or clarifying) a mortgagee's good faith duty and the specific duty of care of a mortgagee in possession does not necessarily lead to an expansion of the mortgagee's specific duties into a novel general duty encompassing whether or when he ought to sell. The mere fact that the mortgagor has no say in the mortgagee's decision whether and when to sell is not reason enough to impose a general duty of care, since the law does not impose a duty on a defendant merely because his conduct may affect a plaintiff who has no say in his conduct. Arguments that a novel general duty would accord with commercial sense merely presumes the conclusion. In the same way that a mortgagee owes no duty to stop the mortgagor voluntarily incurring more debt and no duty to sue the mortgagor personally to recover the debt, it would flout commercial sense to suggest that the mortgagee ought to be liable to the mortgagor in deciding whether and when to sell the mortgaged asset. Although a duty of care ought to be excluded if it might conflict with the right of the mortgagee to prefer his own interest, the converse is not true. Just because there might be no conflict of interest between them for the time being, this does not mean that the law should impose upon the mortgagee a general duty to take care of the mortgagor's interest.

Analogies between receivership and mortgages have been shown to be false, so reliance on arguments made in the receivership context cannot justify the imposition of a duty of care on a mortgagee's decision whether and when to exercise his power of sale. Policy arguments in favour of reforming the law of insolvency, particularly moving away from administrative receivership (analogous to the appointment of a receiver and manager in Singapore) towards administration (analogous to judicial management in Singapore) do not automatically translate into arguments in favour of imposing a general duty on mortgagees.

Whilst this article does not purport to justify the existing state of the law, the burden is on those who seek change to justify it. No compelling reasons necessitating departure from established precedent and principle has been found. This is not to say that there is no room for change; it simply means that, as yet, no justification in legal policy or principle has been put forth for departure.[123]

[123] In its 1994 Practice Statement, *supra* note 45, the Singapore Court of Appeal stated that although it reserved the power to depart from prior decisions; it will only exercise such power "sparingly" in view of the "danger of retrospectively disturbing contractual, proprietary and other legal rights".