The Bank of East Asia Ltd v Tan Chin Mong Holdings (S) Pte Ltd and Others [2000] SGHC 250

Case Number : Suit 1263/1999

Decision Date : 27 November 2000

Tribunal/Court : High Court

Coram : G P Selvam J

Counsel Name(s) : Joseph Hoo Chun Hee and Lawrence Khoo (Joseph Hoo Morris & Kumar) for the plaintiffs; Tan Chuan Thye and Bianca Cheo (Allen & Gledhill) for the defendants

Parties : The Bank of East Asia Ltd — Tan Chin Mong Holdings (S) Pte Ltd

Civil Procedure – Judgments and orders – Default judgment – Setting aside – Judgment against joint and several guarantors – Effect of setting aside

Contract – Guarantee – Joint and several guarantee – Settlement between creditor and one guarantor – Liability of remaining guarantors

: ***Introduction***

This case concerns, first, the rights and obligations of a mortgagee bank in relation to its power of sale of its mortgaged security. Next, it concerns the circumstances under which obligations of joint and several sureties may be extinguished. The context in which they arise is a claim against two out of six sureties for the shortfall of money due and payable by the principal debtor, Tan Chin Mong Holdings (S) Pte Ltd (`the company`). The company mortgaged a residential property owned by it, 40 Jansen Road, to the plaintiffs.

The plaintiffs, The Bank of East Asia Ltd, are based in Hong Kong and have a branch in Singapore. They brought this action against seven defendants. The first defendant was the company. The second defendant was Tan Chin Mong. The third defendant was his wife. The other four defendants were his sons. Two of them have to be named. The sixth defendant was Jeffrey Tan Keok Hng. The seventh defendant was Andrew Jerry Tan Keok Kiang (`Jerry Tan`). All the individuals were shareholders in the company.

The facilities

In 1993 the company became a customer of the plaintiffs. The plaintiffs extended an overdraft facility to the company. In addition, at the request of the company, the plaintiffs issued bank guarantees to Acma Ltd at the request of a related company, Symbolic Technologies Pte Ltd. The aggregate amount of the guarantees in February 1998 was $1.5m. The total line of credit available to the company in 1996 was $6.2m. When granting the facilities, the bank `reserved its customary overriding right of repayment on demand`.

The securities

The facilities were secured by (a) a joint and several guarantee for $6.2m signed by the six individual defendants, and (b) the legal mortgage of 40 Jansen Road, Singapore.

The guarantee

The guarantee that was signed on 9 December 1996 by the individual defendants was an `all money guarantee`. Clauses 16 and 17 of the guarantee read as follows:

> *16 You shall be at liberty to release or discharge any one or more of us from the obligations of this guarantee or to accept any composition from or make any other arrangements with any one or more of us without thereby prejudicing or affecting your rights and remedies against the other or others of us.*
>
> *17 Our liability hereunder shall be joint and several and all covenants, agreements, undertakings and other provisions herein shall be deemed to be made by and be binding on us jointly and severally.*

Cancellation of the credit facilities

The unsatisfactory financial position of the company forced the plaintiffs to cancel the facilities on 27 April 1998. The plaintiffs further asked the company to seek refinancing by 27 July 1998 to repay the outstanding debt.

On 5 May 1998 the company responded saying that they were unable to effect refinancing and stated that the plaintiffs `may proceed with the auction sale at the best price`. On the same day the lawyers for the company wrote to the plaintiffs, stating that the company would like to place the property for sale, and seeking the plaintiffs` consent to the sale price of $4.8m. The plaintiffs were prepared to permit a sale by the company provided that the price was not less than $5m. That amount was less than what was owing to them on the overdraft on 22 May 1998. On 7 May 1998, the overdraft account showed a debit of $4,457,794.64. On 31 May, the company withdrew $34,899.93. This increased the debit to $4,492,694.57. There was, also, the exposure on the Acma bank guarantees. The company without raising any objection to the minimum price of $5m went ahead and appointed Knight Frank, auctioneers, to sell the property. Knight Frank sent out mailshots and advertised the property in the press on 3, 10, 12, 15 and 18 June 1998 for an auction sale on 18 June 1998. The opening price was $4.2m but there was no bid even at that level. So there was no sale. The market then was in the trough of a recession in the wake of the Asian financial crisis.

On 17 July 1998 lawyers retained by the plaintiffs issued a demand letter to the company for payment of $4,542,821.24 being the debit balance on 13 July 1998. The letter further stated that if the bank guarantee issued to Acma Ltd were called, the plaintiffs would look to the company for indemnity with interest. The letter was copied to all six guarantors with a covering letter.

The company made proposals to the plaintiffs for restructuring the credit facilities. On 2 September 1998 the plaintiffs replied that they were not agreeable to the restructuring and asked for the keys to the property to enable them to sell it by way of public auction. On 4 November 1998 the plaintiffs were given the keys. The plaintiffs were thus placed in a position to exercise their power of sale as mortgagees.

Sale of property by the plaintiffs

The plaintiffs appointed Jones Lang LaSalle to sell the property by public auction. The property was advertised in the newspapers on some 21 days during the period of December 1998 to 13 May 1999.

The property was put up for auction three times - on 16 December 1998, 18 March and 15 May 1999. There was an agreement for sale on 15 May 1999. The sale was completed on 22 July 1999. The sale price was $3.8m.

Judgment against the guarantors

Meanwhile, on 17 June 1999, Acma Ltd called on the bank guarantees issued by the plaintiffs. By then, the only amount outstanding on the bank guarantees was $1.25m. The plaintiffs honoured it on 30 June 1999. Consequently, after giving credit to the sale proceeds, the balance due to the plaintiffs on 29 July 1999 was $2,423,230.33. In the event, the plaintiffs commenced the present action. No one filed an appearance. For that reason the plaintiffs entered default judgment on 26 October 1999. There was a joint judgment against all seven defendants. The plaintiffs then commenced winding-up proceedings against the company and bankruptcy proceedings against the guarantors.

The next relevant event was a settlement between the plaintiffs and Jerry Tan, the seventh defendant. In that settlement the plaintiffs agreed to accept $400,000 in settlement of their claim against him and to withdraw the bankruptcy proceedings against him.

The second and the sixth defendants applied to set aside the judgment against them and succeeded in doing so. The default judgment against them was set aside on 17 May 2000, and they were given leave to defend the claims against them. There is an important implication in the setting aside of the judgment, in that it demerged the cause of action from the judgment in which it had merged. More about it later.

The defence

The defence filed by the two defendants made these assertions: The plaintiffs as mortgagees had a duty to act in good faith and to obtain the best price when selling the property. They had breached those duties because they insisted on a sale price of at least $5m for the property in May 1998, when the amount then outstanding on the facilities was $4,492,694.57. Further, they asserted that the plaintiffs had failed to obtain the best price when they sold the property in May 1999, as they had failed to properly or adequately advertise the sale of the property. When the two defending defendants discovered the settlement between the plaintiffs and the seventh defendant, they added another block to the defence against the plaintiffs. They amended their defence by adding the following paragraph:

> *7 Further or in the alternative, the second and sixth defendants will contend that they have been released from any liability under the* ***guarantee*** *by virtue of a settlement reached between the plaintiff and the seventh defendant. [Emphasis is added.]*

Limit to mortgagee`s power in exercising power of sale - The law

I shall now consider the defence relating to the sale of the mortgaged property. The falls in property prices in the past decade and a half have spawned a plethora of reported cases on mortgagee`s power of sale. It would, therefore, be salutary to take stock and sum up the salient principles of law.

George Jessel MR in **Nash v Eads** [1880] 25 Sol Jo 95 set out the duty of a mortgagee to a mortgagor in these general terms:

> *Of course there were some limits to the powers of the mortgagee. He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself. But he was not bound to abstain from selling because he was not in urgent want of his money, or because he had a spite against the mortgagor.*

Pollock CB, referring to the duty of the creditor to the surety in respect of the security, spoke in terms of a triple duty in **Watts v Shuttleworth** [1860] 157 ER 1171:

> *The substantial question in the case is, whether the omission to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged: **Story`s Equity Jurisprudence**, sect 325. The same principle is enunciated and exemplified by the Master of the Rolls in **Pearl v Deacon** 24 Beav 186, 191, where he cited with approbation the opinion of Lord Eldon, in **Craythorne v Swinburne** 14 Vesey 164, 169, that the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be a quasi contract; but that the right of a surety arises out of the equitable relation of the parties.*

Lord Moulton in **McHugh v Union Bank of Canada** [1913] AC 299 at p 311 defined the mortgagee`s duty towards the mortgagor in these general terms:

> *It is well settled law that it is the duty of a **mortgagee** when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property, so that the **mortgagor** may receive credit for the fair value of the property sold. [Emphasis is added.]*

Finally, the following statement of law by Salmon LJ in **Cuckmere Brick Co v Mutual Finance** [1971] Ch 949[1971] 2 All ER 633 has become the beacon for all concerned ([1971] Ch 949, 965-966; [1971] 2 All ER 633, 643:

> *[A] mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee`s interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.*

Salmon LJ went on to expound that the mortgagee must observe two distinct duties in exercising the power of sale: first he must act in good faith; next, he must take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it. He added that the proposition that the mortgagee owes both duties represents the true view of the law. Acting in good faith alone would not suffice.

Duty to surety

It was thought at one time that the mortgagee did not owe the above duties to a surety who did not provide any material security to the mortgagee: see **Barclays Bank v Thienel** [1978] 122 Sol Jo 472. It was, however, held later that the mortgagee owed the duty not only to the mortgagor but to the surety as well: see **Standard Chartered Bank v Walker** [1982] 3 All ER 938[1982] 1 WLR 1410 and **American Express International Banking Corp v Hurley** [1985] 3 All ER 564. Lord Denning MR accurately summarised the law in the ***Walker*** case [1982] 3 All ER 938, 942; [1982] 1 WLR 1410, 1415:

> *If a **mortgagee** enters into possession and realises a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to **the mortgagor** so as to reduce the balance owing as much as possible, and also to **the guarantor** so that he is made liable for as little as possible on the guarantee. [Emphasis is added.]*

Although the duty owed by the mortgagee in realizing the security has been expressed in differing phraseology, they are all much of a muchness. The purpose of the pronouncements is to prevent an abuse of the power of sale to the detriment of the mortgagor and the guarantor. As a general proposition, the mortgagee is not under a duty to exercise his power of sale over mortgaged property at any particular time or at all. There are some important exceptions to this general rule. Once he decides to realize the security, he must apply due diligence to obtain the best price which the circumstances of the case permit.

No duty of care in tort

Lord Denning MR in the ***Walker*** case postulated the proposition that the duty of a mortgagee in exercising his power of sale was only a particular application of the common law concept of a general duty of care, stated by Lord Atkin in **Donoghue v Stevenson** [1932] AC 562, and applied in many cases, such as **Home Office v Dorset Yacht Co Ltd** [1970] AC 1004 and **Anns v Merton London Borough Council** [1978] AC 728. Detractors of Lord Denning MR, however, said that the principles were evolved by equity over many decades before the modern development of the law of negligence was evolved. Detractors also said that where there is a contractual relationship between two parties, in the absence of fraud or motivated misrepresentation, the law will not impose a wider duty of care in tort between those parties. The law does not superimpose duties in tort inconsistent with settled contractual or equitable duties. The proposition of Lord Denning MR was invoked by the defendant in **Tan Soon Gin George v China and South Sea Bank** [1988] 2 HKLR 202. George Tan (aka Tan Soon Gin) was sued in Hong Kong by China and South Sea Bank Ltd as a guarantor for a loan of HK$30m

made to Carrian Holdings Ltd. When the principal debtor defaulted, shares mortgaged to the bank by a third party, Filomena Ltd, were worth more than the loan. The bank chose not to sell the shares. The mortgagor did not ask the bank to sell the shares either. When the shares became worthless, the bank filed an action against the guarantor and sought summary judgment. The surety argued for unconditional leave to defend. The judge who heard the application gave judgment in favour of the bank. The guarantor appealed to the Hong Kong Court of Appeal. The Court of Appeal reversed the decision of the judge and gave unconditional leave to defend. The Court of Appeal applied the common law negligence theory postulated by Lord Denning MR and held that it was prima facie unreasonable for the bank to delay sale for a substantial length of time or in a falling market. The bank, therefore, was negligent. About that time, New Zealand also accepted Lord Denning`s theory and acted on it: see **First City Corp v Downsview Nominees** [1990] 3 NZLR 265. Both decisions were appealed to the Privy Council.

By a tautly worded joint judgment in **China and South Sea Bank v Tan Soon Gin George** [1990] 1 AC 536[1989] 3 All ER 839 Lord Templeman rejected the suggestion that the modern law of negligence and its cognate duty of care applied to a mortgagee`s power of sale. He said ([1990] 1 AC 536, 543-544; [1989] 3 All ER 839, 841):

> *[T]he tort of negligence has not yet subsumed all torts and does not supplant the principles of equity or contradict contractual promises or complement the remedy of judicial review or supplement statutory rights.*

Equity intervenes to protect a surety

In **Downsview Nominees v First City Corp** [1993] AC 295[1993] 3 All ER 626 Lord Templeman delivering the judgment of the Privy Council reiterated the position ([1993] AC 295, 315; [1993] 3 All ER 626, 637):

> *The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of wilful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor.*

In **Parker-Tweedale v Dunbar Bank** [1991] Ch 12[1990] 2 All ER 577 Nourse LJ stated the position assertively (at [1991] Ch 12, 18; [1990] 2 All ER 577, 582):

> *[I]t is both unnecessary and confusing for the duties owed by a mortgagee to the mortgagor and the surety, if there is one, to be expressed in terms of the tort of negligence.*

In **AIB Finance v Debtors** [1998] 2 All ER 929 at p 937 Nourse LJ reiterated the position in these

words:

> *It was established by the decisions of this court in **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] 2 All ER 633[1971] Ch 949 and **Parker-Tweedale v Dunbar Bank plc (No 1)** [1990] 2 All ER 577[1991] Ch 12, first, that a mortgagee, although he may exercise his power of sale at any time of his own choice, owes the mortgagor a duty to take reasonable care to obtain a proper price for the mortgaged property at that time; secondly, that **the duty is not tortious in nature but one recognised by equity as arising out of the particular relationship between mortgagee and mortgagor**. [Emphasis is added.]*

Basis of duty

It is settled law that a creditor-mortgagee is not obliged to do anything for the benefit of a borrower or a surety under established equitable principles in relation to the recovery of the debt or realization of the security. The basis of the principle is this: it is the duty of the borrower and the guarantor to activate themselves and discharge their obligations. If they don`t then they bear the risk of a falling market. It is not desirable to turn the right of a mortgagee into a duty. To do so would be baneful to the business of property financing. The lender is entitled to sit tight and wait until he feels that he has to act in his interest. Both equity and statute, however, have intervened to sober the excesses of the mortgagee to the detriment of his supplicants.

Selling in a falling market

Provided that the mortgagee observes the duties stated above, the courts will not rule against him even if the price affords but little relief to the mortgagor and guarantor. Selling in a falling market per se is not wrong, for more often than not, it is a falling market that triggers a default by the borrower and the consequent sale of the mortgaged property by the mortgagee. The law, therefore, does not impose a duty on the mortgagee not to sell in a falling market. If it did, it would unduly interfere with his right to sit tight, and also encourage the borrower and guarantor to do nothing. As Lord Templeman said in the ***China and South Sea Bank*** case at [1990] 1 AC 536, 545; [1989] 3 All ER 839, 842: `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.`

No absolute power

The statement, that the mortgagee has the right to decide whether to sell the mortgaged property and when to sell, must not be understood as an absolute entitlement or treated akin to strictly worded stipulations of a statute. The mortgagee`s power is subject to certain limitations.

First, possession of the mortgaged property must not be sought with a hidden agenda, in disregard of the harm that it might cause to someone with a vested interest in it. This prohibition applies to the mortgagee as well as a surety who is subrogated to the power of sale. In **Quennell v Maltby** [1979] 1 All ER 568[1979] 1 WLR 318 the mortgagee sought possession with the ulterior motive of assisting her husband to free the property from rent control and to sell it at a good profit. The Court of Appeal denied possession. Templeman LJ said (at [1979] 1 All ER 568, 572; [1979] 1 WLR 318, 324):

> *The estate, rights and powers of a mortgagee, however, are only vested in a mortgagee to protect his position as a mortgagee and to enable him to obtain repayment.*

Secondly, in appropriate circumstances, the court may order sale against the wishes of the mortgagee. In **Palk v Mortgage Services Funding** [1993] Ch 330[1993] 2 All ER 481, the mortgagee obtained an order for possession of the property when the property market was in the trough of a recession. The intention was to let out the property and wait for a recovery. The mortgagor had found a buyer at a price insufficient to meet what was due to the mortgagee. The sum due on the mortgage was increasing by about Â£43,000 a year, that is, at the rate of 12%pa. The rental income of the property was unlikely to yield more than Â£13,000 or Â£14,000. The mortgagor applied to the court for approval of the sale at Â£283,000. The application was made under s 91 of the Law of Property Act 1925 (UK). The Court of Appeal allowed the sale to proceed and denied the mortgagee the right to decide whether to sell and when to sell. Sir Michael Kerr justified the decision in these words (at [1993] Ch 330, 344-345; [1993] 2 All ER 481, 492):

> *If a sale is refused, then they are in a situation of financial haemorrhage for an indefinite period while the company continues to speculate at their expense on an increase in the value of the property. But although a sale cannot staunch this outflow entirely, it can greatly reduce it. On the assumed present value of about Â£283,000 and expenses of, say, Â£8,000, a sale would reduce the plaintiffs` capital debt from Â£300,000 to about Â£25,000, and their liability for interest to about one-twelfth of what it is now. At the same time, if a sale is ordered, the company can back its faith in the future value of the property by acquiring it in the sale, if it wishes to do so. So there is fairness to both sides.*

Thirdly, in appropriate cases, the mortgagor should be given a reasonable opportunity to market the property. Warren LH Khoo J speaking for the Court of Appeal said in **How Seen Ghee v Development Bank of Singapore** [1994] 1 SLR 526 at p 531:

> *[W]hen the power of sale has arisen, and when it comes to realizing the security, there is seldom any divergence of interests between the mortgagee and the mortgagor; both are interested in securing the best price from the sale of the security. In the vast majority of cases, there is no reason why the parties should not co-operate with each other to try to realize as much as possible from the sale of the property. An auction is not always the best way of securing a good price, as shown in the instant case. It is often possible for the mortgagor himself, who has every reason to try to do so, to secure a good price by a private treaty sale. There is seldom any harm in allowing the mortgagor a reasonable opportunity to do so. While the mortgagor is engaged in such efforts, the mortgagee should refrain from doing anything which is liable adversely to affect the mortgagor`s efforts.*

Fourthly, the court has no power to decline to make an order for possession when the mortgagor is in clear default and order instalments of the accrued debt. The court must give judgment and order possession. The court, however, has power to postpone possession by ordering stay of execution of the order for possession and at the same time order payment of the accrued debt by instalments. See **Hong Leong Finance v Tan Gin Huay** [1999] 2 SLR 153 .

Decision on breach of duty defence

Now I shall decide the issues on the sale of the property. As a prelude, I shall state the financial exposure of the plaintiffs in May 1998. In an affidavit made on 31 August 2000 the second defendant swore to the following facts:

> *In February 1998, 40 Jansen Road was valued at S$6,600,000 for mortgage purposes by the plaintiff`s valuers. At around the same time, the plaintiff`s exposure on the guarantee in favour of Acma Ltd was reduced to $1,250,000 and the outstanding on the overdraft facility was S$4,390,087.87.*

The total exposure of the plaintiffs, according to the second defendant, was $5,640,087.87. As noted above, the closing balance of the overdraft account on 31 May 1998 was $4,492,694.57. The total exposure of the plaintiffs on 31 May 1998, therefore, was $5,742,694.57 and not $4,492,694.57. This was not reduced until the sale proceeds of the property were given credit. There was, therefore, a factual error in the defence.

When the bank stipulated the minimum price of $5m, it was not exercising mortgagee`s power of sale. At that point of time, the power had not even arisen. The property was in the constructive possession of the company. To be sure, it yielded no income to the bank. One or more of the shareholders of the company were in occupation of it. Therefore, the bank was actually granting an indulgence to the company when it agreed to a sale by the company subject to the minimum price of $5m. This condition imposed by the bank did not deter the company from moving ahead with the auction. The auction was held on 18 June 1998. But the property was withdrawn because there was no bid even at $4.2m. The defendants were not in any way affected by the $5m stipulation. The facts of the case, therefore, did not make out the point of defence that the plaintiffs did not act in good faith.

As for the second defendant, it was a disingenuous defence because of his own admission that the amount due to the plaintiffs at that time exceeded $5m as stated in the preceding paragraph.

If the company had thought that the sale of the property at any time was advisable or achievable at a fair price, an application could have been made by the mortgagor under s 30 of the Conveyancing and Law of Property Act (Cap 61, 1994 Ed). The section provides as follows :

> *(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.*
>
> *(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money, or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.*

> *(3) In an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.*

The English equivalent of the above provision is s 91 of the Law of Property Act 1925. This was the provision the mortgagor relied on in ***Palk v Mortgage Services Funding*** (supra). The company made no such application. On the other hand the bank offered reasonable opportunity to the mortgagor to sell the property and waited to take possession until the mortgagor exhausted his own efforts. The guarantors had no basis to complain.

Now, the problems relating to the price. The company which gave the mortgage did not allege any allegation of wrongdoing by the mortgagees. There was no bid at the auction conducted for the company even at $4.2m. The bank`s auctioneers attempted three times to auction the property. They advertised the property more widely than the agents of the company in the newspapers and other standard methods. In the circumstances the charge that the plaintiffs did not advertise it properly was without substance or merit.

It was then said that the plaintiffs should have done an owner`s sale. That, however, would not have been honest because they were effecting a mortgagee`s sale. In any event, the owners had already tried and failed.

Finally, the defendants before me called valuers who put a higher value than $3.8m and contended that the plaintiffs sold below market value. This was not their pleaded case. In any event, as a matter of principle, where the mortgagees are not in breach of their duties in relation to their power of sale, their liability cannot be measured on the basis of valuers` opinions. Expert evidence on value should be admissable against the mortgagees only in cases where they are at fault as in ***Cuckmere Brick Co v Mutual Finance*** (supra). Even so, when considering expert evidence on property valuation the following common sense observations must be borne in mind. In ***Cuckmere Brick Co v Mutual Finance Ltd*** (CA (Eng)), Salmon LJ said (at [1971] Ch 949, 959; [1971] 2 All ER 633, 638):

> *The valuation of a plot of land depends upon the knowledge, experience, expertise and ability of the valuer. Valuation is not an exact science. Equally careful and competent valuers may differ within fairly wide limits about the value of any piece of land.*

In Singapore, the professions of estate agents and property valuers have a propensity to operate in combination. Given that, when a competent firm of estate agents and property valuers market a property and conclude a sale, the price obtained by them is conclusive of the correct market price. On this basis I would reject the argument of the second and sixth defendants that the sale price was low.

Joint and several liabilities - the law

The next matter for consideration is the defence based on the settlement between the plaintiffs and Jerry Tan. This calls for restatement of the relevant law. There is an interaction of two distinct

concepts: the doctrine of joint liability of joint and several sureties; and the doctrine of merger of a cause of action in a judgment.

At law, a joint guarantee creates a joint, undivided and indivisible liability of two or more sureties. A several guarantee creates separate liability of each guarantor to answer for the entire amount subject to the rule against excess recovery. Several liability of guarantors is not cumulative. To create several liability of two or more guarantors there must be words of severance in the guarantee. Otherwise it will be construed as a joint guarantee. In practice, one seldom, if ever, encounters a several guarantee. The common form of guarantee is the joint and several guarantee. A joint and several guarantee is a hybrid guarantee - it creates both a joint obligation and a number of separate obligations binding each signatory. The liabilities, however, are non-cumulative. Performance by one will discharge all. At common law it was necessary to bring one action against all joint guarantors. Separate actions had to be brought and separate judgments obtained in respect of a several guarantee. All that has changed. It is now possible to sue several guarantors in one action provided that the pleadings make it clear that separate judgments can be obtained on a joint liability.

Merger by judgment

At common law, the general rule was that a judgment against joint guarantors resulted in a joint judgment. The judgment extinguished the original cause of action by the doctrine of merger. The act of court transformed the claims into a superior right empowering the creditor to take execution proceedings. A judgment against one joint guarantor extinguished the only cause of action that existed. This was so, even though the judgment remained unsatisified. Logically, therefore, if an action was brought against joint and several guarantors, there could be a joint and several judgment. Satisfaction of the judgment by any one of the judgment debtors would discharge all guarantors, for the judgment would become extinct by satisfaction.

It has, however, been held that if a single judgment was obtained on a joint and several guarantee, and a compromise settlement by accord and satisfaction was reached with one of the guarantors, all guarantors would ipso facto be discharged. The case of **Re EWA, A Debtor** [1901] 2 KB 642 decided that point. The creditor in that case obtained a judgment for Â£6,000 against two guarantors. The judgment was described as `joint and severally for Â£6,000`. The creditor took out bankruptcy proceedings against one debtor alone. Later there was a settlement between the creditor and that debtor when it was agreed that the creditor would be paid Â£3,000 `in full discharge of all claims` by the creditor against that debtor and `all guarantees given by him ... and in settlement of any outstanding questions as to the amount due to the [creditor]`. The creditor undertook to withdraw the bankruptcy petition. Later, the petition was withdrawn. The creditor then filed a bankruptcy petition against the other debtor in respect of the alleged balance of Â£3,000. It was held that the entire cause of action was extinguished by accord and satisfaction and release. The Court of Appeal, by a majority, construed the judgment as creating a joint judgment, and that there was a release of the entire judgment. Collins LJ said at p 648:

> *[U]nder any judgment or other obligation creating a joint liability there is only one debt, and, that being so, the rule that the release of one of the joint debtors gets rid of the debt applies equally whether the obligation arises on a judgment or on any other security. Therefore no reliance can be placed upon the fact that the obligation in this case was a judgment. It is too late now to question the law - that where the obligation is joint and several, the release of one of two joint debtors has the effect of releasing the other.*

Logically, where a judgment is joint and several, it should be accepted and acted upon as such. The reason why it was read as `joint` ignoring the `several` part, is historical, though not fair or logical. According to Glanville L Williams` masterpiece, **Joint Liabilities** [1949] at 36 and 63 that has been the law since 1374 and it `has been adopted in the United States of America, though rejected in the Restatement on grounds of logic and convenience`. It has also been accepted in Singapore: see **European Asian Bank v Chia Ngee Thuang** [1995] 3 SLR 171 at p 174 where Warren LH Khoo J said:

> *The general rule is that in the absence of any contractual stipulations to the contrary, the release of one joint surety has the effect of releasing all the other joint sureties. This applies to joint and several, as well as joint, sureties.*

In modern times, much new law has been made. The Civil Law Act (Cap 43, 1999 Ed) by s 17 (re-enacting s 3 of the English Civil Liability (Contribution) Act 1978 provides that:

> *Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage.*

It follows, therefore, that if judgment is entered against many joint and several guarantors and one or more of them succeeds in setting aside the joint judgment against them the cause of action is demerged. The original cause of action is resuscitated against those who are no longer bound by the judgment. A subsequent judgment against each of them will be a separate judgment. Any release of any of the other judgment debtors will not affect the separate subsequent judgment. The subsequent judgment, nonetheless, will be reduced by the amount paid by the other judgment debtors.

The same result may be reached by another route: Where a joint judgment is obtained against one or more of joint and several sureties, it is no bar against proceeding against the others on their several liabilities. See **Re Davison, ex p Chandler** [1884] 13 QBD 50 which sealed this principle of law: that where a joint judgment is obtained in respect of a joint and several liability, the several liability is not extinguished. Cave J explained the principle at pp 53-54:

> *Take the illustration of a joint and several note against A, B, and C, which is usually comprised in one document. The result is the same as if three separate notes were given as well as the joint note. If A is sued to judgment on his separate note, is the joint note of A, B, and C merged in the judgment? On principle why should it be? The object of taking a joint and several note is to have the separate liability of each promissor as well as the joint liability of all, and why should the fact that the separate liability of one promissor has merged in a separate judgment against him prove a bar to an action on the joint note? Is there any authority? **King v Hoare** 13 M & W 494 is the leading case, and there it was held that a judgment without satisfaction recovered against one of two joint debtors was a bar to an action against the other, but it was pointed out both at the bar and in the judgment that the law is otherwise when the obligation is joint and several. This very point was decided as long ago as **Drake v Mitchell** 3 East 251. In that case one of three joint covenantors had given a bill of exchange for the debt secured by the covenant, on which bill judgment was recovered, and it was held that this judgment was no bar to an action of covenant against the three.*

The underlying logic of that principle is that several liability spawns separate causes of action. Action and joint judgment without satisfaction against one or more is no bar to a subsequent action on several liability. At common law it was not possible to bring one action against guarantors who were severally liable. It is no longer necessary to bring several actions in respect of several liability. One action may be brought against several guarantors and several judgment obtained against them. That being so, release of one or more of them will not release the other except when the full amount has been paid.

Decision on release point - the legal basis

Applying the above law, I hold as follows. When the plaintiffs obtained a judgment against the guarantors it was a joint judgment. However, when the second and sixth defendants set aside the judgment against them and obtained leave to defend there was a demerger of the separate cause of action against them. That made it possible for the plaintiffs to obtain separate judgments against them. That liability was not affected by the settlement between the plaintiffs and the seventh defendant, for there was no joint judgment against the second and sixth defendants. Their liability, however, was reduced by $400,000 the plaintiffs received from the seventh defendant. The court must find the parties, their pleadings and evidence as they are before it on the day of judgment and give its judgment accordingly. Accordingly I pronounce separate and several judgment against the second and sixth defendants for the amount that is outstanding with interest.

Decision on release point - the factual basis

The above is the legal basis for my rejection of the defendants` argument. In addition, the plaintiffs had two answers based on facts to the second and sixth defendant`s assertion of release from liability. One was cl 16 of the guarantee. The other was the reservation of their rights against the other guarantors.

The provision in cl 16 was that composition with any of the guarantors will not prejudice the plaintiffs` right against the others. This is a short answer to the case of the two defendants before me. The clause is analogous to the provision in the Bankruptcy Act, that acceptance of a composition by a creditor from one debtor shall not release the debtor`s joint surety. The composition with Jerry Tan, therefore, did not prejudice the plaintiffs` right against the other defendants.

It is settled law that a settlement with one surety will not discharge the others if the settlement does not discharge the debt but discharges the surety. The settlement agreement may expressly or impliedly include a reservation of rights against the other sureties.

The plaintiffs relied on the deed made on 3 August 2000 between the plaintiffs and Jerry Tan, that is, the deed of settlement. Recital 2 of the deed referred to cl 16 in the guarantee. Recital 6 stated that a settlement was reached. It read as follows:

> *6 A settlement was subsequently reached between the Guarantor and the Bank upon terms that it will not affect the Bank`s rights and remedies against the other guarantors under the Guarantee or the said judgment and that all further action against the Guarantor will be stayed.*

The body of the deed contained three clauses which read as follows:

1 The Guarantor agreed to pay to the Bank and the Bank agreed to accept the sum of $400,000 in settlement of the Bank`s claim against the Guarantor upon the terms and conditions herein provided.

2 The settlement is personal to the Guarantor, and in accordance with the terms of the Guarantee will not affect the Bank`s rights and remedies against the other guarantors under the Guarantee or the said judgment.

3 Upon receipt of the said sum the Bank will withdraw the bankruptcy proceedings against the Guarantor and will thereafter make no further claims against the Guarantor whether arising out of the Guarantee or the said judgment or any other dealings heretofore between them.

The provisions of the deed are as plain as they can be. It was the product of a mind which knew the law on the matter. The defendants said it was a sham document - an afterthought. According to them, the settlement was reached much earlier without any reservation of rights as feigned in the deed of settlement. So it is necessary to trace the origin of the settlement.

On 14 February 2000, Jerry Tan sent a letter to Ms Lorraine Cher, VP of Credit Marketing of the plaintiffs. It said that he was jobless and `he earnestly hoped that the plaintiffs` management would kindly consider the proposal` he had put forward. He did not spell out in his letter what the proposal was. On 15 February 2000 his lawyer, Robert Yu of Low and Robert Yu, did. He wrote a letter to the plaintiffs` lawyers, Joseph Hoo Morris & Kumar as follows:

We have been instructed by our client that your clients have agreed in principle to accept our client`s offer to pay your clients a lump sum of $400,000 in 2 weeks` time, ie say by 1 March 2000 in full and final settlement of all claims whatsoever your clients may have against our client. Our client is therefore arranging for the necessary funds to pay your clients, upon which your clients will discontinue the above bankruptcy proceedings against our client.

Given the above, please confirm that you have instructions to adjourn the hearing of the above bankruptcy petition against our client which we understand has been fixed on Friday, 18 February 2000 for say 3 weeks to allow time for our client to effect the settlement.

Then there was a memorandum dated 14 February 2000, prepared by Lorraine Cher, and sent to the plaintiffs` Hong Kong head office. It set out the proposal made by Jerry Tan. It was signed by five members of the Singapore Branch Credit Committee. The memorandum was captioned as follows:

Tan Chin Mong Holdings (S) Pte Ltd

To accept the offer of a one time payment of $400,000 from one of the guarantors Mr Tan Keok Kiang, Andrew Jerry, as final settlement ***to release him*** *from the joint and several guarantee of the company`s liabilities. [Emphasis is added.]*

It contained the following relevant paragraphs:

> *4.2 We have been approached by only one of the guarantors, Mr Tan Keok Kiang, Andrew Jerry to accept his offer of a one-time payment of $400,000* ***to release him from the guarantee*** *. According to him, he managed to raise this money from his friends and wife`s relatives.*
>
> *5.3* ***Notwithstanding the release of one of the guarantors*** *, Mr Jerry Tan Keok Kiang,* ***we will still proceed with bankruptcy action against the remaining 5 guarantors*** *.*
>
> *5.4 We have sought the advice of our lawyers Ms Margaret Neo of Joseph Hoo Morris & Kumar, who informed us that the release does not prejudice our rights of claim against the remaining guarantors. Besides, no consent is required from the remaining guarantors for the release of Mr Tan Keok Kiang, Andrew Jerry as guarantor. [Emphasis is added.]*

The Hong Kong head office approved the proposed settlement on 23 February 2000. The next day, the plaintiffs instructed their lawyers to `inform Messrs Low & Robert Yu that the bank is agreeable to their client`s offer of $400,000 in full and final settlement of all claims against Tan Keok Kiang Andrew Jerry`.

On 25 February 2000, the plaintiffs` lawyers wrote to Jerry Tan`s lawyers stating that `we have our clients` instructions that they are agreeable to your client`s offer of $400,000 in full and final settlement of our clients` claim against your client. The said payment must be received by our clients by 9 March 2000.`

On 8 March 2000, Jerry Tan`s lawyers wrote to the plaintiffs as follows:

> *We forward herewith our client`s cheque dated 9 March for $400,000 made payable to your clients in full and final settlement of all claims whatsoever which your clients may have* ***against our client****. For the avoidance of doubt, this is to confirm that with this payment your clients* ***release our client*** *fully from all guarantees, which our client has given to your clients. Accordingly, as agreed, please apply to discontinue the above bankruptcy proceedings against our client at the next hearing date on 17 March 2000. [Emphasis is added.]*

On 22 March 2000, Jerry Tan`s lawyers wrote saying that the plaintiffs had informed their client that they would give him a deed of release and discharge. They asked for it. The plaintiffs` lawyers replied on 15 May 2000 as follows:

> *If your client wishes to have a Deed of Release and Discharge, kindly let us have draft of the same for our approval.*
>
> *Among the terms agreed on our instructions was that such release and discharge would be without prejudice to and would not affect our clients` rights against the other guarantors. Furthermore, legal costs of our clients for such Deed of Release and Discharge will have to be borne by your client.*

Jerry Tan`s lawyers wanted to prepare the draft deed. The plaintiffs` lawyers agreed. Then, for some unrevealed reason the plaintiffs` lawyers sent a draft to their counterpart on 26 July 2000. In the event, the deed was executed and dated 3 August 2000.

The plaintiffs` principal witness, Chan Swee Nee, the first vice president, in his affidavit evidence-in-chief swore to the following statement:

> *In the meantime, the seventh defendant was negotiating a personal settlement with the plaintiffs. After discussions, the plaintiffs agreed to accept $400,000 from the seventh defendant in settlement of the plaintiffs` claim against him on the understanding that it will not release the other defendants.*

I find and hold that the contents of the deed was a recreation of what had been agreed earlier. It was not a sham. It contained nothing new. The agreement did not extinguish the entire cause of action as such. It merely released Jerry Tan from his personal liability and not the claim. This was indicated in the letters and memorandum whose date appear in brackets:

> *` **release him** from the guarantee - **release one of the guarantors**` (memorandum 14 February 2000)*
>
> *`in full and final settlement of all claims whatsoever your clients may have against **our client**` (15 February 2000 letter)*
>
> *`full and final settlement of all **claims against Tan Keok Kiang Andrew Jerry**`(24 February 2000 letter)*
>
> *`settlement of our clients` claim against **your client**` (25 February 2000 letter)*
>
> *` **release our client** fully from all guarantees` (8 March 2000 letter). [Emphasis is added.]*

The deed of settlement accurately captured what had been agreed. The second and sixth defendants were not released from their liability.

The sense and substance of what I have said decrees me to give judgment for the plaintiffs.

There shall, therefore, be a judgment for the plaintiffs for the sum claimed less $400,000 received plus interest and costs.

Outcome:

Plaintiffs` claim allowed.