Privy Council Appeal No. 39 of 1981

Tse Kwong Lam *Appellant*

v.

Wong Chit Sen and Others *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1983

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
LORD TEMPLEMAN
SIR JOHN MEGAW

*[Delivered by **Lord Templeman**]*

This appeal concerns the rights and obligations of a mortgagee in the exercise of his power of sale.

In 1963 the appellant Borrower Tse Kwong Lam arranged for the construction of a building to be known as Kwong Hing Building on two sections of land at Kowloon held by the Borrower under a Crown Lease for the residue of a term expiring in 1973 but with the right of renewal until 1997. The building was duly constructed of 15 storeys containing 90 units consisting of 6 shops on the ground floor, 12 offices on the first and second floor, and 72 flats on the third to the fourteenth floors. The Borrower financed the building construction partly by borrowing on the security of the property and partly by advance sales of the units. The Borrower underestimated the cost of the building and overestimated the prices obtainable for the units.

By 28th February 1966 the Kwong Hing Building had been completed and 36 units had been sold but 54 units remained to be sold notwithstanding that the

original asking prices had been considerably reduced.

The building, save for the 36 units which had been sold, was by 28th February 1966 mortgaged to the first respondent, the Mortgagee Wong Chit Sen, for a principal sum and arrears of interest amounting to some $1,400,000. These sums were secured on the terms of a legal charge dated 30th November 1963 which contained the usual power for the Mortgagee to sell the mortgaged property as a whole or in lots by public auction or by private treaty. By notice dated 28th February 1966 the Mortgagee informed the Borrower that unless certain arrears of interest amounting to $76,548 were paid on or before 29th March 1966 the Mortgagee would exercise his power of sale without further notice. By a notice dated 28th April 1966 the Mortgagee required payment of all the principal monies and interest secured by the mortgage and warned that in default of payment on 29th May 1966 the Mortgagee would exercise his power of sale. The Mortgagee arranged for the mortgaged property to be sold by Messrs. Lammert Brothers by public auction at their auction room in Pedder Building, Victoria, Hong Kong on 24th June 1966 and placed advertisements of the auction in three newspapers circulating in Hong Kong for publication in those newspapers on 9th, 16th and 24th June. Particulars and Conditions of Sale were prepared by the Mortgagee's solicitors and were dated 9th June. The property was described as being 54/90th parts of the building known as Nos. 52 and 54 Cheung Sha Wan Road, registered in the Land Office together with the sole and exclusive right and privilege to hold, use, occupy and enjoy the numbered shops, offices and flats of the building which remained unsold. The Conditions of Sale gave notice that there would be a reserve price and that the vendor reserved the right to bid generally by himself or his agents or to withdraw the property at any time. The purchaser was to pay 20% of his purchase price on the date of the auction and was to pay the balance on or before 23rd July 1966 and time was made of the essence.

On 20th June 1966 the Mortgagee and his wife the second respondent, Wong Cheng Wai Shuk, held a meeting of the directors of the third respondent Company, Chit Sen Company Limited, at which it was resolved *inter alia* that the Mortgagee's wife "be appointed to attend at the office of the Lammert Brothers before 3p.m. on the 26th June (sic) of this year to take part in the auction of Kwong Hing building but in principle the bidding price shall not exceed 1.2m dollars".

At that time the directors of the Company were three in number, namely the Mortgagee and the

Mortgagee's wife and the Mortgagee's eldest son. The Board meeting held on 20th June 1966 was not attended by the eldest son who was abroad. The issued shares of the Company were held as to 50 by the Mortgagee, 50 by the Mortgagee's wife, 50 by the eldest son and 40 by three infant children of the Mortgagee. The Company was financed by non-interest bearing loans from the Mortgagee.

On 24th June the Mortgagee accompanied by his wife, his solicitor and his solicitor's managing clerk attended the auction and informed the auctioneer that the reserve price for the Kwong Hing Building was 1.2m. dollars. The Mortgagee and his wife occupied seats in the front row which, according to the managing clerk, usually were occupied by the Mortgagee and his advisers. The auctioneer introduced the property, announced that the reserve price was 1.2m. dollars and invited bids from the 30 - 40 persons present. There was no bid until the Mortgagee's wife bid 1.2m. dollars and the property was knocked down to her. Subsequently the Mortgagee advanced 1.2m. dollars to the Company by way of interest free loan and the Company paid 1.2m. dollars to the Mortgagee for an assignment of the Kwong Hing Building dated 23rd July 1966.

The Mortgagee then claimed payment by the Borrower of some $400,000 being the difference alleged to be outstanding in respect of principal and interest owing under the mortgage less the sum of 1.2m. dollars paid by the Company for the Kwong Hing Building. The Borrower disputed the amount claimed and counter-claimed to set aside the sale to the Company on the grounds that the sale to the Company was improper and that the purchase price was an undervalue. It was subsequently found by an arbitrator's report dated 26th February 1968 that the amount owing by the Borrower to the Mortgagee after taking into account the sale price of 1.2m. dollars paid by the Company and including interest up to 29th June 1966 amounted to $238,933.39. Judgment was given for that amount but execution was suspended pending determination of the Borrower's counter-claim. That counter-claim in which the Borrower alleged impropriety, fraud and undervalue in the sale to the Company was dated 15th December 1966, but the Borrower did not succeed in obtaining judgment on the counter-claim until 15th May 1979 when Zimmern J. found that the price of 1.2m. dollars paid by the Company was not a proper price but refused to set aside the sale to the Company after a lapse of 13 years and awarded the Borrower damages payable by the Mortgagee of $950,000 and interest at 1.2% per month from 1st July 1966 until payment. By judgment dated 26th November 1980 the Court of Appeal of Hong Kong (Huggins and McMullin,

JJ.A, and Garcia J.) allowed an appeal by the Mortgagee, set aside the judgment of Zimmern J. and dismissed the Borrower's cross-appeal which asked for the sale to the Company to be set aside. The Borrower appeals to Her Majesty in Council.

Counsel for the Borrower submitted that the sale to the Company should be set aside because the Mortgagee who sold the property was interested in the Company which bought the property. There was a conflict between the interest of the Mortgagee as vendor in obtaining the highest price and the interest of the Mortgagee in the Company as purchaser to pay the lowest price. A sale by a Mortgagee to a company in which he was interested would only be upheld if the sale was at arms length and the Mortgagee played no part in the decision of the Company to buy or in the implementation of that decision.

Counsel for the Mortgagee submitted that a mortgagee may exercise his power of sale in favour of a company in which the mortgagee is interested but must satisfy the mortgagor or the court that the mortgagee took reasonable steps to obtain the true market value. In the present case the mortgaged property was purchased by the Company at an auction which the courts below described as "unimpeachable" or "impeccable". The price bid by the Company and accepted by the auctioneer represented the true market value because no higher bid was received. Both Counsel relied on authority for their submissions.

In *Warner v. Jacob* (1882) 20 Ch.D. 220 Kay J. after considering the authorities concluded at page 224 that:-

> "..... a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realise his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."

In *Martinson v. Clowes* (1882) 21 Ch.D. 857 North J. said at page 860:-

> "It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account, and I think it clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either."

Mr. Rattee, on behalf of the Borrower, submitted that a mortgagee, his solicitor or agent cannot be allowed to purchase because they cannot resolve the conflict between their interest to buy for the lowest price with their duties to sell for the highest price. Therefore, he says, whenever there is such a conflict, the sale will not be upheld. In the present case there was clearly a conflict between the interest of the Mortgagee in securing that the Company secured the mortgaged property at the lowest price and the duty of the Mortgagee to sell for the highest price. Mr. Rattee admits that there can be no general rule that a company in which a mortgagee is interested cannot purchase the mortgaged property. He submits that the company can only do so where the sale is negotiated at arms length and where it is clear that the mortgagee had no influence on the decision of the company to purchase or on the implementation of that decision.

In *Farrar v. Farrars, Limited.* (1888) 40 Ch.D. 395 a solicitor who was one of three mortgagees and acted for the mortgagees negotiated a sale in principle and agreed a price at the time when he had no connection with the purchasers. He subsequently took shares in a company formed by the purchasers to carry the sale into effect. Lindley L.J. said at page 409:-

> "The plaintiffs on appeal did not question the view of the judge that there was no fraudulent sale at an undervalue, but they contended that fraud or no fraud, undervalue or no undervalue, the sale could not stand, inasmuch as it was in substance a sale by a mortgagee to himself and others under the guise of a sale to a limited company."

That submission was rejected. Lindley L.J. also said at page 409:-

> "A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself.... There is no authority for saying that such a sale is not warranted by an ordinary power of sale .... But although this is true, it is obvious that a sale by a person to an incorporated company of which he is a member may be invalid upon various grounds, although it may not be reached by the rule which prevents a man from selling to himself or to a trustee for himself. Such a sale may, for example, be fraudulent and at an undervalue or it may be made under circumstances which throw upon the purchasing company the burden of proving the validity of the transaction, and the company may be unable to prove it."

And at page 410 Lindley L.J. said:-

> "A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realise his security and to find a purchaser if he can, and if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed."

The Court of Appeal concluded at page 415 that:-

> "The sale here impeached having been made honestly and at a fair value, ought, in our opinion, to be allowed to stand, and there is no hard and fast rule which compels us to hold the contrary."

In the view of this Board on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time. The mortgagee is not however bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss. This view of the matter is consistent with the decision of the House of Lords in the *York Buildings Company v. MacKenzie* (1795) 3 Craigie, Stewart and Paton 378 (8 Brown 42; 3 E.R. 432). In that case an agent for creditors purchased an estate of the insolvent at auction. The sale was set aside although 11 years elapsed before the sale was impugned. Lord Loughborough L.C., at page 398, referred to two extreme arguments, first that "the quality of common agent, barred his exercising any right as a purchaser," and secondly "if he was not disabled absolutely in point of law from purchasing, he must stand in the position of all the rest of mankind, and might purchase as advantageously as he could, provided there was no gross practice or direct fraud". The Lord Chancellor rejected both extremes and held that agents were entitled to purchase but:-

"The bargain must be perfectly fair and equal, at the best price, because they are placed in a situation which they are bound, in the first instance, to act against their own advantage, and for the advantage of their employers; and if they sacrifice that interest and advantage, with view of profiting and taking the interest of it to themselves, the purchase will be liable to be set aside, the advantage will not come to themselves, and the breach of confidence will not avail them."

In the present case in which the Mortgagee held a large beneficial interest in the shares of the purchasing company, was a director of the company, and was entirely responsible for financing the company, the other shareholders being his wife and children, the sale must be closely examined and a heavy onus lies on the Mortgagee to show that in all respects he acted fairly to the Borrower and used his best endeavours to obtain the best price reasonably obtainable for the mortgaged property.

Sale by auction does not necessarily prove the validity of a transaction. In *Hodson v. Deans* [1903] 2 Ch. 647 at a sale by auction by a friendly society in exercise of their power of sale as mortgagees, the secretary of the committee which fixed the reserve and instructed the auctioneer bought the property for himself having ".... conceived the idea of buying .... and making a profit for himself out of the transaction"; per Joyce J. at page 651. The learned judge found at page 653 that:-

".... the property was sold at an undervalue, not of itself so great as to invalidate the sale, but still at an undervalue. The investment committee could not have sold privately to themselves either as representing the society or as individuals at a price fixed by themselves, nor could they, I think, have so sold to one or more of their number. It is said that any such objection is cured by the fact that the sale was by auction. I do not think so. At all events .... the onus is on the defendant to show that everything was done fairly and *bona fide*."

In *Kennedy v. De Trafford* [1897] A.C. 180 a mortgagee sold the mortgaged property to one of two mortgagors who were entitled to the equity of redemption as tenants in common for a sum equal to the mortgage debt. Lord Herschell, at page 185, was "... disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty

of any breach of duty towards the mortgagor". But in that case he advised the House that:-

> ".... if you were to accept the definition ... for which the appellant contends, namely, that the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, as well as to act in good faith, still in this case he did take reasonable precautions. Of course all the circumstances of the case must be looked at."

The circumstances there were that the mortgagee had told each of the mortgagors that he wished to sell and was willing to take a sum sufficient to discharge the mortgage. No offer or objection was made by the mortgagor who subsequently sought to impugn the sale.

In *McHugh v. Union Bank of Canada* [1913] A.C. 299 Lord Moulton in tendering the advice of the Privy Council said, at page 311, that:-

> "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."

Finally in *Cuckmere Brick Co. Ltd. and Another v. Mutual Finance Ltd.* [1971] Ch. 949 Salmon L.J. after considering all the relevant authorities including the views expressed in *Kennedy v. De Trafford* concluded at page 968 with the subsequent agreement of Cross and Cairns L.J.J. that ".... both on principle and authority, that the mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it".

In the result their Lordships consider that in the present case the Company was not debarred from purchasing the mortgaged property but, in view of the close relationship between the Company and the Mortgagee and in view in particular of the conflict of duty and interest to which the Mortgagee was subject, the sale to the Company for 1.2m. dollars can only be supported if the Mortgagee proves that he took reasonable precautions to obtain the best price reasonably obtainable at the time of sale.

On behalf of the Mortgagee it was submitted that all reasonable steps were taken when the Mortgagee, with adequate advertisement, sold the property at a properly conducted auction to the highest bidder.

The submission assumes that such an auction must produce the best price reasonably obtainable or, as Salmon L.J. expressed the test, the true market value. But the price obtained at any particular auction may be less than the price obtainable by private treaty and may depend on the steps taken to encourage bidders to attend. An auction which only produces one bid is not necessarily an indication that the true market value has been achieved.

In the present case, the Mortgagee threatened on 28th February 1966 to sell the property if certain arrears of interest were not paid; it was then obvious that the Borrower was in difficulties. On 28th April the Mortgagee called in the principal and gave notice of his intention to sell the property if the principal and interest, which the Mortgagee alleged to amount to 1.6m. dollars, were not paid by 29th May 1966. The Mortgagee had ample opportunity to consult and instruct estate agents. The property could have been offered for sale by auction or by private treaty or by announcing that the property would be sold by public auction if not previously sold by private treaty. The property could have been sold as a whole or in units. The Mortgagee might have been advised that, as happened, a sale by auction might not produce any independent bidders; that the number of potential purchasers able and willing in 1966 to pay over 1m. dollars for this building was limited; that, to obtain a purchaser by private treaty or to obtain sufficient interest to justify an auction, it would be necessary for the estate agents to approach their clients and other persons known to be interested in property purchase, investment and speculation and to provide them with full information about the construction of the building, the terms upon which parts had already been sold, the provisions for sharing expenses and maintenance, the existing condition of the building, its advantages and prospects. The auctioneers to be employed in selling the property by auction, if this was necessary or desirable, could have been instructed to seek out potential purchasers and bidders and to arouse interest in the property. The Mortgagee was advised by his solicitor's managing clerk that a sale by auction was "fairer" but the Mortgagee does not appear to have considered the possibility that a higher price could be obtained by a sale by private treaty to an independent third party at a price recommended by an estate agent as being the best obtainable after the agent had had an opportunity to explore the market. Moreover the Mortgagee does not appear to have taken any step to secure any interest in the auction. The Mortgagee instructed auctioneers who prepared Particulars and Conditions of Sale which were dated 9th June. On

the same day the sale was advertised in three newspapers. There is no evidence that the advertisement did more than give notice of the bare fact of the auction coupled with a minimum description of the property. The Particulars and Conditions of Sale contained only the legal requirements. There was no evidence that anyone requested a copy of the Particulars and Conditions or asked to inspect the property. The Conditions of Sale disclosed that there was a reserve price, that the vendor reserved the right to bid, that 20% of the purchase price was payable after the auction and that the balance was payable one month thereafter, time being of the essence. A reader of the first advertisement had just 15 days in which to make detailed inquiries and investigations and to organise his finances so that he was prepared to engage in competitive bidding possibly with a vendor and with a borrower who knew all about the property and might be puffing the sale. There was no evidence that anyone took the elementary precautions which a purchaser of a building for a sum in excess of 1m. dollars would expect to take before venturing to bid at an auction.

The Mortgagee could have consulted estate agents about the method of sale and about the method of securing the best price. At the very least he could have consulted an estate agent about the level of the reserve price. The auctioneer was not informed of the reserve price until immediately before the auction and in evidence he very properly declined to comment on the reserve because he had not valued the property.

This confirms the impression that the auctioneers were not instructed to do more than put the property under the hammer, a procedure which may be appropriate to the sale of second-hand furniture but is not necessarily conducive to the attainment of the best price for freehold or leasehold property. It was not of course in the interests of the Company that enthusiasm for the sale should be stimulated or that the reserve should be settled by anyone other than the Mortgagee.

The reserve of 1.2m. dollars was fixed by the Mortgagee and was the price at which he advised and intended that the Company should purchase. The Mortgagee was a property investor and speculator. The Company was his family company and he held shares in and financed the Company. The Mortgagee would not have advised the Company to bid 1.2m. dollars for the property unless he thought that was an advantageous price for the Company to pay.

The Company, unlike an independent bidder, knew all about the property through the Mortgagee and knew the amount of the reserve in advance. The Company and the Mortgagee did not have to arrange finance. The Company bought the property for 1.2m. dollars provided by the Mortgagee who received back that sum in reduction of his mortgage debt. The sale transferred from the Borrower to the Mortgagee's family Company at a price advised by the Mortgagee the chance of making a profit which the Mortgagee could not acquire for himself. The Borrower was exposed to an action for $200,000 being the difference between 1.2m. dollars, the price paid by the Company and 1.4m. dollars the amount of the mortgage debt. That left the Mortgagee with a hold over the Borrower which he exercised when the Borrower complained about the sale. If, as appeared probable, the Borrower could not pay $200,000 the Mortgagee would suffer a loss which he could have prevented by advising the Company to bid 1.4m. dollars for the property. No doubt the Mortgagee did what was best for himself and the Company.

The only indication that 1.2m. dollars represented the market value of the property was the fact that no one at the auction bid more than 1.2m. dollars. But the fact that no one bid more than 1.2m. dollars at this auction does not necessarily mean that the property could not have been sold for more than 1.2m. dollars if the Mortgagee had consulted estate agents about the method of sale and the amount of the reserve and had instructed them to try to interest the investing public in the property. There was no competitive bidding and the Company purchased the property at a price fixed by the Mortgagee. There is no sufficient evidence that this particular auction produced the true market value.

On behalf of the Mortgagee, Mr. Scott objected that the pleadings did not allege that the Mortgagee should have taken more precautions than he in fact took to obtain the best price. At the trial the Mortgagee was not asked why he had not consulted the auctioneers or other estate agents about the sale or about the reserve. Their Lordships were impressed with Mr. Scott's forceful arguments and with his submission that the judges of Hong Kong are the best judges as to the propriety and effectiveness of steps taken in local conditions to procure the best price reasonably obtainable at the sale of a Crown Lease. But Mr. Scott rightly accepted that in the circumstances the Mortgagee must shoulder the burden of proving that the Mortgagee took all reasonable steps to obtain the best price reasonably obtainable. The Mortgagee made no effort to

discharge that burden but relied simply on the fact that, fortified by the vague approval of a solicitor's managing clerk, he submitted the property to auction after proper advertisement.

The auction took place on 24th June 1966 and by December 1966 the Borrower had filed a counter-claim alleging *inter alia* that the auction price of 1.2m. dollars was a gross undervalue. The Borrower sought an account on the basis of what was the true value of the building at the date of the auction and damages equal to the difference between the true value and the price realised. Despite these allegations the Mortgagee came to trial without any contemporaneous or other evidence as to the value of the building at the date of the auction. At the trial the judge was asked to determine "Agreed Issues" which included the question whether the auction sale should be set aside or damages awarded for "collusion and bad faith (equitable fraud) and or negligence in relation to the sale". The Mortgagee did not proffer any evidence seeking to justify the steps which he took to sell the building or any expert evidence that any other steps would have been futile. The Mortgagee gave evidence that his solicitor's managing clerk advised that an auction sale was "fairer". Even this vague advice shows that the Mortgagee realised that he ought to seek some advice about the method of sale; he ought to have realised that a solicitor's managing clerk was not the best person to give such advice. It is impossible to imagine any sound reason why the Mortgagee did not consult the auctioneers about the method of sale or about the possibility of stimulating interest in the auction. In any event the advice of the managing clerk did not explain or justify the failure of the Mortgagee to consult the auctioneers about the reserve price. There being no relevant cross-examination the court could not assume that the Mortgagee thought that the advice of or valuation by the auctioneers or some other expert might prove an embarrassment. But in the circumstances in which the building came to be sold without any bid save the bid of the Company made on the advice of the Mortgagee and in the absence of any contemporaneous and expert independent advice whatsoever, the price paid by the Company proved nothing about the value of the building. At the trial and on this appeal the Mortgagee adopted the attitude that a mortgagee exercising his power of sale is entitled to secure the mortgaged property for a company in which he is interested at a price advised by the mortgagee provided that the property is properly advertised and sold by auction. A decision to this effect would expose borrowers to greater perils than those to which they are now

subject as a result of decisions which enable a mortgagee to choose the date of the exercise of his power. A mortgagee who wishes to secure the mortgaged property for a company in which he is interested ought to show that he protected the interests of the borrower by taking expert advice as to the method of sale, as to the steps which ought reasonably be taken to make the sale a success and as to the amount of the reserve. There was no difficulty in obtaining such advice orally and in writing and no good reason why a mortgagee, concerned to act fairly towards his borrower, should fail or neglect to obtain or act upon such advice in all respects as if the mortgagee were desirous of realising the best price reasonably obtainable at the date of the sale for property belonging to the mortgagee himself.

Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for the sale to be set aside. In the present case it is submitted on behalf of the Mortgagee and the Company that the Borrower is debarred by the terms of his mortgage from any remedy save damages. Alternatively the Mortgagee and the Company submit that the delay on the part of the Borrower in pursuing his counter-claim has rendered it unjust for the building to be restored to the Borrower.

By the legal charge dated 30th November 1963 the Mortgagee agreed not to exercise his power of sale or other powers in relation to the building until he gave notice in writing or unless the Borrower defaulted in the payment of interest or in the observance of his covenants. The legal charge also provided that "the remedy of the mortgagor in respect of any breach of the clauses or provisions hereinbefore contained with respect to the letting, leasing or sale of the premises shall be in damages only". But, in the view of the Board, there is nothing in the legal charge that enables or could enable the Mortgagee to uphold a sale which is defective because the Mortgagee failed to fulfil the duty imposed on him by the law to take all reasonable steps to obtain the best price reasonably obtainable. The Borrower is not therefore debarred by the terms of the legal charge from seeking to set aside the sale to the Company.

The Borrower has however been guilty of inexcusable delay in prosecuting his counter-claim. The Mortgagee's writ was issued on 31st October 1966, the Borrower's defence and counter-claim were filed on 17th December 1966 and the Mortgagee obtained judgment on his claim on 16th November 1968. The successive delays which took place thereafter were the responsibility of the Borrower. In particular two years elapsed between the date in 1970 when the Borrower filed an amended counter-claim and the date in 1972 when the Borrower took out a summons for directions. A further five years elapsed between the date in 1972 when the court ordered that the action should be set down for trial within 40 days and the date in 1977 when the action was in fact set down for trial. The Borrower contends that these delays have not been prejudicial to the Mortgagee who will receive principal and interest. But the Borrower also seeks an account from the Mortgagee on the basis of wilful default. Moreover either the Mortgagee or the Company must have been put to expense in maintenance and repairs of the building and may have laid out moneys on other matters which could have been better employed elsewhere. The Borrower by his delay achieved a favourable position; if the property decreased in value he could either abandon his action or seek damages in setting aside the sale. If the property increased in value he could persist with his claim to set aside the sale. In the circumstances the Board consider that the Borrower is not entitled to have the sale set aside but is entitled to the alternative remedy of damages. That was the view taken by the learned trial judge.

The measure of damages must be the difference between the best price reasonably obtainable on 24th June 1966 and the price of 1.2m. dollars paid by the Company. The trial judge assessed these damages at $950,000. The Court of Appeal in Hong Kong strongly criticised the evidence upon which this assessment was made. The oral evidence of a valuer who gave evidence for the Borrower was vitiated by the fact that the valuer was supplied with insufficient information and assumed a sale of individual parts of the building over a period. There was more cogent evidence in the form of a letter from the Wing On Life Assurance Company dated 26th April 1966 whereby the insurance company agreed in principle to advance 1.5m. dollars on the security of the building. There was evidence that the insurance company would not normally advance more than 70% of the value of a security thus valuing the building at nearly 2.15m. dollars. This was cogent evidence, save that there was no direct evidence from the representative of the insurance company who valued

the building for the purpose of making the offer. More particularly there was no evidence of the amount by which the building declined in value between April and June 1966. The Court of Appeal recognised and identified a general fall in the value of real property in Hong Kong between April and June 1966. In these circumstances the Board consider that the action must be remitted to the Court of Appeal of Hong Kong for that Court to make such directions as may be considered necessary for the assessment of damages.

Counsel for the appellant and the respondents have very helpfully agreed the form of the order which is appropriate in the light of the conclusions reached by the Board. The draft minutes of order settled by Counsel are attached to this judgment. The respondents object to the award of interest on the damages payable to the appellant as provided by the order, but their Lordships consider the mortgage rate of interest which was payable to the Mortgagee pursuant to the terms of the mortgage should be paid to the Borrower as from 24th June 1966.

In all the circumstances of the present case, however, taking into account the delays for which the Borrower was responsible and the deficiencies of the pleadings and evidence and cross-examination their Lordships consider that the Borrower is only entitled to receive from the Mortgagee and the Company jointly and severally 50% of the costs of the trial, the appeal to the Court of Appeal and the appeal to the Board. The respondents must pay their own costs.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be allowed in accordance with the terms set out in their Lordships' judgment and the draft Minutes of Order settled by Counsel attached thereto and that the action ought to be remitted to the Court of Appeal of Hong Kong for that Court to make such directions as may be considered necessary for the assessment of damages by the High Court.

MINUTES OF ORDER

DECLARE that the sale to the respondent Chit Sen Company Limited of the property comprised in the mortgages mentioned in the pleadings ought not to be set aside.

ORDER that an inquiry be made as to the sum net of the costs of sale which the respondent Wong Chit Sen would have received on 24th June 1966 if he had properly exercised the power of sale conferred on him by the mortgages mentioned in the pleadings and had taken all reasonable care to obtain the true market value of the property comprised in the said mortgages on that date.

AND ORDER that the amount (if any) by which the said net sum exceeds HK $1,182,783 be certified.

AND ORDER that an Account may be taken of interest on the amount (if any) certified in accordance with the foregoing provisions of this order at the rate of 1.4 per cent per calendar month from 24th June 1966 until the date of certification of the said amount.

AND ORDER that the amount of such interest be certified.

AND ORDER that the respondent Wong Chit Sen do pay to the appellant the aggregate of the amounts (if any) certified as aforesaid together with interest on such aggregate sum at the rate for the time being applicable to judgment debts from the said date of certification until payment.