

Lecture 10: Mortgages/Release Of CPF Money

Objectives

- Describe how a Purchaser may finance his purchase of a property
- Describe the process involved in a mortgage transaction
- Identify and explain the documents involved in a loan/mortgage
- Describe the process of applying for use of CPF money and how property is charged to CPF Board
- Identify and explain the documents involved in the charge to CPF Board
- Need to understand the procedural aspects of the documents.
 - **Based on the facts as stated in the exam question, what documents are required to be prepared in a mortgage situation?**
 - The priorities between the CPF Board and the bank (mortgagee) in the event that the sale proceeds are insufficient to pay off both the CPF Board and the bank – Refer to the CPF's Memorandum of Mortgage.

How can a Purchaser finance his purchase of property?

- Own funds (cash)
- CPF money
- Loan
- = PURCHASE PRICE
- Not just Bank and CPF board's issue – must also give proper advice on this issue – rules and regn within realms of lawyer
- Quotas allowed – law changed last yr -
 - MAS issued guidelines in July last yr to relax the rules on usage
 - **Can finance property up to 95 percent with use of CPF**
 - **If loan only (bank loan with no CPF involved) then 90 percent**
 - Can even use CPF to pay the 5 percent or 10 percent deposit – works up to 95 percent if use CPF as well
 - **Read press release in www.mas.gov.sg – archives 2005 19 july**
 - In July this yr, n longer allowed to use CPF to buy commercial properties
 - Only for residential properties

MAS Issues Revised Housing Loan Rules

Singapore, 19 July 2005...The Monetary Authority of Singapore (MAS) today announced **that banks may grant housing loans of up to 90% of the property value**. Currently, MAS' housing loan rules cap the loan-to-value (LTV) limit at 80%.

2. As part of the minimum 10% downpayment by the borrower, the **minimum cash component for purchases of private residential properties has also been reduced from 10% to 5%**. In tandem, the Government has decided to reduce the cash downpayment for HDB flats financed with bank loans to 5%, instead of the originally slated 10%¹ on 1 January 2006. This will align the cash downpayment for both HDB and private property.

3. The LTV limit of 80% was introduced in 1996, at a time when the property market was overheating. However, the 80% LTV was intended not as a counter-cyclical measure, but at ensuring sound bank lending practices across property market cycles. The 20% downpayment by borrowers provided a buffer for banks against fluctuations in property prices and losses on mortgage loans. This was particularly important as bank mortgages ranked after borrowers' own CPF claims on the properties.

4. In 2002, Government reversed the order of priority of charges so that financial institutions held the first charge for a property ahead of CPF. Further, borrowers were allowed to use their CPF savings for up to 10% of the 20% downpayment for private property purchases. In the last three years, the market has had time to adjust to these major changes. Banks now have first claim status for over two-thirds of their outstanding housing loans.

5. MAS has assessed that it is now appropriate to raise the LTV limit to 90%. This change will give banks more room to assess risk, and enable them to offer certain consumers a wider range of financing options when purchasing a property.

6. The 10% downpayment will continue to deter over-borrowing by purchasers and reduce potential losses to banks from borrower default. To mitigate the increased risk that banks will take, MAS will require banks offering such loans to hold higher capital in line with its current capital adequacy rules². MAS also expects banks to apply rigorous internal credit evaluation criteria before extending high LTV loans. This is similar to the approach taken in certain other well-regulated jurisdictions. Property buyers on their part should exercise financial prudence in their purchases and ensure that they can comfortably service their loans.

7. These changes in housing loan rules are not designed for the short term, or to address immediate market needs. They are part of MAS' longer term shift to a risk-focused supervisory approach towards banks and financial institutions. We have been refining our prudential policies and rules in recent years, to provide financial institutions greater leeway to make their own risk decisions, subject to sound risk management practices. MAS has focused increasingly on supervision of banks' internal risk practices, rather than one-size regulation.

- As result of relaxation of rules, option for no 7 jalan nipah
 - Deposit of full 10 percent – not so common
 - Now more common to have only 5 percent for obv reasons – the min 5 percent cash – to have option for purchaser to fund rest of 95 percent using CPF

How much money can you borrow from bank and use from cpf?

- Generally the bank would prefer that you first exhaust all your CPF funds
- The MAS guidelines are that banks/HDB will lend you up to 95% of your purchase price, and you fork out the rest yourself (cash)
- Since banks insist you exhaust all your CPF funds first, your loan from the bank will work out to be (95% of purchase price) minus (CPF \$\$).
- Therefore, Purchase Price = (95% from bank+CPF) plus (5% cash)

- **Besides preparing draft Transfer, which we did at the last lecture, P's sols must also ...**

- Prepare mortgage documents if acting for Bank, if not, must obtain from Bank's sols, & get P to sign
 - **You have to read the whole doc and explain to clients before they sign. You are not merely a postbox!**
 - **So how to explain complex legal docs to client in layman terms?**
- In mortgages, as in other conveyancing transactions, don't forget to check on stamp duty payable. The mortgage is only valid to the extent that the proper stamp duty has been paid for the amount secured.
- Prepare CPF documents if acting for CPF, if not still have pri duty to explain doc to client before they sign

BANK MORTGAGE

What's involved in the mortgage transaction?

- • Process
- • Parties to a Mortgage
- • The security documents used
- • The execution and registration of a Mortgage under both the Torrens system and Common Law
- • Uncompleted Properties

Process of a mortgage transaction -

- • Apply for loan
- • Bank offers loan to customer if he satisfies the requirements (contractual stage – offer and acceptance) – letter of offer to customer
- • Customer accepts offer
- • Solicitors are instructed
 - or client may come here with letter of offer and ask for advice.

- • Bank's solicitor prepares mortgage documents, conducts searches required by bank and ensures all conditions of bank are met
 - doubling of duties?
 - When acting for prucahser, do searches already
 - So client can obv save money is same solicitor performs the mortgage transaction because can use the same searches
 - Even if diff sol, can still request/ offer searches already done so that client can save money
- • Parties sign mortgage documents
- • Bank's solicitor lodges caveat
 - to notify bank's interest
- • Loan is released on day of completion itself
 - not earlier
 - try to time everything on completion date because interest starts to run the day the interest is released
- • Mortgage is registered

Parties to a Mortgage

- • Mortgagor: the person who provides the security
- • Borrower: the person who is taking the loan
- • Mortgagee: the person lending against the security, usually the Bank
- • Mortgagor and Borrower may be the same or different persons
 - • Mortgagor-Bank mortgage: 2-party mortgage, the easiest kind!
- • Mortgagor-Borrower-Bank mortgage
 - owner of property may be indiv but director of company which wants the loan because needs it to run business; dir of company prepared to mortgage ohme to bank for loan to company to run its business
 - (so mortgagor is director and borrower is company and bank is the mortgagee)
 - borrower may be individual as well – eg ask friend to mortgage his house
- • Mortgagor-Borrower (Co)-Bank mortgage: more than one bank, particularly if the loan is huge
- • Mortgagor-Firm-Bank mortgage: borrower = “firm” = sole proprietorship
- • Mortgagor-Borrower (Partnership)-Bank mortgage

Capacity and authority of mortgagor/borrower to enter transaction

- If the mortgagor is an individual, he must be an adult, of sound mind, etc. If the mortgagor is a company, the mortgage must be signed by the proper party as agreed in the company's resolutions.

Security Documents

- • Letter of Offer – by bank
- • Standard Terms and Conditions (usually printed form) – by bank
 - will be deemed to accept when signed
 - non est functo – accept std terms and conditions too (deemed to have read it)

- • Mortgage
 - lawyers prepare this
- • Memorandum of Mortgage – prepared only once
- • Additional documents, eg. Supplemental Deed – to regulate term loan, Deed of Assignment of Rental Proceeds – if meant for investment and to be rented out, Letter of Undertaking – for certain conds attached to the loan
 - security over land

Letter of Offer (Applies to both LTA and ROD mortgages)

- • Offer in writing from bank to borrower
- study carefully instructions
- • Specifies:
 - Type of loan facility – What is the difference between a term loan and an overdraft?
 - Check out the difference
 - Interest Rates – must be specified!
 - Repayment terms – whether mthly instalments, within 6 mths etc, or on occurrence of certain event eg sale of other property
 - security required
 - Security documents – what kind wanted by the bank whether mortgage in addition to that, supp deed
 - Special conditions or conditions precedent – eg before loan released, bankruptcy search, writ and seizure and causebk search must be in order
- How to prepare a mortgage document when acting for the bank?
 - Every bank has its own set of standard terms and conditions, usually set out in a printed form, usually incorporated in and attached to Letter of Offer
 - If not attached to Letter of Offer, should ask for it
 - Sometimes the letter of offer usually sets out the bare terms, remember to contact the credit/legal officer of the bank to find out more details
 - All terms apply unless negated by Letter of Offer
- Common practice for bank to structure housing loan to customer into 2 or 3 sep term loan accts each with own interest rate and repayment sched
 - To cater to borrower's financial plan eg borrower selling off property within next 6 mths and wishing to have flexibility to pay off one of term loan accts fa sale proceeds => rte caclation may be on mthly rest basis for 1 acct and on annual rest basis for another
 - Clarify so tt mortgage will reflect the bank's intention
- May need adaptations:
 - mortgagor is sole proper of business and overdraft facility to operate through acct to be opened in name of firm
 - mortgagor is partner in partnership firm but property t be mortgaged owned by mortgagor solely and mortgage intended to secure credit facility to be granted to partnership
 - mortgage peorpty to secure acct of third party borrower

- mortgage to secure acct of 2 or more persons who are jt borrowers where mortgagor one of jt borrowers
- Always present when a mortgage is granted.
 - Type of facilities granted
 - Terms of facilities granted e.g. interest rates/tenure etc
 - Parties – i.e. identity of mortgagor/borrower/guarantor etc
 - Types of security – e.g. property to be mortgaged, assignment of rentals, guarantees etc
 - Types of security documents – e.g. mortgage, supplemental deeds, assignments, guarantees etc
 - Standard terms of mortgage – to check if these have been forwarded by the bank
 - Special terms of mortgage e.g.
 - cancellation fees
 - prepayment penalties
 - use of CPF funds
 - owner occupation
 - capital reductions required
 - insurance

Standard Terms and Conditions

- • Every bank has its own set
- • Usually set out in a printed form
- • Usually incorporated in and attached to Letter of Offer
- • If not attached to Letter of Offer, should ask for it
- • All terms apply unless negated by Letter of Offer
- if not in letter of offer, std terms stand
- must read both to know full terms!!!
- Note updated versions

The Mortgage – bank’s std form mortgage

- Banks have fairly std formats for mortgage instruments
 - Both cl indenture of mortgage and LTA mortgage form
- adopt std form accordingly after reading letter of offer
- • Legal document by which the property is mortgaged
- • Each bank usually has its own form of mortgage
- • Solicitor should adapt or amend bank’s standard form where necessary to reflect terms in letter of offer
 - consider offer letter and std terms and conditions
 - ensure tt all nec provisions incorp into mortgage instrument
- • “Open” vs “closed” mortgage - differences & benefits.
 - Open – no ref to quantum of loan – ‘to secure all moneys principal interest etc tt may be owing to bank under loans granted fr itme to time on term

basis/ revolving credit basis' – meant to make security for any type of loan granted now or future

- Benefit of this – when want to take out new loan, no need to do second mortgage since orig mortgage open, therefore covering loans granted now and all loans granted in the future – open mortgage covers present and subsequent loans, therefore pay only one set of stamp and registration fees – flexibility
- Disadv – cover even credit card bills (everything!)
- Closed mortgaged – only want one part term loan and nothing else – no future loans being considered
 - Most banks go for open loans these days

Requirements as to Form

➤ Closed or open format

1. Open format mortgage (more common): All monies security. Secures all banking facilities that are granted by the bank to the specific mortgagor, now or hereafter or prior to the mortgage.
 - Prepared in very general terms, in the form used for an overdraft, i.e. that all monies are payable on demand, and no specific terms as to what the interest is, how repayment is to be made (i.e. the mortgage is in general terms).
 - What certain banks require is a *supplemental deed* or a *term loan agreement* which regulates the particular loan concerned – need to read the letter of offer to find out whether this is required. The bank may require the mortgagor to covenant to make payment on the term loan, e.g. specific monthly/interest payments.
 - Other banks simply incorporate the letter of offer into the mortgage so that the terms of payment etc are incorporated.
2. Closed format mortgage: A mortgage to secure a specific banking facility.
 - Direct/indirect mortgage or 3rd party mortgage
 - Mode of execution

Memorandum of Mortgage

- • Usually called “MM”
- • Registered at the SLA and therefore has a registration no.
- • Another set of standard terms and conditions
- • Different MMs apply to different situations and types of mortgages
- • Usual covenants
- • Incorporated by a clause in the mortgage document itself, called the “deeming clause”, i.e. deems the terms of MM incorporated into Mortgage
- Different MMs apply to different situations and types of mortgages, so can file more than 1 MM
- • Purpose is to avoid lengthy mortgage

- can take up all std terms, register it and by one ref in mortgage iuncorp all terms ‘this moartgage shall include all erms in MM no 1 be icnrporated as if it takes full effect....’
- Mortgage cannot exceed 10 pages otherwise registry x register it (rule still stands?) => need MM!!
- see CPF board memorandum (attached to lecture notes)\
 - diff fr that of bank’s
 - each bank has own set
 - MM no is different depending on type of bank
- (It cannot be more than 10 pages long.??) All the terms of the memorandum of mortgage are deemed to be part of the mortgage.
 - All the standard terms of the mortgage are registered, but must also check to ensure that all the terms contained in the letter of offer are included. If any of the special terms from the letter of offer are not found in the memorandum of mortgage, you will have to draft it in yourself.
- Rule 8, Land Titles Rules
 - ⇒ The banks and financial institutions put their terms of mortgage in MM, and different kinds of mortgage have different MMs, so banks may file more than one MM
 - ⇒ They file it with the Registry – rule 8(2): MM must be filed prior to the registration of any instrument of mortgage (or lease) with the registry
 - ⇒ Each MM assigned a number
 - ⇒ Bank can file in several sets of MM forms to cover proviiosns applicable to eg term loans/ overdraft facilities/ sitn where mortgagor is borrower etc

Common covenants and conditions in leases or mortgages

8. —(1) The Registrar may require that similar terms, covenants and conditions which are intended to apply to 2 or more leases issued by the same lessor, or to 2 or more mortgages created in favour of the same mortgagee, to be set out in a Memorandum of Lease or Memorandum of Mortgage (referred to in this rule as a Document), as the case may be, in the approved form.

(2) The Document shall be filed with the Registrar prior to the lodgment of any such instrument of lease or mortgage in the Registry for registration.

(3) The covenants and conditions set out in a Document filed with the Registrar **shall bind the affected parties to every instrument of lease or mortgage which makes a reference to the Document by its number allotted by the Registrar.**

(4) The Registrar may refuse to accept for lodgment any instrument of lease or mortgage which exceeds 10 sheets and which sets out in full the terms, covenants and conditions which, in the opinion of the Registrar, should be set out in a Document to be filed with the Registrar prior to the lodgment of the instrument of lease or mortgage.

(5) This rule shall not apply to the standard covenants and conditions for mortgages prescribed

under section 170 of the Act.

- MM usually contains greater details on the covenants that borrower must comply with, e.g. borrower to upkeep the property, to inform the bank of any damages to the property
- Can also include interest rate payable, length of periods allowed for default, prepayment, etc. Hence if you as borrower negotiated the terms, must check MM and alter MM terms accordingly
- Covenants and conds contained in MM form are those general provisions covering mortgagor oblig:
 - Keep property in repair
 - Pay all taxes and other outgoings
 - Insure
 - Comply with notice served by auth
 - Not to make structural alterations without bank's permission
 - Not to use property for purposes other than those for which built
 - Not to do anything it will contravene any law relating to use of property
 - Pay bank's costs
 - Repay moneys expended by bank in prxtn of security
 - Exclude or vary some of restrictions on mortgagee's power of sale/power to appt receiver implied in mortgages by CLPA
- Note restrictions on power of sale: CLPA ss24 and 25.

Power incident to estate or interest of mortgagee.

24. —(1) A mortgagee, where the mortgage is made by deed, shall have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further:

(a) a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby;

(b) a power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(c) a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof.

(2) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of these powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in this Act.

(3) This section shall apply only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4) This section shall apply only where the mortgage deed is executed on or after 1st August 1886.

Regulation of exercise of power of sale.

25. A mortgagee shall not exercise the power of sale conferred by this Act unless —

(a) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money or part thereof for 3 months after the service;

(b) some interest under the mortgage is in arrears and unpaid for one month after becoming due; or

(c) there has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

○ Note also Rule 30, ROD Rules

⇒ So Registrar of Deeds can refuse any mortgage > 10 pages, or any mortgage that incorporates things that the registrar feels should be part of MM filed with register of titles

⇒ Therefore when drafting land titles form of mortgage or cl form of mortgage, shld incorp terms of bank's relevant mortgage form by single provision to effect tt mortgagor covenants to observe and perform all covenants set forth in MM

Rule 30, ROD Rules

Memorandum of mortgages

30. The Registrar may refuse to accept for registration any instrument of mortgage which —

(a) exceeds 10 sheets; and

(b) sets out in full the terms and conditions which, in the opinion of the Registrar, are or could be set out in a Memorandum of Mortgage filed with the Registrar of Titles.

- Review MM forms periodically
- Can vary terms of MM form when drafting mortgage instrument by including provision to effect it in its application to ur mortgage instrument, partr clause in MM form to be deleted or varied
- If acting for mortgagor, can ask for amendments if provn of MM inconsistent with client's reqts

Additional Deeds and Documents

- • Supplemental Deed, usually sets out particular conditions of a specific loan like a term loan
 - borrower needs some kind of security ie not just loan overdraft (repayable on demand)
 - so this governs partr term loan – eg rates/ penalty for prepayment
- • Deed of Assignment of Rental Proceeds, usually for properties bought for investment
 - just in case default, want to be able to get rental every mth
 - instead of tenant paying landlord he pays mortgagee of landlord
- • Letter of Undertaking, usually to cover a one-off act
- • Sometimes, Term Loan Agreement is used instead of Supp Deed

Drafting the mortgage document/ letter of offer (above)

- Lender's solicitor usually drafts and finalises the mortgage documents. Generally the banks already have standard mortgage forms, so bank's solicitor hardly gets to draft.
- In practice, the borrower/mortgagor is someone with very little bargaining power (your average aspiring homeowner), so there is no negotiation.
 - You take or leave the terms of the bank.
 - However, if you are the borrower's solicitor and you do have some bargaining power, if you have negotiated some terms with the bank, then you **MUST** go through the terms of the mortgage and the memorandum of mortgage¹.
 - This is because the bank usually has a standard form for mortgages, which may not fit with the terms you have negotiated.

1. Note the type of facilities given; every mortgage differs depending on its purpose

- term loan
 - o fixed amount for a given period, with fixed payment regime (instalments, interest rate), prepayment conditions, and certain conditions precedent set by the bank must be met²
- bridging loan
- overdraft: payment on demand, though bank must give borrower a reasonable time upon demand being made³ (see also p141-142, Manual)

¹ For greater detail on the memorandum of mortgage (called the MM), see below.

² Very rough definition. Please see (future) commercial law notes. Recognise however that the conditions for term loans are frequently negotiated between big borrowers and lenders, so must check MM and mortgage carefully!

³ Ibid.

- all moneys/monies mortgage (common in commercial loans) – the mortgage secures all monies which may be payable from time to time to the Mortgagee

2. Terms of facilities granted

- principal sum –
 - o prev preferred practice to state borrowing limit in instrument – recital 2 – ‘up to aggregate limit of dollars __ for principal moneys...’
 - o amt inserted is principal limit for which mortgage is security
 - o ad valorem stamp fees paid according to principal sum secured
 - o so if bank to grant any additional facility, mortgagor to execute second mortgage to secure increased facility
 - ⇒ this means additional stamp fees and another set of legal fees
 - o now many banks opt for all moneys mortgage – to secure all moneys which fr time to time may be advanced to borrower
 - ⇒ if so don’t insert fixed limit and amend to permit mortgagor to further overdraw said accts to such ex and for so long as may be fixed by mortgagee fr time to time at its absol discretion
 - ⇒ but only valid to ext tt proper stamp duty paid for amt secured (upstamped accordingly)
 - ⇒ if mortgagor is company, when mortgage executed to secure initial facility, statement containing particulars of charge must be electronically filed via bizfile with ACRA (s131)
 - ⇒ see below
 - ⇒ state in statement tt mortgage secures all moneys which may fr time to time be due and payable to mortgagee – if statement filed iro mortgage states specified principal sum, then evne if drafted as all moneys sum mortgage, bank still advised to insist on 2nd mortgage to secure any subseq increase in facility – otherwise mortgagor or liquidator may challenge effectiveness of mortgage
- repayment clause
 - o overdraft mortgage – covenant for payment – ‘to pay to mortgagee on demand in writing made to mortgagor all such sms of money now or shall fr time to time be owing or remain unpaid’
 - o by and large payable on dd but right subj to caution
 - ⇒ MUI Bank v alkner investments 1990 SLR 785 – willingness of court to consider bank’s conduct in handling of bank borrower rr and where unconscionable conduc ton aprt of bank, to apply equitable principles to limit strict enforcement of express contractual provision to pay overdraft facility on dd

Facts

The plaintiff mortgagee bank MUI sued the defendant Alkner for monies owed on an outstanding overdraft secured under a legal mortgage, and also delivery of the property mortgaged under that legal mortgage. The senior assistant registrar refused MUI’s claim,

and MUI appealed. Alkner's defence rested on fraud, illegality, breach of statutory duty and unconscionable conduct. They claimed that MUI's officer improperly put pressure on Alkner's director to undertake a certain transaction and when he refused, relations between the two parties deteriorated. In addition, it was alleged that MUI's officer had also disclosed information about Alkner to another bank, in breach of the duty of banking secrecy. As a result, Alkner was unable to obtain alternative financing.

Held, dismissing the appeal:

(1) Where the mortgagee's right of entry onto the mortgaged property arose only on default of payment on demand, a reasonable time had to be given for the mortgagor to comply with the demand before the right was exercised. The mortgagee was obliged not to do anything during that period to delay, undermine or frustrate the mortgagor's efforts to obtain alternative financing.

(2) In this case, if Alkner's allegations of breach of confidence and statutory duty were true, it would be clearly inequitable to grant possession to MUI to enable them to sell the property. It would be justifiable to grant a reasonable period of time to enable Alkner to make alternative arrangements to pay MUI off. In the circumstances, equity should step in to mitigate the rigours of the law. An early trial was also ordered.

- interest rates⁴, tenure, conditions precedent
- any relevant third party clauses

RIGHTS OF THIRD PARTIES

- Contracts (rights of third parties) act operative fr 1 jan 2002 and confers on third parties in circumstances set out in act, right to enforce benefits conferred on them in contracts to which not party
 - Rights can arise not onl where contract expressly prov for 3rd party to enforce term in its favour but also where contract term has effect of conferring benefit on 3rd party and contract x make it clear tt contracting party did not intend third party to have enforceable rights under act
 - So when drafting consider whether third parties shld be grnted eights under act or whether mortgage has unintended effect of granting such rights
 - Act gives contracting parties flexibility to opt out – express and approp wording must be used
- Mortgage Clauses And The Equity Of Redemption

3. Types of security

- mortgage on property, assignment of rentals, guarantees or proceeds (on insurance policies⁵)

⁴ Normal, small fry loan – fixed interest rate; big fry loan – usually attached to some internationally recognised interest rate, e.g. LIBOR (London Interbank Offered Rate – watched by int'l markets) or SIBOR (Singapore equivalent, usually watched in Asia)

⁵ You can't assign away life policies for the benefit of your immediate family—s73, CLPA. But when you're dealing with companies as mortgagors, you can assign the proceeds of insurance policies of the mortgaged commercial buildings.

- ***Types of security documents***

- mortgage, supplemental deeds, assignments, guarantees etc
- Supplemental Deed, usually sets out particular conditions of a specific loan like a term loan
- Deed of Assignment of Rental Proceeds, usually for properties bought for investment (most likely for commercial properties)
- Letter of Undertaking, usually to cover a one-off act, e.g. letter of undertaking to return title deeds
- Sometimes, Term Loan Agreement is used instead of Supp Deed

4. Standard terms of mortgage

- to check if these have been forwarded by the bank/part of letter of offer
- memorandum of mortgage

5. Printed form of mortgage

- Legal document by which the property is mortgaged
- Each bank usually has its own form of mortgage
- Solicitor should adapt or amend bank's standard form where necessary to reflect terms in letter of offer
- "Open" (all monies mortgage – secures all monies owing to lender now and in future) vs. "closed" mortgage (limited to that particular loan)
- Q: whether printed form covers all that is covered in letter of offer? (check – depending on the bank, either the printed form of mortgage covers greater area, or the letter of offer does)

6. Special terms of mortgage

- cancellation fees
- prepayment facilities (could vary from loan to loan)
- use of CPF funds
- owner occupation
- capital reduction required (for companies)
- insurance

HARD LAW

Equity of redemption

- Property conveyed to mortgagee subj to proviso for redemption in clause 3 stating tt if on dd or without dd borrower pays to bank al moneys covenanted to be paid, bank wil reconvey property to borrower
 - Usually banking practice to provide for
 - for payment of premium of certain percentage of principal amt if loan redeemed before stipulated time and
 - reqt for at least 3 mths prior notice before redemption

- these proven not clog in equity of redemption – mere compensation to bank for loss of profit occasioned by premature redemption see fiscal consultants

Fiscal Consultants Pte Ltd v. Asia Commercial Finance [1980-1981] SLR 545
(HC, Singapore, Lai Kew Chai J)

Facts

- M'gor – Fiscal; M'gee ACF
- Clause in mortgage documents incorporated obligations in MM registered by ACF
- Clause 2(j) of the MM provided that 'the mortgagor shall only be entitled to redeem this security upon the expiry of one year from the date of these presents by giving to the mortgage three months' notice of his intention to do so and upon payment of all moneys due ... including interest up to that date.'
- Less than three months after mortgage was executed and registered, Fiscal wanted to redeem mortgage in breach of cl 2(j) of the memorandum.
- ACF demanded that Fiscal pay the full 1 yr + 3 mths' interest
- In an earlier transaction with Fiscal under similar circumstances, ACF waived their rights under a clause similar to cl 2(j) of the memorandum and did not charge interest for the full period.
- Fiscal paid up as it had already sold the mortgaged properties, and commenced the present proceedings to seek a declaration that ACF were not entitled to charge the 1 yr + 3 mths' interest on top of the repayment of the principal sum and interest due upon the redemption
- The plaintiffs made three contentions: (a) by allowing the premature redemption, ACF had waived their rights; (b) there was no variation; and (c) even if there was a variation, the terms thereof were harsh and unconscionable and a clog on the equity of redemption.

Held:

- ⇒ **ACF succeeded in claiming the interest for the full period of one year and for the period of three months' notice of redemption from Fiscal**
- ⇒ **(1) On the evidence, there was no waiver as ACF did not abandon their strict rights under sub-cl 2(j) of the memorandum.**
- ⇒ **(2) There was a variation which was expressed or which was implied from the parties' conduct if the interest for the full period which ACF had insisted amounted to or must be deemed to be acceptance of their offer. It would be wrong to allow Fiscal to say that their protest and objection had successfully qualified their acceptance.**
- ⇒ **(3) The additional interest which was imposed in exchange for ACF's agreement to waive their rights under cl 2(j) was not harsh and unconscionable nor a clog on the equity or redemption.**

- Note s23, CLPA, which can be varied in the mortgage documents (s23(15)) – clause 5r makes mortgagor's power of leasing exercisable only with mortgagee's prior written consent

- If so lease created by mortgagor without mortgagee consent is not binding on mortgagee

Leasing powers of mortgagor and of mortgagee in possession.

23. —(1) A mortgagor of land while in possession, as against every incumbrancer, may make from time to time an agricultural or occupation lease of the mortgaged land or any part thereof for any term not exceeding 3 years.

(2) A mortgagee of land while in possession, as against all subsequent incumbrancers, if any, and as against the mortgagor, may make from time to time —

(a) an agricultural or occupation lease for any term not exceeding 21 years;

(b) a building lease for any term not exceeding 99 years.

(3) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(4) Every such lease shall be made to take effect in possession not later than 12 months after its date.

(5) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(6) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding 30 days.

(7) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(8) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, agreeing to erect within not more than 5 years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.

(9) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first 5 years, or any less part of the term.

(10) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding.

(11) This section shall apply only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(12) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagee any further or other powers of leasing or having reference to leasing, and any further or other powers so reserved shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects and consequences, unless a contrary intention is expressed in the mortgage deed.

(13) Nothing in this Act shall be construed to enable a mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(14) This section shall apply only in the case of a mortgage made on or after 1st August 1886; but the provisions thereof, or any of them, may, by agreement in writing made on or after that

date between the mortgagor and mortgagee, be applied to a mortgage made before that date, so nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(15) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to any agreement, whether in writing or not, for leasing or letting.

Note case of ***rimmon watch v great pacific finance 1989 –**

Facts

The respondents, Great Pacific Finance ('GPF') were mortgagees of three units of shops in Lucky Plaza of which Rimmon Watch Private Limited ('RWPT') were proprietors. The mortgaged properties were registered under the Land Titles Act (Cap 157). Clause 5(i) of the mortgage provided that the mortgagor would not lease out the mortgaged property 'without the prior written consent of the mortgagee'. Under a tenancy agreement, the mortgaged premises were let by the mortgagors, RWPT (then known as Eastern Watch Co Pte Ltd) to the appellants, Rimmon for a term of 36 months from 22 January 1985. Clause 14(v) of the agreement gave Rimmon an option to renew the lease for a further term of five years subject to the same terms and conditions of the tenancy agreement. Rimmon exercised this option in December 1987. GPF commenced proceedings against RWPT and Rimmon, seeking declarations that - (a) the purported option under cl 4(v) of the agreement was not binding on them as mortgagees; and (b) GPF were entitled to exercise their rights as mortgages, including the right to obtain possession of the mortgaged properties upon the expiry of the tenancy agreement on 22 March 1998. In the High Court, AP Rajah J found in favour of GPF, and Rimmon appealed. Two arguments were advanced in appeal. First, the grant of the tenancy, including the option to renew was consistent with the consent given; and second, by GPF accepting rent from Rimmon under the agreement, GPF impliedly accepted the terms, including the option to renew.

Held, dismissing the appeal:

(1) GPF did not impliedly consent to the whole of the tenancy terms just because they did not ask to see a copy of the agreement. There was no evidence that they accepted the option for renewal for a term of five years.

(2) The question to be decided was whether the option to renew the lease was within the terms of the initial consent. Correspondence between the parties demonstrated that the consent given by GPF was for the grant of tenancy to Rimmon for three years. It was not a blanket consent.

(3) Rimmon's argument that GPF impliedly accepted the entire contract, including the option to renew overlooked the fact that there was no transfer of the legal estate to GPF as in the case of a mortgage in common law. Section 69 of the Land Titles Act specifically empowered the mortgagee to take possession. In exercising his statutory power to enter into possession, a mortgagee remained aloof from the legal estate. His right derived its force entirely from s 69 of the Land Titles Act and was of a wholly different character from the legal mortgagee's right under a common law title.

Mortgagor's Duty In Exercising Power Of Sale

- There are 2 basic: (1) to act in good faith (2) to take reasonable care to obtain true market value of mortgaged property at date of sale: *Cuckmere Brick Co v Mutual Finance* [England CA].

1. There is an objective duty to take reasonable care to obtain true market value of mortgaged property at date on which he decides to sell it:

Cuckmere Brick Co Ltd v. Mutual Finance Ltd [England CA]

Facts: Upon default of mortgage, mortgagee advertised property for sale. Advertisement did not mention that mortgagor had also obtained planning permission for the erection of 100 flats on the property which would have made the property much more valuable. Mortgagor brought this to attention of mortgagee, but mortgagee refused to postpone the sale. Mortgagor brought action of negligence against mortgagee.

Held:

- Duties were breached. Inquiry ordered as to damages sustained by mortgagor.
- Salmon J thought it to expect mortgagee to obtain 'the best price' was to exact too high a standard an 'proper price' was too nebulous

Freeguard v royal bank of Scotland 2002

- – eng HC held that mortgagee owes duty of care in relation to sale of mortgaged property not only to borrower but anyone else with interest in equity of redemption; here held that mortgagee owed duty of care to legal owner of property even though owner not borrower

Goh chin soon v vickers capital 2001 1 SLR 728 –

- Facts?: The defendants extended a loan facility to a customer that was secured by a mortgage over the property and a joint and several guarantee provided by the plaintiffs. Following default on the loan facility, the defendants obtained default judgment against the customer and the plaintiffs. To satisfy the judgment debt, property was sold by the defendants above valuation. After the sale and, the defendants issued statutory demands to the plaintiffs for the sum still outstanding under the judgment debt. The plaintiffs filed the present application to set aside the statutory demands on the ground that they had a valid cross-claim against the defendants for negligence. It was alleged that the defendants failed to obtain the best possible price for the property, that there was no proper valuation report and that the defendants had not consulted professional valuers before putting up the property for sale. The plaintiffs claimed that the property could have been sold for more and

therefore the defendants were liable for the shortfall. The application was dismissed by the deputy registrar. The plaintiffs appealed.

- Held, dismissing the appeal:
 - ⇒ (1) On the facts, the defendants did not act in derogation of their duties to obtain a best possible price for themselves, the mortgagors and the guarantors. They had placed substantial advertisements putting the property up for sale by tender and had accepted the only offer at hand, which was higher than the valuation given as well as the price the plaintiffs could have obtained. There was nothing negligent, unreasonable or unseasonable in the defendants' efforts to sell the property and they were not required to use an estate agent to carry out the sale.
 - ⇒ (2) In any event, the alleged cross-demand made by the plaintiffs did not seem to equal or exceed the amounts stated in the statutory demands. Thus, there was no justification for the court to exercise its power under r 98(2)(a) of the Bankruptcy Rules to set aside the statutory demands on the basis that the plaintiffs had a valid cross-demand which was equivalent to or exceeded the amount of debt stated in the statutory demands.
 - ⇒ As regards the duty of care, it was well-settled that a mortgagee owed a duty not only to himself but also to the mortgagor as well as to the guarantors involved
 - ⇒ a mortgagee owed a duty not only to himself, to clear off as much of the debt as he could, but also to the mortgagor so as to reduce the balance owing as much as possible and also to the guarantor so that the latter would be held liable for as little as possible on the guarantee.

Kian Choon Investments v. Societe Generale & Anor [1990] SLR 167, S'pore HC (LP Thean J)

Facts

- M'gor: Kian Choon; M'gee: Societe Generale
- The bank took possession and sold the property to Amcol, the second defendant.
- Amcol leased the bank four floors of the property and granted to the bank an option to repurchase six floors of the property, which bank exercised contemporaneously with the execution of the sale agreement
- The plaintiffs applied for an interlocutory injunction restraining both the defendants from completing the sale and purchase of the property in pursuance of the sale agreement.
- The plaintiffs complained that the bank as mortgagee, in exercising their power of sale, had not discharged their duties; they had not acted in good faith in relation to the sale and had not taken reasonable steps to obtain the best price in the circumstances.

Held, inter alia:

The mortgagee had a duty to take reasonable steps to obtain the best price available in the circumstances, or the true market value thereof at the time of sale

(1). A mortgagee in exercising the power of sale had two duties: the duty to act in good faith and the duty to take reasonable steps to obtain the best price available in the circumstances or, the true market value thereof at the time of sale.

(2). In a case such as this, there was a conflict between the mortgagee's interest to repurchase the part of the property at the lowest price and his duty to sell the entire property at the best price available. The mortgagee would have to show that the sale was made in good faith and that reasonable precautions had been taken to obtain the best price reasonably obtainable in the circumstances.

Lee Nyet Khiong v. Lee Nyet Yun Janet [1997] 2 SLR 713, applied Cuckmere Brick

- A mortgagee, in exercising his power of sale, had a duty to act in good faith and to take reasonable care to obtain the true market value or the proper price of the mortgaged property on the date on which he decided to sell it.
- The mortgagee had not discharged his duty. The advertisement for sale of the property gave a woefully inadequate description of the property. It did not provide further details which would have attracted a wider group of potential purchasers, probably those interested in a luxurious lifestyle. The fact that the advertisement appeared only meant that the chances of potential purchasers missing it high.
- Allowing only two weeks for the submission of tenders was wholly unreasonable, given that the Property was worth a large sum of money and a prospective purchaser would have to make necessary searches and investigations and organise his finances.

AIB Finance v Debtors 1997

- Carnwath J stated that when exercising power of sale mortgagee whose security included business carried on property charge, had duty to ensure that value of combined assets maximized
 - o Though mortgagee had free choice as to timing of sale, once he decided to exercise power to repossess and sell property, had to take into account effect of that on value of goodwill of business
 - o Therefore had duty to safeguard and maintain business and should make arrangements to ensure continuity before taking physical possession as otherwise would inevitably be break in business and damage to value as going concern
- But this not accepted by CA
 - o Held that mortgagee whose security included business carried on property charged under no duty to preserve business before entering into possession
 - o Mortgagee in general has no duty to take steps to preserve value of security in exercise of security rights ahead of obtaining possession and control of property subject to mortgage

Citibank NA v Lee Hooi Lian and Another [1999] 4 SLR 469

Facts

The plaintiff bank granted the defendant a loan facility secured by a mortgage over property. The facility included the following conditions: (a) interest to be paid monthly; (b) the security to be topped up or the outstanding paid down if the total principal and

interest outstanding exceeded 80% of the value of the property; and (c) the mortgaged property not to be leased out without the bank's consent.

The plaintiff terminated the facility on account of the defendant's breach of these conditions and commenced these proceedings to claim vacant possession and payment of the principal and interest owing under the facility. Vacant possession was obtained from the defendant's tenant and the mortgaged property was put up for sale by auction. There was no bid at the opening price and the property was withdrawn from the auction. The bank eventually sold the property by private treaty at a price above the forced sale value as advised by its valuer. At the hearing before the assistant registrar, the defendants denied that the bank was entitled to judgment on its claims and contended that she had a counterclaim arising from the bank's sale of the property at an undervalue. The assistant registrar gave judgment in the bank's favour and the defendant appealed.

Held, dismissing the appeal:

- (1) The defendant was in breach of all the three conditions and the bank was entitled to terminate the facility.
- (2) The bank had not breached its duty of obtaining the best price reasonably obtainable at the time as the sale price was above the forced sale value as advised by its valuer.
- (3) Even if the defendant had a valid counterclaim it could not be set off against the plaintiff's claim in view of the express prohibitions under the security documents

51 Once the moneys secured by the mortgage became due, by cl 4.1 of the memorandum, the plaintiff became entitled to exercise the power of sale by giving 14 days in writing. Notice complying with this clause was given by plaintiff by its letter of 27 July 1998.

52 The sale was entrusted to Knight Frank. There was no bid at its opening price of \$3,020,000 at the adjourned auction on 8 October 1998. Accordingly, the plaintiff sold the property by private treaty on 30 October 1998 at \$2,800,000 after receiving advice from Colliers Jardine, that the then open market value was \$3,450,000 and forced sale value was \$2,600,000. I was therefore of the view that the plaintiff had not breached its duty of obtaining 'the best price reasonably obtainable at the time'. See *Good Property Land Development Pte Ltd v Societe Generale* [1989] SLR 229 at 237; [1989] 2 MLJ 14 at 15 per Chan Sek Keong J (as he then was). The property market was then still on a downward slide.

53 I was thus of the view that there was no defence to the plaintiff's claim and there was no merit on the defendant's counterclaim that the property was sold at an under value. The defendant's counterclaim was based on a market value of \$3,600,000 against the sale of the property by the plaintiff at \$2,800,000.

Sri Jaya v. RHB Bank (2001)

- Selling property above valuation does not per se absolve mortgagees from liability. There is a duty to bring interested purchasers into competition with each other so as to obtain highest price for the property (there was a phenomenal rise in the price offered for the property over a short span of a few months):.
- Mortgagee need not obtain valuation of property but where there is one court will generally consider it unless valuations such as should merit being ignored *sri jaya v RHB bank

- Here mortgagor claimed tt mortgagee negligent in not obtaining a valuation based on redevpt value as disting fr the en block existing use basis and for not indicating to potential purchasers tt property had redevpt value
- Rajendran J held tt mortgagee was not in breach of duty by not valuing property on redevpt basis although flats were in run down state – this wld req various assumptns to be made on variables and then to req mortgagee to have regard to such a valuation before selling property which goes far beyond scope of mortgagee’s duty; unduly onerous on mortgagee

Tai Sea Nyong v Overseas Union Bank Ltd [2002] 4 SLR 811

Facts

The plaintiff (“Tai”) took a loan from the defendants (“OUB”), which was secured by a mortgage of his property (“the property”). OUB obtained an order giving it possession of, and the power to sell, the property when Tai defaulted on his loan. Tai only delivered up vacant possession of the property some three months later.

OUB then appointed two estate agencies to value the property, and instructed a company to market and sell it. The company direct-mailed its clients, fixed “For Sale” signs at the property, and advertised the two auctions in the newspapers. The reserve price of \$12.6m was not reached at both auctions. There were no bids in fact and no one approached the auctioneers privately after the auction either. The company then advertised the property for sale by private treaty, but still no offers were received.

OUB eventually received two offers of \$11.7m, and gave Tai two weeks to better it. OUB then sold the property when Tai did not respond.

Tai sued OUB for damages, claiming that - (a) OUB breached their duty as mortgagees in possession in exercising their power of sale by not taking reasonable steps to get the true market value of the property, and (b) OUB obliged to, but did not, rent out the property prior to its sale and were to account to him for such notional rent.

Held, dismissing the claim with costs:

(1) A mortgagee exercising his power of sale had a duty to act in good faith and to take reasonable care to get the true market value of the property at the date of sale.

(2) The forced sale valuations which OUB relied on as an estimate of the property’s price were reasonable given the nature of the sale. A mortgagee sale was different from a sale by an owner in that a mortgagee - (a) **was not obliged to wait indefinitely for the theoretical market value of the property to be obtained before the property could be sold**, (b) was not a trustee of the mortgagor when he exercised his power of sale, (c) **could pursue his own benefit in choosing the time of sale, and (d) was merely duty bound to get the best reasonable price at that time regardless of the theoretical valuations of the property in question.** Further, in the absence of proof of fault on OUB’s part, the sale price of \$11.7m was conclusive of the property’s true market value, and the valuations of experts were inadmissible.

(3) In assessing whether a mortgagee was in breach, the **focus should be on whether reasonable steps were taken to sell the property rather than on the experts’ valuations or whether the true market value ought to be the open market value. It**

was unfair to expect the mortgagee to get a price that met such valuations since it was impossible to precisely determine the property's value in a mortgagee sale.

(4) OUB took all reasonable steps to get the true market value of the property when it was sold. First, OUB had maintained the property such that it was in presentable condition at the time of sale. Second, it properly marketed the property. Third, Tai's assertion that the property should have been sold by tender or by private treaty was without merit. Fourth, OUB's reason for not pitting the potential buyers against each other was because of the risk that they could be lost as a result.

(5) A mortgagee could enter into possession without being liable to account for notional rent where he intended to sell the property within a reasonable time; he only had to prove that he sold the property without undue delay.

(6) OUB were not liable for the notional rent as they sold the property with reasonable promptness; that the sale occurred five and a half months after possession was due to the lack of interest and not OUB's delay. In any event, it was to Tai's benefit that the property was sold quickly as the expected monthly rent could not cover the monthly interest on his loan.

Goh Chin Soon and Another v Vickers Capital Ltd (fka St. Capital Ltd) [2001] 1 SLR 728

Facts

The defendants extended a loan facility to a customer that was secured by a mortgage over the property and a joint and several guarantee provided by the plaintiffs. Following default on the loan facility, the defendants obtained default judgment against the customer and the plaintiffs. To satisfy the judgment debt, property was sold by the defendants above valuation. After the sale and, the defendants issued statutory demands to the plaintiffs for the sum still outstanding under the judgment debt. The plaintiffs filed the present application to set aside the statutory demands on the ground that they had a valid cross-claim against the defendants for negligence. It was alleged that the defendants failed to obtain the best possible price for the property, that there was no proper valuation report and that the defendants had not consulted professional valuers before putting up the property for sale. The plaintiffs claimed that the property could have been sold for more and therefore the defendants were liable for the shortfall. The application was dismissed by the deputy registrar. The plaintiffs appealed.

Held, dismissing the appeal:

(1) **On the facts, the defendants did not act in derogation of their duties to obtain a best possible price for themselves, the mortgagors and the guarantors. They had placed substantial advertisements putting the property up for sale by tender and had accepted the only offer at hand, which was higher than the valuation given as well as the price the plaintiffs could have obtained. There was nothing negligent, unreasonable or unseasonable in the defendants' efforts to sell the property and they were not required to use an estate agent to carry out the sale.**

(2) In any event, the alleged cross-demand made by the plaintiffs did not seem to equal or exceed the amounts stated in the statutory demands. Thus, there was no justification for the court to exercise its power under r 98(2)(a) of the Bankruptcy Rules to set aside

the statutory demands on the basis that the plaintiffs had a valid cross-demand which was equivalent to or exceeded the amount of debt stated in the statutory demands.

Roberto Building Material Pte Ltd and Others v Oversea-Chinese Banking Corp Ltd (No 2) [2003] 3 SLR 217

Facts

Under a loan arrangement made with the first respondent ('OCBC') in November 1995, the first appellant ('Roberto') was granted credit facilities of up to \$31m. It was a term of the arrangement that the facilities were repayable upon demand. As agreed, two forms of security were furnished. First, Roberto mortgaged its property ('mortgaged property') to OCBC. Second, the second to fourth appellants, who were directors of Roberto, gave a joint and several letter of guarantee to OCBC. Subsequently, Roberto granted a fixed and floating charge over its remaining assets to OCBC.

On 3 April 2000, OCBC gave notice to the appellants to repay the total outstanding sum within 14 days from the date of receipt of that notice. On 17 April 2000, Roberto's auditors informed OCBC that an UK company ('Chelsfield') was a potential buyer for the mortgaged property and that it would revert with an offer on 20 April 2000. OCBC did not receive any indication of an offer by 22 April 2000 and it proceeded to appoint Mr Ho as receiver and manager over the assets secured under the debenture. Thereafter, Mr Ho took over the task of realising Roberto's assets.

Subsequently, Chelsfield made an offer, subject to contract, to purchase the mortgaged property and the second to fourth appellants requested OCBC to revoke Mr Ho's appointment, which OCBC refused. Several other proposals were also made by the appellants to induce OCBC to revoke the appointment without success. The deals with Chelsfield and with other potential buyers eventually fell through and the mortgaged property remained unsold.

The appellants instituted an action against OCBC and Mr Ho alleging that they had breached their duties as lender and as receiver and manager respectively. Further, the appellants also alleged that OCBC did not give Roberto sufficient time to repay the debt before appointing a receiver and manager and the appointment was therefore invalid.

Held, dismissing the appeal:

(1) All that the law required of a lender before exercising his power of appointing a receiver and manager was that he must act **in good faith. In order to show bad faith, there must be dishonesty or improper motive on the lender's part. Negligence per se was not bad faith since the lender had no general duty of care to consider or have regard to the interests of the debtor. In this case, there was no evidence that OCBC had acted in bad faith or had acted so recklessly as to amount to bad faith**: at [23], [24] and [28]; *Shamji v Johnson Matthey Bankers Ltd* [1991] BCLC 36 and *Medforth v Blake* [2000] CH 86 followed.

(2) Where money was payable on demand, a debtor was only permitted to have such time as was necessary to enable him to implement the mechanics of payment and he was not entitled any time to raise the funds, either from banks or from other sources: at [34]; *Cripps (Pharmaceuticals) v Wickenden* [1973] WLR 944 followed; *Ronald Elwyn Lister Ltd v Dunlop Canada Ltd* [1982] 135 DLR (3d) 1 and *Mister Broadloom Corporation (1968) Ltd v Bank of Montreal* [1979] 25 OR (2d) 198 not followed.

(4) In effecting a sale of mortgaged property, a receiver and manager must exercise reasonable care as to the manner in which the sale was carried out so as to obtain its true market value. Just because the sale price of the property was much lower than the book value *per se* did not suggest a lack of reasonable care. It was the process of effecting the sale which was critical: at [63]; *Lee Nyet Khiong v Lee Nyet Yun Janet* [1997] 2 SLR 713 followed.

The Bank of East Asia Ltd v Mody Sonal M and Others [2004] 4 SLR 113

Facts

The plaintiff, a bank incorporated in Hong Kong with a branch in Singapore (“the Bank”), commenced a suit against three members of a family (“the defendants”) in respect of a joint and several guarantee given by them to the Bank to secure overdraft facilities extended by the Bank’s Singapore branch to MTM Trading Pte Ltd (“the Company”). The defendants were directors of the Company. The first and third defendants were also shareholders of the Company. The Company had mortgaged to the Bank an apartment (“the Property”) to secure its own indebtedness. The Property was sold at a public auction for \$1.14m. The Company had been wound up prior to trial. The Bank claimed for the sum of \$639,293.19, being the balance owing after the net proceeds of sale of the Property had been applied in payment of the Company’s outstandings to the Bank and interest thereon. The defendants alleged that they had not been given a breakdown of the sum demanded from them despite numerous requests. The first and third defendants, the daughter and wife of the second defendant respectively, further pleaded that the guarantee was procured by the undue influence of the second defendant over them. They argued that the Bank should be fixed with constructive notice of the circumstances, as it did not take steps to satisfy itself that their agreement to stand surety had been properly obtained.

The defendants counterclaimed for \$310,000 in damages, being the difference between the alleged prevailing market price of the Property at the time of the auction of \$1.45m, and the actual price fetched of \$1.14m. They alleged that the Bank, by selling the Property at the auction despite being informed that there was a potential buyer willing to pay \$1.45m, breached a duty owed to the Company as mortgagor and to themselves as guarantors, to act in good faith and take reasonable steps to obtain the best price obtainable at the time. The Bank had also not acceded to the second defendant’s request that the reserve price be set at no lower than \$1.45m and to postpone the auction if the price was not reached. In the event, the Property was sold at the auction to the same prospective buyer who allegedly had been prepared to pay \$1.45m, and was resold four months later for \$1.36m.

Held, granting judgment for the plaintiff and dismissing the defendants’ counterclaim:

- (1) The defence that the defendants had not been given a breakdown of the sum demanded had no merit. The Company had been provided monthly statements of account. The defendants as directors of the Company knew, or ought to have known, the state of the accounts. In any case, the Bank had annexed to their reply to the Statement of Claim detailed statements of account which were not challenged at the trial: at [3].
- (3) The counterclaim was misconceived. Although the Bank’s alleged breach of duty could be used as a defence in equity to set off the alleged loss in the sale against the

amount claimed under the guarantee, it could not form the basis of a counterclaim. The defendants as guarantors had no right to the equity of redemption: at [23].

(4) The Company had repeatedly made promises to the Bank that it did not honour. In the circumstances, it was understandable that the Bank refused to believe the second defendant when informed that there was a potential buyer at \$1.45m and pressed on with the auction. **There was nothing to suggest that the Bank had acted in bad faith or failed to take reasonable steps to obtain the true market value of the Property at the time of sale.** Therefore, the defendants did not have an equitable right of set-off: at [31] and [34].

31 *Was it wrong for the Bank to have pressed on with the auction? As early as June 2001, the Company was already in default. The Bank's solicitors' letter of demand dated 14 June 2001 had threatened sale of the Property. The Company suggested an instalment scheme to reduce their debt to a manageable level. Although the proposal was accepted by the Bank, it was not honoured. Other promises followed, on each occasion to gain an extension of time for repayment. They were not kept. Similarly, promises of re-financing and redemption were made but not kept. A reading of the affidavit of evidence-in-chief of Margaret Tan Whee Bee, the Bank's assistant manager, provides in detail the delaying tactics employed by the Company through the second defendant. In these circumstances, the refusal of the Bank to believe the second defendant was understandable. If they had thought there was any truth in the second defendant's assurances of a buyer at \$1.45m, would they not have waited, given that any additional proceeds of sale would have gone towards reducing the outstandings owed to the Bank? It is noteworthy that the buyer who was allegedly prepared to pay \$1.45m for the Property sold the Property in an improved market for only \$1.36m. The price at which the property was sold was above the forced sale value of \$1,060,000 separately ascribed to the Property by two reputable firms of valuers, viz, Jones Lang LaSalle Property Consultants Pte Ltd and Knight Frank Pte Ltd. Although the second defendant challenged the evidence of Tan Keng Chiam, Jones Lang LaSalle's National Director of Advisory Services, the latter maintained that his firm's valuation was correct. Nothing in the cross-examination caused me to believe that the valuation had been wrong.*

32 *Apart from obtaining valuations, the Bank had also approached various property agents to find buyers for the flat, particulars of which efforts were set out in the affidavit of evidence-in-chief of the Bank's assistant manager, Margaret Tan Whee Bee. No one offered more than \$1.1m.*

33 *The auction was preceded by seven newspaper advertisements placed by the auctioneers Colliers International Singapore Pte Ltd. The auction itself drew a crowd of about 100 persons and although the opening bid by the auctioneers was S\$1.28m the eventual price at which it was sold was \$1.14m, there having been about 13 bids all in.*

34 *On the above facts, I cannot see how the second defendant could have alleged bad faith on the part of the Bank. Neither have the defendants made out a case for saying the Bank did not use reasonable care to obtain the true market value of the Property at the moment they chose to sell it. Therefore no right of set off arose.*

Skipton building soc v stoff 2001

- Eng CA held that where loan to mortgagee also supported by guarantee, if mortgagee breached duty to obtain current market value of secured property before selling

property, the guarantor's liability for loan would be reduced to extent of difference between current market value and lower price at which property sold

2. No Duty To Sell At A Particular Time

Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof [1989] SLR 290

Facts

The plaintiff finance company entered into a loan agreement with the defendant borrower. As security, the borrower pledged some securities. However a fall in the market value of the shares caused the finance company to demand additional security. The borrower obliged, but not to the extent demanded, and the finance company sued for recovery of the difference between the amount owing and the value of the security deposited. The finance company obtained summary judgment against the borrower for the amount owing and proceeded to sell the shares. Three defences were raised by the borrower in their appeal:

- (a) the finance company was estopped from pursuing this claim on account of the conduct of their servants or agents;
- (b) the action was premature as the finance company should only sue for the balance owing after all the shares had been sold; and
- (c) the finance company breached their duty as mortgagee as they failed to sell the shares at market value.

Held, dismissing the defendant's appeal :

- (1) The finance company wrote several letters asking the borrower to pay the interest owing or reduce the loan by paying various amounts. As such no estoppel was created against them.
- (2) The borrower's failure to pay the amount demanded entitled the finance company to commence action. The finance company was entitled to sell the security after the start of the action.
- (3) As mortgagees, the finance company were entitled to sell the securities in good faith at such time as they thought fit. They sold the listed shares at the prevailing prices quoted then. They were under no obligation to wait for the market to turn and for prices to improve.

How Seen Ghee v. DBS [Singapore CA].

- The mortgagee is entitled to prefer its own interest to that of the mortgagor, but it cannot sacrifice interests of mortgagor if own interests not at risk
- Facts: Mortgagee did not approve of the sale by mortgagor because sale price was insufficient to cover outstanding debt. Mortgagee subsequently sold prop at auction at an even lower price than that obtained by mortgagor in the first place. Mortgagor contested the sale, arguing that mortgagee was in breach of its duty.

- Held: The mortgagee is entitled to prefer its own interest to that of the mortgagor. However, mortgagee cannot sacrifice interests of mortgagor if own interests not at risk. In vast majority of cases, there would seldom be any divergence of interests between mortgagor and mortgagee. On facts, duty was breached. In refusing to sanction sale by mortgagor, mortgagor's interests were sacrificed without any gain to mortgagee
 - mortgagee when chose to exercise power of sale, mortgagor also trying to sell the property; finally he found buyer but purchase price not sufficient to pay off amount outstanding; mortgagee refused to consent to this sale unless shortfall resolved satisfactorily; because offer of this sale fell through and eventually mortgagee sold property at auction for price below that which mortgagor's prospective buyer prepared to pay
 - CA held that mortgagee was liable
 - What is considered to be 'reasonable steps' – see below – depends on facts of case
 - Here Khoo J remarked that shown on facts of case that public auction not always best way to secure good price; but if sale conducted by auction, not in itself sufficient to discharge duty if circumstances leading up to auction or at auction itself indicate that steps taken not reasonable for obtaining true market value
- **Duty however is not to obtain best price or true market value, merely to take reasonable steps to do so** *Lee Nyet Kiong v Lee Nyet Yun Janet
 - Advertisement & period for submission of tenders must be reasonably & sufficiently long: *Lee Nyet Khiong v. Lee Nyet Yun Janet* [Singapore CA]
- The mortgagee is not a trustee of power of sale for mortgagor. So long as he does not act injurious to the surety, he has right to decide in his own interest when he wants to sell, and if he wants to sell: **China & South Sea Bank v. Tan Soon Gin**.
 - Property mortgaged were shares in company, after power of sale arisen mortgagee chose not to sell although shares still fetched decent price, but then price dropped and almost valueless when mortgagee decided to take action; mortgagee then sued surety instead, where argued that he should have exercised power of sale when still had value
 - But PC held that mortgagee owed no duty to mortgagor as to whether would exercise power to sell and if so when to sell – mortgagee can choose when to sell property – this is completely up to him. But if he DOES sell, then comes under certain duties (see below)
 - Lord Templeman emphasized the point that mortgagee may do nothing about mortgaged property and on its becoming worthless, may sue guarantor where there is one
- contrast **Palk v. Mortgage Services Funding PLC**: - extreme circumstances here.

- CA exd discretion under LPA's equiv provn of s30.2 CLPA and allowed aplciation of mortgagor to have mortgage property sold in spite of mortgagee's objection
- Facts were 'extreme and exceptional'
- Mortgagee's intention was to rent out property unbtill market improved but rent insuff to pay even interest owed to mortgagee
- Mortgagor was in 'positn of financial haemorrhage for indefinite period while mortgagee cont to speculate at their expense on an increase in value of their proeprty'
- Hence CA ordered sale of property
- : - seems to run against duties of mortgagee – needs to attain market value. Also told tt mortgagee can ex power of sale at his own choosing, does not need to do so at any partr bank se *china and south seabank
- but note: palk still liable under personal covenants after judicial sale.

○ **tension bet *palk and *china south sea bank**

- **mortgagor chooses time of sale and x fault him for choosing to ex power of sale at time inconvenient**
- **but in *palk, court ORDERED sale of property judicially at mortgagor's request against lender's wisehs**
- **ans to prob is procedure – mortgagee can do wat he wants, cannot force him/ sue him for damage if he did not**
- **but there is proced under s30 to ask for judicial sale – not realised before but this proced is avaiable to borrower!!! – exersd under extreme circusmtaces.**

○ **Recent case of *teo siew har followed *china and *palk distinguished -**

Mortgagee has the right to decide when to sell the property. He need not do so automatically when the power arises, unless the decline of the value of the property is due to the fault of the mortgagee: *Teo Siew Har v. OCBC* [Singapore CA].

- Property owned by teo a housewife and mortgaged to OCBC; mortgage payments made by husband tang who was unable to make payments in late 96 and early 97 – teo decided to sell property and pay off laon, but ten ue to defm action against tang, all his assets subj to mareva injn, conseq receiver appted to manage their assets and cld not deal with any of their asses themselves; 1997 tang approached bnk to ex power of sale; bank did not respond and later demanded payment of sums due and owin and later sked for possession; teo alleged tt bank in breach of equitable dutie to mortgagor by not selling property when she had requested the sale
- **CA affiend decision below and held tt bank x breached duty to mortgagor**
- **Followed *china – when power of sale arisen, mortgagee eniteld to decide when to sell property; not obliged to act immed ipon such power of sale arising**

- Disting *palk by stating tt circsmtnaces there rather extreme and court was asked to ex its disretion as to when fair and just to order sale
- No allegation tt mortgagee was in breach of duty to mortgagor
- Also, in *palk, mortgagee had taken steps alo to enforce his rights by applying for and being granted possession of proerty though order for possession suspended pending application of mortgagor for slae- in *teo, bank had not decided to ex its powers at time when mortgagor asked it to do so
- Hence *palk can be disting on such technical pts

Teo Siew Har v. OCBC [1999] 3 SLR 129

Facts

In March 1997, Teo requested OCBC to exercise their power of sale. Failing to receive a response, she unsuccessfully applied for leave to sell her property. On 26 February 1998, OCBC wrote to Teo's solicitors seeking possession of the property with a view to exercising their power of sale. There was no response. On 24 June 1998, OCBC obtained judgment for \$3.5m and an order for possession. Teo appealed and argued that OCBC were in breach of their duty when they failed to exercise their power of sale as mortgagee at an early stage when she requested and should be liable for her loss.

Held, dismissing the appeal:

- (1) When the power of sale had arisen, the mortgagees were entitled to decide when they should sell the mortgaged property. They were not obliged to act immediately upon such power of sale arising.
- (2) On the facts, there was no evidence of any breach of duty of care or failure to exercise prudence on OCBC's part in relation to the sale of the property. Teo was not justified in her complaint that OCBC had exercised their power of sale too late. It was with the benefit of hindsight that she could say the sale should have been made earlier. Nobody could have foreseen the drastic decline in the property market which took place subsequently.

Cf Palk

Palk v. Mortgage Services Funding PLC [1993] 2 All ER 481

- CA of England and Wales (leave to appeal to HL was denied)
- The plaintiffs were unable to pay the instalments under a mortgage of their house to a finance company. They negotiated a sale of the house for £283,000, less than the £358,587 needed to redeem the mortgage.
- The m'gee refused consent to the sale and obtained an order for possession with a view to letting the house and postponing sale to achieve a better price. The expected annual rental value was significantly less than the interest that would be saved by selling the house. Plaintiffs applied for leave to sell the house.
- The judge refused the plaintiffs' application for sale. Plaintiffs appealed.
- Held, allowing the appeal, that the court's discretion under section 91(2) of the Act of 1925 [s30(2), CLPA] was unfettered but was to be exercised judicially by having due regard to all interests concerned; that in the circumstances it was just and equitable to order a sale, notwithstanding the deficiency in the price; and that,

accordingly, a sale would be directed and the case remitted to the county court to give any further necessary directions

Roberto Building Material Pte Ltd and Others v Oversea-Chinese Banking Corp Ltd (No 2)

(3) A receiver and manager had no duty to the mortgagor company to exercise the power of sale and he was entitled to determine the time for sale so long as he acted in good faith: at [51].

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

The Bank of East Asia Ltd v Tan Chin Mong Holdings (S) Pte Ltd and Others [2001] 2 SLR 193

Facts

The plaintiff bank took out an action the first defendant TCMH and six others for the shortfall of money due and payable by TCMH, who were the bank's principal debtor. The bank obtained default judgment in default of appearance but the second and sixth defendants successfully applied to set aside the default judgment and asserted the following defences: (a) that the bank breached their duty as mortgagees by insisting on a sale price of at least \$5m for the property when the debit amount then was \$4.49m; (b) the bank failed to adequately advertise the sale of the property and hence failed to obtain the best sale price; (c) the second and sixth defendants were released from any liability under the guarantee by virtue of a settlement reached between the bank and the seventh defendant. The bank appealed. The issues before the court concerned (a) the rights and obligations of a mortgagee bank in relation to its power of sale of its mortgaged security; and (b) the circumstances under which obligations of joint and several sureties would be extinguished.

Held, allowing the plaintiffs' claim:

(1) In exercising its power of sale, the mortgagee's duty was to behave as a reasonable man would in realising his own property so that the mortgagor received credit for the fair value of the property sold. The mortgagee must act in good faith and take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it. This duty was owed to the surety as well as to the mortgagor. It was not tortious in nature but one that was recognised by equity.

(2) However, a creditor-mortgagee was not obliged to do anything for the benefit of a borrower or a surety in relation to the recovery of the debt or realization of the security. It was the borrower's and guarantor's duty to activate themselves and discharge their obligations. Their failure to do so meant bearing the risk of a falling market. The law did not impose a duty on the mortgagee not to sell in a falling market. Selling the property in a falling market was not in itself wrong.

(3) The mortgagee did not possess an absolute power of sale. The mortgagee's power of sale was subject to four conditions:

a) First, possession of the mortgaged property was not sought for a hidden agenda, in disregard of the harm that it might cause to someone with a vested interest in it;

b) Second, the court could, in appropriate circumstances, order sale against the wishes of the mortgagee; c) Third, the mortgagor should in appropriate cases be given a reasonable opportunity to market the property;

d) Fourth, the court had power to postpone possession by ordering a stay of execution of the order for possession and at the same time order payment of the accrued debt by instalments.

(4) The court rejected the breach of duty defence as the bank's stipulation of a minimum price of \$5m was in actual fact an indulgence to the defendants and not made in exercise of the mortgagee's power of sale. Expert evidence on value should be admissible against the mortgagees only in cases where they were at fault and even then, the evidence was subject to certain commonsense observations since valuation was not an exact science. In the circumstances, the judge rejected the defence that the sale price was low.

(5) In considering the defence of the seventh defendant's settlement, it was possible to sue several guarantors in one action provided the pleadings made it clear that separate judgments could be obtained on a joint liability.

(6) At common law a judgment against joint guarantors generally resulted in a joint judgment. Thus, if judgment was entered against many joint and several guarantors and one or more of them succeeded in setting aside the joint judgment against them, the cause of action was de-merged. The original cause of action was resuscitated against those who were no longer bound by the judgment. A subsequent judgment against each of them would be a separate judgment. Any release of any other judgment debtors did not affect the separate subsequent judgment. Nonetheless, the subsequent judgment was reduced by the amount paid by the other judgment debtors.

S30, CLPA

Sale of mortgaged property in action for foreclosure, etc.

30. —(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.

(4) In any case within this section, the court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

3. Mortgagee May Be Liable For Rent

- If sale of mortgaged property contemplated within reasonable time, mortgagee entitled to enter into possession to protect security without being able to account for any notional rent
- if unreasonable delay in selling property, mortgagee accountable to mortgagor for any loss occurring between date of taking possession and date of effective sale

Motorcycle Industries (1973) Pte Ltd and Another v Indian Overseas Bank [1992] 2 SLR 453

Facts

The first plaintiffs MI owed the defendant bank IOB substantial sums of money. In consideration of IOB agreeing to withhold the enforcement of a judgment against MI, the second plaintiffs, Abacus agreed to pay all moneys due under the said judgment, and mortgaged its property – which was then occupied as a showroom, sales office and store – to IOB subject to a prior encumbrance in favour of Chartered Bank. When the plaintiffs defaulted in payment of the judgment debt, IOB exercised its power of sale under the mortgage, and with the plaintiffs' agreement and sold the property with vacant possession by public auction on or about 2 July 1981. Vacant possession of the property was effectively given to IOB on 3 July 1981 and the property was auctioned off for \$2.6m. Unfortunately, the sale was aborted and IOB sued the purchaser. Although an order for setting down for trial was made in 1982, the action was not set down until after a lapse of some four-and-a-half years.

In the meantime, the plaintiffs had, since 1981, asked IOB for accounts and pressed for the property to be either rented out or put up for sale. IOB failed to respond satisfactorily to the plaintiffs' letters. On 13 September 1989, the plaintiffs commenced this action, claiming an order for accounts and for the property to be auctioned. Shortly before the action came on for hearing in June 1991, the property was sold for \$2.3m. The issue was whether IOB incurred any liability in failing to put the property up for rental when the first sale was aborted. IOB argued that: (a) when it contracted to sell the property in 1981, the equity of redemption was destroyed and they owed no further duty to Abacus; and (b) Abacus was precluded from coming to the court for accounts without at the same time seeking to redeem the property. Abacus argued that: (a) under s 30 of the Conveyancing and Law of Property Act (Cap 61), they were entitled to apply for the sale of the property without offering to redeem it; (b) when IOB contracted to sell the property and sought specific performance against the defaulting purchaser, IOB made it impracticable for Abacus to redeem the property; (c) after the completion of the sale of the property in 1991, there was nothing for Abacus to redeem; and (d) they were entitled to allege improper conduct when they applied for an account of the proceeds of sale, and that when

Abacus, as mortgagor, alleged misfeasance against IOB as mortgagees, they were not obliged to offer to redeem the property in order to determine that issue.

Held, allowing the application:

(1) The rule that a mortgagor could not bring an action relating to the mortgage without expressly or by implication offering to redeem was not a practical rule applicable in all circumstances. It should be confined to cases where the application to court was inconsistent with the mortgagee's rights as the rule was intended to protect an innocent mortgagee against an unscrupulous and unreasonable mortgagor. It did not apply to a case where the mortgagor sought to restrain a mortgagee who was in breach of his duty to exercise due diligence to obtain the best price, or where there was an allegation of improper conduct. As such, Abacus was entitled to bring the action against IOB.

(2) A mortgagee in possession became the property's manager and was bound to be diligent in collecting the rents and profits. However, where sale of the property was contemplated within a reasonable time, a mortgagee may enter into possession in order to protect his security without being liable to account for any notional rent. Thus, if there was unreasonable delay in selling the property, the mortgagee was accountable to the mortgagor for any loss occurring between the date of taking possession and the date of effective sale, as a mortgagee in possession must exercise due diligence to put the property to beneficial use. IOB was liable to pay Abacus rental income to be assessed in respect of the property from 7 October 1981.

(3) While the contract for the sale of the property remained executory, the mortgagor's right to redeem was merely suspended and not destroyed. The right to redeem was extinguished only when the second contract of sale of the property was completed. As IOB kept the position open for such a long time, IOB would have had no real difficulty renting out the property.

(4) The extent and limits of a conclusive evidence clause was not fully discussed and delimited in the cases. The effect of IOB's argument was that the clause gave them the right to exempt themselves from any form of liability by issuing a certificate under the clause. However, the clause in question was not sufficiently wide or clear to confer on IOB a right to escape the consequences of an established breach of their equitable duty to rent out the mortgaged property or to obtain the true market value when a sale was effected. In any event, IOB did not produce a certificate purporting to determine IOB's liabilities to MI and Abacus. Should such a certificate be produced at such a late stage, it would be without good faith and tantamount to fraud.

(5) IOB was in breach of its obligation. The property was in commercial use and as such, tenantable at the time IOB took possession. As IOB's interest was in the recovery of the money lent, the prudent course was to accept the repudiation of the contract by the first purchaser, resell the property and sue for the difference in price in case the resale price was lower, which IOB only did after ten years. That was an inordinately long period of time, the consequence of which was to increase the financial burden on MI and Abacus and to cause a diminution in the value of the property. IOB failed to explain their inaction.

(6) The aim of taking accounts was to ascertain the final accounting position of the parties. In the absence of settled accounts, there was a continuous cause of action at least until the mortgagee effectively ceased to be in possession. Accounts therefore must be given for the entire duration the mortgagee claimed interest from the borrower and the

mortgagor. The equitable remedy for accounts was accordingly not time-barred unless time had run out from the time of sale of the mortgaged property or an account had been stated between the parties.

Overseas Union Bank Ltd v Chua Kok Kay and Another [1993] 1 SLR 686

Facts

The plaintiff bank OUB sued the first defendant Chua on a loan granted in 1983 for a sum of \$700,000. The loan was secured by a mortgage on Chua's property in Singapore and a guarantee given by the second defendant. Chua subsequently defaulted on the loan and the bank obtained possession of the mortgaged property on 28 November 1987. The property was subsequently sold in March 1989 for \$600,000. OUB brought this action for the outstanding amount due to the bank and on the guarantee. The defendants claimed that: (a) the loan was illegal under the provisions of the Exchange Control Act 1953 of Malaysia and the guarantee was tainted by that illegality; (b) the loan was illegal under Singapore law as OUB knew that Chua was a Malaysian citizen and resident and no prior approval from the Controller of Foreign Exchange had been obtained; (c) the loan was tainted with illegality because part of the purpose of the loan was to raise money for a business operated by Chua in Malaysia; and (d) OUB breached its duty as mortgagees by failing to rent out the property between the date of possession and the eventual date of sale, and for selling the property below market value.

Held, allowing the plaintiffs' claim and dismissing the defendants' counterclaim:

(3) OUB defaulted in their duties as mortgagees in possession and were liable for wilful neglect in not letting out the property. They were not vigilant and did not exercise due diligence to put the property to beneficial use, nor were they diligent in their approach to rents and profits which they may have received (had they let out the property) and the price at which the property was sold (which was below market price). => not enough for bank to advertised for rent ads shld reflect market value; if bank gets offers for rental at less than asking price, shld accept best offer instead of simply leaving property vacant

Lee Nyet Khiong v Lee Nyet Yun Janet [1997] 2 SLR 713

(3) As a mortgagee in possession, the mortgagee had to exercise due diligence to put the property to beneficial use. He was liable to the borrower for the rents and profits that he ought to have generated while in possession, and if he entered into and remained in possession himself, he was liable to pay an occupation rent. In this case he was not in occupation but allowed his mother and siblings to stay at the property. As such he was liable to pay rent at the market rate for their occupation.

33 In our judgment, the appellant was at all material times a mortgagee in possession. As such, the appellant is liable to account to the respondent for the rents and profits received as well as the rents that he ought to have generated while in possession: see *Overseas Union Bank Ltd v Chua Kok Kay* [1993] 1 SLR 686 and *Motorcycle Industries (1973) Pte Ltd & Anor v Indian Overseas Bank* [1992] 2 SLR 453. If the mortgagee enters into and remains in possession himself, he is liable to pay an occupation rent: *Marriott v Anchor Reversionary Co (1831)* 3 De GF & J 177 at p 193; 45 ER 846 at p 852. In this case, even if the appellant was not in occupation, he had put his mother and

siblings in occupation, and he remained liable to pay rent at the market rate for their occupation.

Tai Sea Nyong v Overseas Union Bank Ltd

(5) A mortgagee could enter into possession without being liable to account for notional rent where he intended to sell the property within a reasonable time; he only had to prove that he sold the property without undue delay.

(6) OUB were not liable for the notional rent as they sold the property with reasonable promptness; that the sale occurred five and a half months after possession was due to the lack of interest and not OUB's delay. In any event, it was to Tai's benefit that the property was sold quickly as the expected monthly rent could not cover the monthly interest on his loan.

4. Whether Mortgagee Can Exclude Liability For Negligence In Exercising Its Power Of Sale

– Unfair Contract Terms Act, s. 2

Unfair Contract Terms Act, s. 2

Negligence liability.

2. —(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence, a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

Bishop v. Bonham [1988] 1 WLR 742

- Defendant charged shares to plaintiff to secure loan
- The charge agreement provided that on the failure of the defendant to repay the loan the plaintiff could sell the shares in such manner and on such terms as he thought fit and that the plaintiff was not to be liable 'for any loss howsoever arising in connection with any such sale'.
- The defendant did not repay the loan and refused to execute a legal transfer of the shares to the plaintiff because he considered that the plaintiff, who had sold the shares, had done so at an undervalue.
- The plaintiff sought an order to compel the defendant to transfer the shares, which was resisted by the defendant on the ground that the plaintiff had sold the shares at an undervalue. The judge granted specific performance and rejected the defendant's defence on the ground that the charge agreement absolved the plaintiff from liability for any breach of duty towards the defendant. The defendant appealed.
- Held –

- Under the general law, a mortgagee in exercising his power of sale was under a duty to take reasonable care to obtain a proper price for the property sold.
- Although that duty of care could be excluded by the parties to an agreement, it had not been so excluded by the charge agreement entered into by the plaintiff. The provision empowering the plaintiff to sell the shares required the plaintiff to sell the shares within the limits of the duty of care imposed by the general law.

5. Limitation Period

S6, Singapore Limitation Act

Limitation of actions of contract and tort and certain other actions.

6. —(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

- (a) actions founded on a contract or on tort;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture.

(2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

(3) An action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.

(4) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any Act or other written law shall not be brought after the expiration of one year from the date on which the cause of action accrued.

(5) For the purposes of subsection (4), “penalty” shall not include a fine to which a person is liable on conviction for a criminal offence.

(6) Nothing in this section shall apply to —

- (a) any cause of action within the admiralty jurisdiction of the High Court which is enforceable in rem other than an action to recover the wages of seamen; or
- (b) any action to recover money secured by any mortgage of or charge on land or personal property.

(7) Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

S21(1) Singapore Limitation Act

Limitation of actions to recover money secured by mortgage or charge to recover proceeds of sale of land.

21. —(1) No action shall be brought to recover any principal sum of money secured by a

mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of 12 years from the date when the right to receive the money accrued.

- **Bristol and West plc v Bartlett and another 2002** – whether claims to shortfall after sale by mortgagee have 12 yr limitation period or 6 yr limitation period as applicable to simple contract periods
 - o EA held that 12 yr limitation period applies
 - o Concluded that other than in exceptional cases, claims for mortgaged debt should be governed by s20.1 Limitation Act 1980 i.e. that mortgagee has 12 yrs from accrual of cause of action to sue for principal of debt
- Approved and applied by HL in **West Bromwich Building Society v Wilkinson and another 2005**

6. CONSUMER PROTECTION (FAIR TRADING) ACT

- Came into force 1 March 2004
- To protect small consumer against supplier's unfair trade practices
- But Act does not apply to mortgage transactions – excluded by first schedule to act

Upon completion: Execution and Registration of Mortgage

a) Common Law Mortgage (very seldom these days)

RODA – COMMON LAW SYSTEM

- • Must be by deed - S 53 CLPA
 - **Conveyance to be by deed in English language.**
53. —(1) A conveyance of any estate or interest in land other than a lease for a period not exceeding 7 years at a rack rent shall be void at law unless it is by deed in the English language.
(2) This section shall only apply to conveyances executed on or after 1st March 1994.
 - **Deeds Requirements/ Indenture must include⁶:**
 - (1) Description of property
 - o See p132, Manual, for an example of a description of the property
 - (2) Recitals
 - o Recital that the borrower has agreed to transfer to the bank as security for loan
 - o Clause 2, p 110, Manual
 - o Rest of Clauses, p110-132, Manual
 - (3) Proviso for equity of redemption

⁶ See pages 107-135 of Manual

- Proviso for redemption of the property [because under CLPA, although the property is assigned to the bank and has legal and beneficial interest to the property, the borrower has a right to redeem the title to the property upon paying the loan and interests – equity of redemption]
- previously there were no memo of mortgage for common law indentures... hence, had to include all the terms and conditions
- however, there has been statutory amendment so that memo of mortgage can be filed with Land Registry, and so has to keep to 10 sheets limit also

(4) Number of pages

(5) Memorandum of Mortgage No.

(6) Habendum Clause

(7) Execution by seal of common law mortgage

- - only mortgagor/borrower required
 - must be by seal [s53 CLPA]; cf: Land titles execution does not have to be by deed, only has force upon registration
- • Called an Indenture of Mortgage
- Prepare indenture of mortgage: an indenture operates as a transfer of property to the lender bank
 - the important thing to do is to recite how the interest has been derived
 - Must complete attestation certificates as required by **s.11, RODA**

Inquiry before registration.

11. —(1) No assurance or caveat shall be provisionally registered under this Act unless the persons who have executed it or their legal personal representatives or the agents authorised as in section 10 of those persons or representatives appear either simultaneously or at different times before the Registrar and admit such execution.

(2) The Registrar shall —

- (a) inquire whether or not the instrument was executed by the persons by whom it purports to have been executed;
- (b) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the instrument; and
- (c) in the case of any person appearing as a legal personal representative or agent, satisfy himself of the right of that person so to appear.

(3) If all the persons who have executed the instrument appear personally before the Registrar and are personally known to him, or if he is otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution or, in the case of any person appearing by an agent, if his agent admits the execution, or if the person who has executed the instrument is dead and his legal personal representative appears before the Registrar and admits the execution, the Registrar shall provisionally register the instrument under this Act.

(4) The Registrar may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, or for any other purpose contemplated by this Act, examine on oath or affirmation any one present in his office.

(5) This section shall not apply in the case of a person whose execution of the instrument is certified in the prescribed form, subject to variations permitted under the rules, by —

- (a) an advocate and solicitor of the Supreme Court;
- (b) a consular officer or representative of Singapore; or
- (c) a notary public practising in the country where the execution takes place.

(6) This section shall not apply in the case of any instrument which has been executed by a company or corporation under its common seal, if —

- (a) a director or the secretary of the company or corporation by which the instrument purports to have been executed appears before the Registrar and admits that the instrument was executed in accordance with the articles of association or other rules governing the management of the affairs of the company or corporation and that the seal affixed thereto is the seal of that company or corporation; or
- (b) the execution of the instrument is certified in the prescribed form subject to variations permitted under the rules made under this Act by —
 - (i) an advocate and solicitor of the Supreme Court;
 - (ii) a consular officer or representative of Singapore; or
 - (iii) a notary public practising in the country where the execution takes place.

(7) Where there is no notary public practising in the country where the execution takes place, this section shall not apply if an advocate and solicitor of the Supreme Court certifies on the instrument that —

- (a) the person executing the instrument is his client;
- (b) his client is of full age and legal capacity; and
- (c) he is satisfied that the instrument was executed by his client.

(8) Where an instrument is executed by a company or corporation under its common seal in a country where there is no practising notary public, this section shall not apply if an advocate and solicitor of the Supreme Court certifies on the instrument that —

- (a) the company or corporation executing the instrument is his client; and
- (b) he is satisfied that the instrument was executed by the company or corporation in accordance with the articles of association or other rules governing the management of the affairs of the company or corporation and that the seal affixed onto the instrument is the seal of the company or corporation.

(9) This section shall not apply in the case of any instrument executed by the Public Trustee or the Official Assignee under his official seal.

Procedure where appearance of executant or witness is desired.

12. —(1) If any person presenting any instrument for provisional registration desires the appearance of any person whose presence or testimony is necessary for the provisional registration of the instrument, the Registrar may in his discretion issue a summons requiring him to appear at the Registry either in person or by a duly authorised agent as in the summons mentioned and at the time named therein.

(2) A person who by reason of bodily infirmity is unable without risk or serious inconvenience to appear at the Registry and a person in jail under civil or criminal process shall not be required so to appear, but in every such case the Registrar shall either

himself go to the house of that person or to the jail in which he is confined and examine him or issue a commission for his examination.

(3) The law in force for the time being as to summonses, commissions and compelling the attendance of witnesses and for their remuneration in suits before a District Court shall apply mutatis mutandis to any summons or commission issued and any person summoned to appear under this Act.

Conditions precedent to registration.

13. —(1) No instrument or memorial shall be registered —

(a) unless it is duly stamped in accordance with any written law for the time being in force relating to the collection of stamp duties;

(b) so long as any arrears of land revenue after demand for payment has been made remain due to the State in respect of the land included therein or affected thereby or any part of that land;

(c) unless the boundaries of all lands affected thereby have been surveyed and demarcated to the satisfaction of the Chief Surveyor or unless there is annexed to the original instrument presented for registration an assurance plan which is referred to in section 21 of the Land Surveyors Act and has been endorsed by the Chief Surveyor to indicate that it has been approved by him with the caution as to the inconclusiveness of its boundaries and dimensions;

(d) if the fees for registration having been demanded remain unpaid; and

(e) which is not in accordance with any written law which applies to assurances affecting land not subject to the Land Titles Act.

(2) Where the requirement in subsection (1) (c) has not been complied with, the instrument or memorial may be registered under this Act if the Registrar has granted dispensation from compliance with that requirement pursuant to the rules.

(3) If by error any instrument has a wrong town subdivision or mukim number, demarcation lot number or part number, or a wrong area endorsed upon it, the Collector of Land Revenue may visit the land and there hold an inquiry into the matter, and if the Collector is satisfied that all the parties to the instrument who can be found within Singapore or their representatives, if any, admit the error and that the instrument has in fact been wrongly endorsed, then, notwithstanding the absence of any parties who are dead or have left Singapore, the Collector may, by order in writing, direct the endorsement on the instrument to be corrected and may himself make the correction upon the instrument being produced to him.

(4) A certified copy of any order made under subsection (3) shall be served by the Collector on the Registrar who shall make it available for inspection by the public.

(5) Upon the service of a certified copy of any order made under subsection (3) on the Registrar, any instrument, register, book or index kept at the Registry which is affected by the order shall be construed as if the corrections directed by the Collector had been in the instrument, register, book or index and the Registrar shall, if it is practicable for him to do so, make the corrections on the instrument, register, book or index.

- • **Effectively conveys estate to mortgagee, subject to redemption on repayment of moneys secured**
- • Only mortgagor and borrower required to execute, mortgagee need not execute

- Where mortgagor is only a surety, both mortgagor and borrower required to execute
- • Registration regulated by RODA
- • Priorities determined by date of registration- S14 RODA

Priority of instruments.

14. —(1) Subject to this Act, all instruments registered under any repealed enactment, or entitled to be registered under this Act, shall have priority according to the date of their registration and not according to the date of the instruments or of their execution.

(2) Nothing in this Act shall interfere with the priorities as between themselves of any instruments the dates of registration of which are identical.

(3) All priorities given by this Act shall have full effect in all courts except in cases of actual fraud, to which the person by or on whose behalf the registration is made is a party, and all persons claiming thereunder any legal or equitable interests are entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice except in cases of actual fraud to which he is a party.

(4) Nothing in this section shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims, and any disposition of land or charge on land which, if unregistered, would be fraudulent and void shall, notwithstanding registration, be fraudulent and void in like manner.

- • Usually caveat is lodged and mortgage has priority from date of registration of caveat-S8 RODA
 - if a caveat is registered on behalf of the mortgagee before completion, and the mortgage is subsequently registered after completion, then **s8, RODA** states that the mortgage will have priority from the **date of registration of the caveat**
 - Delay regarding completion of mortgage is due to time taken to stamp the deed etc.
 - **Therefore** arrange for mortgage → lodge caveat → register mortgage

b) Land Titles Mortgage

Types of Mortgage Documents

- If the mortgage is over a completed property (i.e. the title deed already exist), create a *legal mortgage*.
- Uncompleted properties – see below

COMPLETED PROPERTIES

❖ **S68(3) LTA - mortgage not to operate as a transfer but as security only =>**

Implications

➤ **Cannot convey**

➤ Under cl type, mortgagor conveys legal interest –

- Under LTA, legal estate remains in the mortgagor
- NOT a transfer of the property to the bank, merely a charge to the lender, therefore does not pass title to the lender bank
- *cf*: common law (RODA) mortgage: the property is actually conveyed/ transferred to the bank as security, so the bank gets the legal interest

❖ **S68(1) LTA - prescribed form of mortgage**

- ✓ Registered land may be mortgaged to secure repayment of a debt by an instrument of mortgage in the prescribed form, registered with the Registrar of Titles
- ✓ Act of registration creates the mortgage
- ✓ S.68(3): a registered mortgage shall not operate as transfer of the land mortgaged, but only as security

Form and effect of mortgages and charges

68. —(1) Registered land may be mortgaged to secure payment of a debt by an instrument of mortgage in the approved form.

(2) Registered land may be charged to secure payment of a rentcharge, annuity or other periodical sum, or of any money other than a debt, by an instrument of charge in the approved form.

(3) A mortgage shall not operate as a transfer of the land mortgaged, but shall have effect as a security only.

(4) There may be included in an instrument of charge such covenants or provisions as the parties think fit for disposing of the moneys which may arise on the exercise by the chargee of his power of sale, either by setting aside the proceeds of sale or part thereof on investment to meet future periodical payments, or by payment to the chargee of such proceeds or part thereof being the estimated capital value of the chargee's interest, or otherwise.

○ Technical requirements for prescribed form of mortgage set out in **Rule 8 of Land Titles Rules**

- Where the bank has a standard form for that particular kind of mortgage, and it has been registered as an MM with the Registry, you just draft the mortgage form with parties' names, basic legal obligations, and add "terms and conditions per MM No.⁷ (remember that every MM registered has its own number, e.g. MM/217)

❖ • S76(1) LTA - mortgagor has equity of redemption

❖ • Land Titles Rules, Part III sets out technical requirements

- size of pages, margin size etc

❖ registrar's PDs on description of parties and certs

- • Must be signed by all parties

⁷ P105, Manual: see Draft-A-M'Gage Notes

- • Priorities by date of registration/notification ie priority between 2 competing mortgage instruments is determined by the date of registration, not by date of execution – **s.48, LTA**
- ❖ only format stipulated, free to include covenants and provisions as deem fit
- ❖ see sample of LTA form of mortgage in manual
 - • Usually incorporates the appropriate MM
- ❖ priority between two competing mortgage instruments determined by date of Regis and not by execution date s48 LTA – use of caveat to prxt interim period of few days before actual Regis also applicable – s49.1 LTA

Priority of unregistered interests

- 49.** —(1) Except in the case of fraud, the entry of a caveat protecting an unregistered interest in land under the provisions of this Act shall give that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.
- (2) Knowledge of the existence of an unregistered interest which has not been protected by a caveat shall not of itself be imputed as fraud.
- (3) For the purposes of this section, the lodgment of an instrument for registration under the provisions of this Act shall have the same effect as the entry, on the date of such lodgment, of a caveat protecting the interest claimed under that instrument.
- (4) Nothing in this section shall otherwise give to any unregistered interest any greater effect than it may have under the instrument by which it was created.
- (5) Any priority conferred by this section on an unregistered interest shall be lost if the caveat or other instrument in respect of which it is claimed lapses, or is withdrawn, or is otherwise disposed of.

What does the solicitor have to do?

Land Titles Requirements

- Description of property
- Particulars of parties
- Execution formats
- Certificates – s 59 Certificate of Correctness
- Backing
- Prior encumbrances
- Number of Pages
- MM No.

(1) Do a property search

- to check and see if the property is already mortgaged and whether the purported owner in fact has title

(2) Check that Memorandum of Mortgage number correct

- Have to insert the memorandum of mortgage number

- because the bank may have more than one memo of mortgage for different type of mortgages
- make sure that the terms of the memo of mortgage (i.e. the standard terms and conditions which are attached to the letter of offer) and the terms in the letter of offer are somehow included in the mortgage document either expressly or by reference
- sometimes the memo of mortgage may have standard terms which are varied by the letter of offer
- hence, have to draft a letter of reference to the memo of mortgage

(3) Particulars of parties

- Make sure parties are correct

(4) Make sure prior encumbrances box are complete

- usually, the bank would insist that the mortgage is a 1st mortgage
- however, if there is a prior mortgage, then to include particulars of the first mortgage
- NB: the property may also be subjected to CPF charge

(5) Number of pages

- where there is a memorandum of mortgage, can only have 10 sheets of terms and conditions
- hence, in practice, can try to print in small font etc

NB: in practice, the Land Titles mortgage document is usually very short, because it usually incorporates the terms in the letter offer and the memo

(6) Format of Execution of mortgage

- **Properly executed:** no requirement for document to be signed under seal, no need for witness to be solicitor, in fact no need to identify the witness's name ... just need a signature
- However, under **s59, LTA**, the solicitor has to indicate under s59 **Certificate of Correctness** that the person who signs has good authority and is competent to sign... because the solicitor is made personally responsible for it

Certificate of correctness.

59. —(1) The Registrar may reject any application to bring land under the provisions of this Act, or any other instrument purporting to deal with or to affect registered land, unless there is endorsed thereon a **certificate by the parties to the instrument that it is correct for the purposes of this Act.**

(2) The certificate by any party to the instrument shall imply representations that, to the best of the signatory's knowledge and belief and in so far as he has any reasonable means of ascertaining —

(a) the instrument is made in good faith;

(b) the matters set forth therein are substantially correct; and

(c) in the case of —

(i) a person acquiring title, the person acquiring title thereunder accepts proprietorship

and (unless otherwise expressed in the instrument) is of full age and legal capacity; or
(ii) a person divesting title, the person divesting title thereunder is the party entitled to divest the interest under the instrument and is of full age and legal capacity.

(3) Where —

(a) a solicitor has been employed by a party to the instrument, the certificate referred to in subsection (2) shall be signed by the solicitor; or

(b) a solicitor has not been employed by a party to the instrument, the party himself shall sign the certificate referred to in subsection (2) and if the party is a corporation, a responsible officer of the corporation shall sign the certificate.

(3A) Where any instrument is executed by an attorney (within the meaning of Part XVI) for a party to the instrument, the certificate by the attorney shall imply representations that, to the best of the belief of the attorney or (as the case may be) the solicitor employed, the attorney has the authority to act as the agent for and on behalf of the party in respect of that instrument.

(4) Each certificate shall indicate in legible characters —

(a) the name and capacity of the signatory; and

(b) where it is signed by a solicitor employed by the party to the instrument, the date of issue of the solicitor's practising certificate.

(5) Where the certificate is signed by any party (including a solicitor who is a party acquiring or divesting title under the instrument), or by an officer of any corporation, divesting or acquiring title, the Registrar may in order to satisfy himself as to the identity and capacity of the signatory require such person to appear before him.

(6) Any person who falsely certifies to the correctness of any application, dealing or caveat shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000 and such penalty shall not prevent a person who may have sustained any damage or loss in consequence of errors or mistakes in any such certified application, dealing or caveat from recovering damages against the person who has certified the same.

(7) In any instrument which is registered under the provisions of this Act, any reference to "**Certificate of Correctness**" shall be construed as a reference to a certificate of correctness given pursuant to this section or any corresponding provision in any repealed enactment.

(8) For the purposes of this section, "solicitor" means a solicitor who has in force a practising certificate issued under the Legal Profession Act.

- Signing of the mortgage document:
 - o if someone is signing on behalf of his company, have to ensure that the procedure and requirements laid down in M&A are complied
 - o if the document is executed by an attorney, then have to ensure that the power of attorney is valid (i.e. what are the conditions that may make the PA be invalid?)
 - o in the case of the bank, there are usually standard Powers of Attorneys
 - o however, in the case of private individuals, PAs have to be presented to the Land Registry... so have to ensure that it is a valid one

UNCOMPLETED PROPERTIES

- previously, governed by LTA – title is issued

- rights of buyer is contractual right – beneficial interest under sale and purchase agreement bet purchaser and developer
- so can assign the right to the bank as security for the loan
- • Separate title not issued yet
- • Mortgagor has no legal interest in property to mortgage
- • Assigns rights and benefits under Sale and Purchase Agreement-
- • Mortgage is perfected and registered later when separate title is issued – mortgage is signed in escrow (in blank – particulars of the property are left blank but terms will remain in full force and effect as if proper mortgage)
- • Security documents:

- **1. Deed of Assignment**

- The Sale and Purchase Agreement is the only security you can pass to the bank. ∴ Need to assign all the rights in the Sale and Purchase Agreement; interest in the property, to the bank.
- Power of attorney is given to the mortgagee so that it can step into the shoes of the mortgagor to deal with the property in case of forfeiture. Otherwise, the mortgagee has no such power. Power to deal with the property is not automatically conferred, as in a legal mortgage.
- Terms
 - *Covenant to repay loan*
 - *Clause entitling bank to release loan in installments to meet progress payment of purchase price of unit as and when become due under sale and purchase agreement*
 - *Clause stating that bank under no duty to advance any part of loan if mortgagor in breach of covenants and proven in deed and until satisfied that diff bet purchaser price and amt of loan paid to developer*
 - *Mortgage clause pursuant to which mortgagor assigns all rights under s and p agreement and all mortgagor's title and interest in unmort to bank subj to proviso for redemption*
 - *Clause recording agreement of parties that terms and conds in mortgage deemed to have full force as if contained in assignment*
 - *Covenants on mortgagor's part to do all nec to obtain duly executed transfer fr developer on issue of sep title and deliver same to bank to facilitate perfection of mortgage*
 - *Particulars of parties*
 - *Particulars of Sale and Purchase Agreement*
 - *Particulars of property*
 - *Assignment clause*
 - *Assignment of Sale and Purchase Agreement*
 - *Assignment of interest in property*

- *Proviso for equity of redemption*
 - *Obligation to comply with terms of Sale and Purchase Agreement*
 - *Contemporaneous execution of mortgage in escrow*
 - *Power of attorney to deal with property and with developers*
 - *Execution by seal – only mortgagor/borrower required*
 - *Events of default which will give rise to dd for repayment*
 - *Converring on bank power of sale*
 - *Reqg mortgagor to pay all costs including stamp duty in connection with transfer and mortgage*
 - This is an assignment of mortgagor's rights and benefits under Sale and Purchase Agreement (the S & P Agreement is in Developer's prescribed form) The mortgagor has no legal interest, so can only assign the equitable interest under the S&P Agreement
 - Must be executed under seal- only mortgagor/borrower required
 - Immediately after execution, must give written notice to developer to comply with formality for creating legal assignment as reqd under s4.8 civil law act
 - In notice, developer to deliver to bank cert of title/subsid strata cert of title relating to unit
 - **read the document!!!**
 - • Gives effect to covenants and conditions in mortgage in escrow
 - • Power of Attorney clause
 - This will enable the mortgagee bank to deal with the property and the developers of the property
 - bank cannot butt in – appting bank as attorney – If purchaser absconds, bank can setp in and deal with the developers
 - Clause must provide for equity of redemption
- Power of sale is effected by bank assigning all rights, title and interest in unit to sub purchaser who surrenders s and p agreement to developer in exchange for fresh sale and purchase agreement to be issued by developer to subpurchaser
 - Seek bank's instructions as to whether bank requires mortgagor to put aside stamp fees payable on transfer and have sum placed with you as stakeholders pending issue of separate title
 - Stamp fees ma be substantial (3 percent of purchase price)
 - If mortgagor insolvent before sep title issued and x pay tamp duty, then unless bank advances stamp fee, will not be able to register transfer and perfect mortgage => most banks req tt stamp fees be held by stakeholders except where part of mortgagor's CPF moneys has been earmarked for payment of stamp fees

- Partial discharge
 - If parent lot mortgaged by developer to financier
 - This had priority over indiv purchaser and equitable mortgagee
 - So risk of developer becoming insolvent and parent mortgagee selling off parent lot -> this will overreach equitable interests of purchaser's mortgagee
 - Mitigated by housing developers (proj acct) rules applying to residential devpt
 - Housing developer must open proj acct for each development
 - All moneys collected fr purchasers – up to 85 percent of purchase price – must be paid into proj acct
 - Withdrawals only permitted for prescribed items of construction and proj costs etc – to prevent dishonest developer fr diverting payments
 - Rules provide developer shall on issue of TOP and payment of up to 85 percent of purchase price, redeem parent mortgage
 - Though most commercial developers not bound, most have developed similar arrangement – but only on receipt of 90 percent of purchase price
 - Imp't for lawyer to ask to see confirmation letter fr parent mortgagee confirming that it will discharge indiv units sold on purchaser's payment of requisite percentage of purchase price
 - So after TOP issued must follow up with developer to insist on execution of deed of release by parent mortgagee

- **2. Mortgage in escrow**

- (because the deed of assignment only covers the period before the title to the property is issued).
- Same as legal mortgage but without property details (because the title deed has not been issued)
- To be signed at the same time as Deed of Assignment
- S 59 certificate to be signed on perfection
- Check whether it's open or closed mortgage
 - Incomplete and cannot be registered
 - Fully effective by virtue of clause in Deed of Assignment
 - Perfection on issuance of separate title and registration of transfer
- Mortgage is perfected and registered later when separate title is issued
- The bank will hold on to the Mortgage in Escrow and Deed of Assignment until the property is completed, whereupon it will release both to its lawyers for registration in order to perfect it
- same as legal mortgage but without property detail

- i.e. the identical document which you would have done if the property was completed and the legal title has passed
- however, it is “in escrow” because the description/particulars of the property is left blank, to be perfected later (when the building is complete and the mortgage can be perfected and registered)
- must be signed the same day as the date of deed of assignment (“contemporaneously executed”)
- **s59, LTA Certificate to be signed on perfection:** the s59 Certificate of Correctness of the capacity by the solicitor cannot be signed until the legal title has really passed, cannot be signed against the mortgage in escrow
- **The Mortgage in Escrow has NO LEGAL EFFECT, although it is evidence of intention**
- **The bank will sue under the DEED OF ASSIGNMENT**

– **3. Caveat**

- – very impt for property under construction – notify beneficial right and interest – the only way 3rd parties know tt develops have sold the partr unit. Otherwise title deed encumbrances whole plot of land
- effect
 - prohibits Regis of another instrument affecting without bank consent
 - acts as notice to anyone who searches land register of bank’s interest as mortgagee
- for common lw interests
 - gives notice of caveator’s interest
 - when caveated transaction is followed by formal deed later registered while caveat is in force, priority dates fr date of Regis of caveat
 - caveat x prohibit Regis of conflicting deed
- Important when you have a property under construction because your security document is only a deed of assignment. The mortgage cannot be registered because a separate title has not been issued to the property. ∴ Need to lodge a mortgagees’ caveat against the property (Otherwise, no notification to the Registrar of the mortgagee’s interest.)
- ⇨ The interest claimed in the caveat would be “a mortgage pursuant to the terms in the deed of assignment in consideration for monies having been released under a banking facility”.
- *Description of property (with or without plan)*
- *Particulars of parties*
- *Interest claimed e.g. pursuant to accept letter of offer or to Deed of Assignment*

- *Prohibition clause*
- *Registration requirements as to form and certifications*
- *May be signed by solicitor*
- • Important notification of bank's interest as mortgagee
- • Bank claims interest as equitable mortgagee
- • Interest based on Deed of Assignment and Mortgage in escrow
 - • Lapses after 5 years unless extended S121 & 122 LTA – caveat is not permanent

Case law

UOF v Mutu Jeras (1989) SLR 486

Facts

- Question of priority between two caveats
- The plaintiff bank was equitable mortgagee of two office units. They lodged a caveat against the units. Subsequently, the original purchaser sold the units to the defendant Mutu who lodged a caveat against the units.
- Both caveats prohibited the registration of any instrument affecting the units unless the caveator gave written consent to such registration.
- Bank foreclosed mortgage after default, and sold the units to buyer who wanted all caveats removed
- Bank lodged fresh caveat before expiry of its caveat
- Issue: which caveat has priority?

Held:

- (1) Section 49(1) of LTA provides that the priority of unregistered interests in land, whenever created, was to be determined – except in cases of fraud – by the date of lodgement and not by the date of creation. The Torrens system, like equity, aided the diligent and not the indolent.
- (3) In addition, s49(4) of the LTA limited the loss of priority to new caveators but not subsisting caveators. In this case, the bank did not lose their priority over Mutu in respect of their claim (bank = subsisting caveator). Thus where two or more caveators were on the register at the same time when any caveat lapsed by effluxion of time, the priority given by that caveat could be extended by the caveator filing a fresh caveat pursuant to s 122(4) of the LTA.

Cathay Theatres Pte Ltd v LKM Investments Holdings Pte Ltd [1998] 1 SLR 917

Facts

The appellants Cathay were lessees of a property under a 99 lease granted by the Housing and Development Board (HDB). The lease was registered under the Land Titles Act (Cap 157) (“the Act”). Cathay agreed to lease part of the property to McDonald’s Restaurants (“McDonald”) and to that end, executed a number of leases in favour of the latter. As of 16 August 1995, there were seven consecutive leases (each for a period of two years) spanning the period 1994 to 2008. On that day, McDonald lodged a caveat on the Land Register pursuant to s 115(2)(a) of the Act, claiming an estate or interest as lessee of the premises. The caveat prohibited the registration of any instrument affecting

the property unless the instrument was expressed to be subject to McDonald's claimed interest. On 17 May 1996, Cathay entered into an agreement to sell the property to the respondents LKM. Clause 4(1) of the agreement stated that the property was sold subject to the seven McDonald leases. At the date of the sale agreement, Cathay obtained HDB's approval for the first two of the seven leases only and not for the rest. The date fixed for the completion was 16 August 1996, but LKM refused to complete the sale unless McDonald's caveat was removed. The next day, Cathay served on LKM a notice to complete pursuant to condition 29 of the Singapore Law Society's Conditions of sale 1994. On the same day, LKM served a similar notice on Cathay who then took out an originating summons seeking: (a) a declaration that LKM were not entitled to insist on the withdrawal of the caveat and to rely on the existence of and the non-withdrawal of the caveat as a reason or ground for not completing the sale; and (b) a declaration that LKM's notice to complete was null and void and of no effect as a notice to complete under condition 29.

The judicial commissioner hearing the originating summons held that the interest claimed under the caveat was different from that which the sale was subject, and that if LKM were to accept a transfer which was expressed to be subject to the interest claimed in McDonald's caveat, they would be taken to have admitted to McDonald's interest as claimed and would be precluded from challenging the validity of the interest claimed. LKM would thus not be getting what they contracted for and was thus entitled to insist that Cathay remove the caveat before completion. Cathay appealed.

Held, allowing the appeal:

(1) The interest claimed by McDonald coincided with that stated in cl 4(1) of the sale agreement. The presence of the caveat was thus consistent with the title contracted for in the sale agreement. As such, LKM were not entitled to insist that the caveat be removed.

(2) A caveat did not evince an interest in and, nor did it create any interest in land. It was to protect whatever interest the caveator claimed he had in the property and to preserve the status quo by preventing the registration of subsequent dealings which, by virtue of the indefeasibility of title by registration conferred on a new registered owner under s 46 of the Act, would otherwise extinguish the rights of the caveator without first giving him a chance to prove his claim. In this case, LKM, by taking the transfer subject to the interest claimed by McDonald, could not be said to have acknowledged and admitted the interest of McDonald claimed in the caveat. The effect of the registration of that transfer did not validate the interest claimed by McDonald. It was open to LKM, if they so wished, to challenge that interest subsequently.

(3) When a new registered owner accepted the registration of a dealing which was expressed to be subject to the interest claimed by the caveator in conformity with a caveat under s 115(2)(a), he was merely acknowledging that his title was defeasible to the extent of the interest claimed by the caveator. He yielded the indefeasibility of title that registration would otherwise give him and acknowledged that the caveator's claim was preserved. He did not acknowledge that the caveator did in fact have the interest claimed. The new registered owner was precluded only from challenging the interest claimed on the ground of indefeasibility of title under s 46 of the Act. He was otherwise free to challenge the interest claimed.

(4) There was no need to consider the issue of reversionary leases since the validity of the reversionary leases had no bearing on the issue at hand. Even if the reversionary leases were indeed void so as to be incapable of supporting a caveat, LKM were at liberty, upon registration of the transfer, to seek the withdrawal or amendment of the caveat under s 127 of the Act.

Drafting A Caveat

- ✓ Must be in prescribed form and must contain an accurate description of the interest claimed and the particulars required under **s.115, LTA**

However,

- ✓ **S128, LTA** – excessive drafting can found an action for damages, because a caveator may protect himself only “according to the extent of his interest” (s115(2), LTA)
- ✓ “wrongfully” = “without legal right” (**Tan Soo Leng David v. Wee, Saktu & Kumar Pte Ltd & Anor [1993] 3 SLR 569; Eng Bee Private Properties Ltd v. Lee Foong Fatt [1993] 3 SLR 837**)

Ho Soo Fong and Another v Standard Chartered Bank and Other Applications [2005] 1 SLR 316 – s128 successfully invoked

9 On 27 February 2004, the plaintiffs issued these proceedings. On 6 July 2004, the bank’s lawyers notified their counterparts that the caveats were withdrawn on 30 June 2004. However, the withdrawal was without prejudice to the bank’s position that it was right in the first place to lodge the caveats. By the time the applications came on for hearing before me, it was no longer necessary for the plaintiffs to seek an order that the caveats be removed. Pursuant to s 128 of the Land Titles Act (Cap 157, 2004 Rev Ed) (“the Act”), the plaintiffs duly sought an order that there be an inquiry as to the damages suffered by them for the period 21 October 2002 to 30 June 2004. It was still necessary to determine whether the caveats lodged against the three properties described above were wrongful or without reasonable cause as the bank at all material times had no caveatable interest in the three properties for cancellation and legal fees.

26 Finally, the plaintiffs sought an order for an inquiry as to the damages recoverable under s 128 of the Act. The plaintiffs claimed that they had suffered pecuniary loss as a result of the bank’s refusal or failure to remove the caveats. Their pecuniary losses included the loss on another property known as 179 Syed Alwi Road, Singapore.

31 I already found that the presence of the caveats on the land register could not be justified. The plaintiffs had arguably shown some losses. An inquiry would determine if such losses were attributable to the bank’s refusal or failure to remove the caveats. As to whether the true cause for the loss on 179 Syed Alwi Road was due to the plaintiffs’ financial straits or the presence of the caveats, this was to be determined at the inquiry. Whilst in some circumstances the court has a discretion to refuse an inquiry as to damages, this was not a case in which the plaintiffs should properly be deprived of the opportunity to prove damages on inquiry. Theirs may well be a weak case, but at the same time it was quite impossible to say that there was indeed no arguable case for claiming damages. The inquiry as to pecuniary loss, if any, pursuant to s 128 of the Act would be at the plaintiffs’ risk of costs: see *Fraser & Neave Ltd v Yeo Hiap Seng Ltd*.

32 In the circumstances, having concluded that the bank had no caveatable interest in the properties for the cancellation and legal fees, I allowed the three applications. I directed an inquiry by the Registrar as to whether any and, if so, what damages were sustained that were attributable to the refusal or failure to withdraw the caveats when requested to do so between 21 October 2002 and 30 June 2004. I also reserved the question of costs of the applications to the Registrar.

- **Asiatic enterprises v UOB 2000** –

- Sg CA held it not possible to treat act of lodging caveat against land held under LTA as appropriate mechanism for creating charge on land
- No need for caveator to show title estate or interest in land is caveatable interest before lodging but must first have preexisting claim of estate or interest in land supporting the caveat
- Act of lodging creates interest

- **Gordon v Treadwell Stacey Smith 1996 NZ case**

- ‘any person lodging caveat’ – not restricted to caveator but also solicitor and client and any person responsible for lodging caveat
- so liable for wrongful lodgement may attach to solicitor as well
- if can show that they acted without reasonable cause or dishonestly
- examined separately for solicitor and depends on what solicitor knew or ought to have known of facts

- Description of property (with or without plan)

- property described; if it is a property under construction, then have a plan annexed to it
- the interest is in the plan or within the limits so described

- Interests claimed

- have to specify the interest and the claim under which you claim that interest
- if the chain of claim is not accurate, then when it is challenged, may have problem with enforcing the caveat
- e.g. pursuant to letter of offer or Deed of Assignment

- Prohibition clause

- can have a negative pledge clause
- to have full control over whatever may be registered subsequently that may conflict with your interest
- to provide that no such registration be allowed without your prior consent

- For property that is already completed, as a matter of practice, still can lodge a caveat

- because usually, mortgage usually takes time to stamp, to file with Registry etc ... and until registration, the title does not crystallize

- note – **alrich devpt v rafiq jumabhoy** – court x astute to find fault with terms of caveat so long as not positively misleading and interests of others not prejudiced
 - o resoln of dispute depends on underlying transaction giving rise to caveatable interest and not form of caveat
 - o see prescribed form of caveat in manual
- where instrument inconsistent with provn of caveat lodged, registrar obliged under s120 to give caveator notice of his intention to accept instrument for Regis on expiry of 30 days fr date of service of notice
 - o he may then take steps to prevent Regis of tt interest eg by court order restraining registrar fr doing so
 - o if no steps then registrar will register conflicting instrument, caveat lapses and ceases to have effect
- lifespan of caveat – LTA – 5 yrs, but noe s122 – may be extended for consecutive periods of 5 yrs fr date of lodgement
- s8.9 RODA – caveat unless cancelled by order of court or withdrawn by caveator remains in force for 5 yrs
- Registration requirements as to form and certifications
- May be signed by the solicitor
- **pay attention to order of registration!!!!!! Exams!!!!!!!!!!**

Where the Borrower is a Company

- ❖ • Check Company’s Memorandum and Articles of Association
- ❖ • Obtain Directors’ resolutions (duly passed and keep in your file) – certified tre copy authorizing the reslns authorizing vorrowing and execution of mortgage under common seal of mortgagor
 - check arts as to how common seal to be affixed – stimes may need presence of at least 2 directors nad comp secretary who must countersign doc
- ❖ • File Statement of Charge at ACRA pursuant to S131 Co Act –
 - Prior to Bizfile, the equivalent were Forms 33 & 34
 - Must file on time, ie within 30 days of creation of charge, otherwise it will be void against the liquidator
 - If don’t file within 30 days, and want to rectify mistake, need to go to court and get court approval – lawyer has to pay the costs for his own negligene!

131(1) CA

Subject to this Division, where a charge to which this section applies is created by a company there shall be lodged with the Registrar for registration, within 30 days after the creation of the charge, **a statement of the prescribed particulars and an affidavit verifying the execution of the charge and also verifying the correctness of the statement, and if this section is not complied with in relation to the charge the charge shall, so far as sany security on the company’s property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.**

➔ and it is provided for in s131(2)(e) that “*a charge on land wherever situate or any interest therein*” must be registered under this provision

Guarantees

- ✓ Have to be prepared when required to do so by the bank.
- Parties
- Joint or several – invalidated by non-execution of joint guarantor?
- Consideration
- To take in account open mortgages
- Execution by seal, if no consideration
- Ensure proper execution and willingness of guarantor to sign
- Power of party to guarantee for companies e.g. commercial benefit
- Promise by guarantor to and for debt of principal debtor, made to creditor to whom principal debtor is liable
- Gives rise to personal liab on part of guarantor
 - Not registrable because not security based on land
 - Contract and collateral form of security
- Sits
 - Guarantee by parent iro child's oblig under mortgge
 - By spouse or sibling
 - By parent comp for subsid
 - Directors iro company's oblig

Characteristics

- Contract –
 - so must have attribvuts of valid egal contract eg intention to create legal oblig/ under seal or supported by consideration
- Rights of third parties
 - Drafting consider whether third parties
 - Contract (rights of third parties) act effective fr 2002 -
 - Whether guarantee has unintended effect of granting third apties such rights
 - If do not want this must expressly and appropaitely insert such wording
- Benefit to corporate guarantor
 - Corporate powers for corporate ends ie commercial benefit
 - Otherwise may be invalid on grds of abuse of powers
 - If in MA to guarantee debts but in furtherance of purpose not to company benefit then guarantee may be set aside

Fid duty and undue influence

- Lender has fid duty to advise guarantor to obtain indep advice
 - Lloyds banjk v bundy 1974 – eng CA set aside guarantee signed by father for debt owed by son's company because bank x discharged duty to ensure

father formed indep and informed judgment on transaction before committing himself; rr bet bank and father was one of trust and confidence and duty was to advise him to get indep advice

- Two kinds of contracts voidable for undue influence
 - o Special rr bet parties – undue influence presumed unless rebutted
 - o No special rr – undue influence to be proved
- Parent child
 - o Rebuttable presumptn of undue influence
 - o Avon finance v bridger 1985 – son exercising undue influence over parent
 - o Applied in **Malayan banking v kim produce**

Facts

The plaintiff bank Maybank brought two actions, which were consolidated in this action against one Ong and one Loi as guarantors under two letters of guarantee. In both actions Ong and Loi gave guarantees in favour of Kim Produce and T Bin. The two guarantees were given in consideration of Maybank granting credit facilities to Kim Produce and T Bin. Maybank already obtained judgment against Kim Produce and T Bin in respect of moneys owing to Maybank. The sole issue was Ong's and Loi's liability under the two guarantees. The applications were made on Kim Produce and T Bin's behalf by their managing director, Lui. Maybank gave the guarantee documents to Lui who obtained Ong's and Loi's signatures as guarantors in respect of credit facilities granted to Kim Produce and T Bin.

Held, allowing the plaintiffs' claim against Ong and dismissing the plaintiffs' claim against Loi:

- (1) Loi misplaced his faith in Lui who was an untrustworthy person. There was inequality of bargaining power between Loi and Lui, and also between Lui and Maybank. Loi did not have the benefit of independent legal advice and the circumstances in which Maybank obtained Loi's signatures on the letters of guarantee were unfair to him.
- (2) On the other hand, Ong was an experienced businessman who in the course of his business signed many guarantees. In this case, he knew he was signing letters of guarantee and knew what guarantees were all about. There were also material contradictions between Ong's testimony and his son's testimony which were irreconcilable. There was no inequality of bargaining power and the principles in the *Avon Finance* case and the plea of *non-est factum* were not available to Ong.

- o **Goh jong cheng v MB Melwani**

Facts

The plaintiff Goh owned a piece of property. The defendant Melwani extended credit facilities to a company of which Goh's son was a director. Goh handed the title deeds of the property to her son and later signed two sets of a mortgage deeds mortgaging the property to Melwani at the solicitors' office. The same solicitor acted for Goh and Melwani in the transaction, and Goh's son acted as an interpreter between the solicitor and her. Goh's son subsequently requested a return of the mortgage deed from the solicitor, and the deeds were returned to Goh. The solicitor later lodged a caveat in the

registry against the property in respect of Melwani's interest. Goh sought a declaration that no equitable mortgage had been created by the deposit of the title deeds and that Melwani's caveat against the property be cancelled. The issue was whether Goh knowingly handed the title deeds to her son and whether the doctrine of *non est factum* applied.

Held, allowing the plaintiff's application:

(1) Two factors were necessary before a party could successfully plead *non est factum*: (a) the documents signed had to be significantly different from that which the signer believed them to be; and (c) the signer should not have been negligent when he signed the document.

(2) Goh's plea of *non est factum* succeeded as: (a) she did not know that when she handed the title deeds to her son, they were to be used as security for credit facilities to be granted by Melwani to the company; and (b) although the solicitor may have explained the general nature of the deed to Goh, the solicitor did not explain the mortgage deed sentence by sentence to her in Hokkien.

Per curiam

Solicitors should exercise extra care in dealings with elderly or illiterate persons, particularly when such persons were assuming responsibilities or liabilities of others. It was vitally important to ensure that such a person fully understood what he was about to do and that there was no undue influence or deception. Only a disinterested person should be asked to interpret. When a solicitor was acting for all parties on a transaction he had to be conscious of a conflict situation arising and should not hesitate whenever there was a reasonable doubt to ask the person to seek independent legal advice.

- **Oversea-Chinese Banking Corp Ltd v Tan Teck Khong and Another (committee of the estate of Pang Jong Wan, mentally disordered) and Others [2005] 2 SLR 694**

Facts

The plaintiff was the successor-in-title of Keppel TatLee Bank Ltd ("KTB"). The first defendants, Tan Teck Khong and Tan Teck Hing, the first and second sons of Pang Jong Wan ("Mdm Pang"), were sued in their capacity as the committee of Mdm Pang's estate. The second defendant, Tan Pian Meng, is Mdm Pang's third son. The third defendant, M/s Ng Yap & Partners, acted for KTB, Mdm Pang and the second defendant in the execution by Mdm Pang of a mortgage over her property ("the Property") in favour of KTB to guarantee certain loans granted by KTB to the second defendant. Ms Annie Yap ("Ms Yap"), a partner in the third defendant, was the solicitor who acted for Mdm Pang and the second defendant in relation to the mortgage.

Mdm Pang was not in good health when she executed the mortgage, having previously suffered two strokes. The first defendants were subsequently appointed the committee of her estate under the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed). The first defendants had instituted an earlier action against the second defendant alleging that Mdm Pang had executed two wills and the mortgage **while physically and mentally incapacitated, and under the undue and improper influence of the second defendant.**

The first defendants sought, *inter alia*, orders that the second defendant repay all moneys he borrowed from KTB to secure the discharge of the mortgage, and declarations that the two wills were null and void and of no effect. **It was held that even if Mdm Pang had the mental capacity to execute the mortgage and her second will, she had been unduly influenced by the second defendant to do so.** The two wills were declared null and void, and the second defendant was ordered to account to Mdm Pang the amount owing to the plaintiff under the facilities granted. Notably, the first defendants did not bring either the plaintiff or the third defendant into the earlier action.

In the present action, the plaintiff claimed against the first and second defendants for delivery of vacant possession of the Property, and an order that the mortgage be enforced by the sale of the Property and payment of the sum due under the mortgage. **In the contingency that the mortgage was unenforceable, the plaintiff claimed against the third defendant for allegedly failing to discharge its duty as the plaintiff's solicitors by failing to take sufficient and adequate steps to ascertain whether Mdm Pang had the mental capacity and was acting on her own free will when she executed the mortgage.** The questions also arose as to whether the decision in the earlier action was a decision *in rem*, whether it gave rise to *res judicata*, and whether it estopped the parties from taking positions inconsistent with the earlier action.

The first defendants claimed that they and Mdm Pang were not liable under the mortgage and sought to rely on the earlier action, alleging that the third defendant did not exercise reasonable care and diligence to ensure that Mdm Pang had the mental capacity to understand and execute the mortgage. There was no allegation of her having acted under the undue influence of the second defendant. The first defendants also counterclaimed against the plaintiff for a declaration that the mortgage was null and void and that it be set aside.

The second defendant accepted that the mortgage was valid and enforceable by the plaintiff, and wanted the plaintiff to recover its loans to him from the proceeds of the sale of the Property.

The third defendant pleaded that Mdm Pang had appeared to be of sound mind and had acted of her own free will, having understood the nature and contents of the documents she had executed. In the alternative, the third defendant claimed that the plaintiff's bank had caused or contributed to the loss suffered by the plaintiffs because the bank and/or its officers did not take reasonable steps to meet Mdm Pang personally regarding the mortgage, even though the plaintiffs were aware that Mdm Pang was the registered owner of the property.

Held, allowing the plaintiff's claim:

(1) The onus was on the plaintiff to prove that the mortgage was valid and enforceable, and if it was not, that the third defendant was negligent when it acted for the plaintiff and Mdm Pang in the execution of the mortgage. The onus was on the first defendants to prove that Mdm Pang executed the mortgage when she lacked the mental capacity to do so, or that she executed it while she was under undue influence from the second defendant, and that the mortgage was not valid and enforceable. As the second defendant accepted the validity of the mortgage, there was nothing in his defence that he needed to prove. The third defendant needed to make good its defence that it had properly carried out its professional duties. While the onus of proving negligence was on the plaintiff and

the first defendant who alleged it, the burden shifted to the third defendant to explain and justify its conduct in relation to the execution of the mortgage: at [18] to [21].

(2) The earlier action could not be a judgment *in rem* because it was not a finding as to Mdm Pang's mental capacity at that time. A person of sound mind could act under undue influence. The judge had limited himself to a finding that Mdm Pang had executed the will and mortgage while under undue influence, and had declared the wills null and void on that basis alone. The third defendant was not a party to the earlier action. Furthermore, the nature of the second defendant's alleged culpability for exerting undue influence with regard to the mortgage and the third defendant's alleged culpability in negligence were different, and they shared no common interest in that action. There was really no basis for raising any estoppel against the third defendant to prevent it from disputing that undue influence was exerted, or from refuting the allegation that it was negligent for not detecting it. The earlier judgement therefore bound only the parties therein (*ie*, the first defendants and the second defendant), and not the plaintiff or the third defendant. The plaintiff and the third defendant had to deal with the allegations relating to mental capacity and undue influence as though they had been brought up for the first time: at [23] to [27].

(3) The first defendants' defence failed because there was no evidence before the court on which a finding on Mdm Pang's mental condition could be made. This was a matter for which medical evidence was necessary, but no medical evidence had been adduced: at [28] and [29].

(4) Class 2(A) presumed undue influence occurred where there was a legally recognised relationship of trust and confidence or ascendancy between the complainant and the wrongdoer and the transaction was not readily explicable by the relationship of the parties. Where there was no such type of relationship between the parties, but there was a relationship of trust and confidence or ascendancy and a similar inexplicability for the transaction, that would constitute Class 2(B) presumed undue influence. When a claim was made on the basis of the presumption, there had to be proof of the existence of the relationship. When a Class 2(A) or Class 2(B) relationship was proved and the transaction was not readily explicable, a rebuttable presumption arose that undue influence had been exerted. The burden of proof was shifted to the wrongdoer to offer a proper explanation for the transaction: at [34] and [35].

(5) Mdm Pang and the second defendant were in a Class 2(B) situation. The transaction was manifestly one-sided and not readily explicable by the mother-son relationship. The mortgage Mdm Pang executed was clearly beneficial to the second defendant and disadvantageous to her. The second defendant did not seek to rebut the presumption of undue influence because he had not appealed against the earlier judgement, and had conceded in clear terms that he had exerted undue influence on his mother. Mdm Pang had therefore executed the mortgage under the undue influence of the second defendant: at [38] to [44].

(6) It had to be apparent to a prudent solicitor that particular care had to be taken when something as sensitive as undue influence by someone close to the client was being probed. That would at all times be a difficult task, and it would be impossible to do this properly in the presence of the interested party. Ms Yap did not have a private person-to-person consultation with Mdm Pang to ensure that she was acting of her own volition and that no undue influence had been brought to bear on her by the second defendant or

anyone else. **To the contrary, the second defendant was always present when Ms Yap spoke with Mdm Pang. This was particularly unsatisfactory when Ms Yap recognised at the time that there might have been undue influence:** at [49] and [50].

(7) A solicitor in the position of Ms Yap who was acting for a client like Mdm Pang should have: (a) had a private meeting with Mdm Pang; (b) explained the risks and liabilities she would be exposed to; and (c) advised her that she had the right not to proceed with the transaction: at [52] to [54].

(8) The manner in which the documents were explained to Mdm Pang before she executed them was unsatisfactory. Ms Yap had handed the documents to Mdm Pang's Hainanese interpreter and left him to explain them to Mdm Pang, without providing any input. When a solicitor advised a client on a document, the solicitor should not merely read it to the client, but should explain the document in a manner the client can understand, and if the client has any queries, give further explanation. Ms Yap should have explained the meaning and effect of the documents in a way that a lay person could understand, and have the interpreter translate that into Hainanese to Mdm Pang: at [55].

(9) In the earlier action, the first defendants sought to have the wills declared void, but not the mortgage. Instead, they wanted the second defendant to discharge the mortgage. By taking that position they were asserting that there was an existing mortgage to be discharged. By their actions, the first defendants had affirmed the mortgage, and by the affirmation, the first defendants' defence and counterclaim failed: at [58] to [61].

(10) Although the plaintiff had established that the third defendant was negligent, its claim for substantive relief failed because its rights under the mortgage remained intact when the mortgage was affirmed. Consequently, it would only be entitled to nominal damages against the third defendant: at [63].

(11) Where there were solicitors acting in a mortgage, the bank should rely on the solicitors, and not on its own officers. When the same solicitor acted for all the parties in a mortgage, the bank was entitled to rely on that solicitor. In any event, there was an underlying contradiction in the third defendant's allegation of negligence against the plaintiff. The third defendant could not complain that the plaintiff was negligent for not doing, through its officers, something which the plaintiff had instructed the third defendant to do on its behalf: at [68] and [69].

○ **Lee siew chun v sourgrapes packaging products trading 1993**

Facts

The plaintiff Lee sought to set aside a mortgage over a property which she and her late husband granted in their joint names to the second defendant bank OCBC. The mortgage was to secure a joint and several guarantee by them of facilities granted by OCBC to the first defendant Sourgrapes. Lee's son forged her husband's signature on the document and she signed after being told by her son that the document was a testimonial as to his character. The document was executed after her husband's death. The signatures were witnessed and attested to by a legal assistant in the employ of the third defendants. Sourgrapes did not enter an appearance. In a third party action, OCBC claimed an indemnity from the first and third defendants and the legal assistant. The third defendants further claimed indemnity or damages against the legal assistant in fourth party proceedings.

Held, dismissing the plaintiff's claim against the second defendants, allowing the second defendants' counterclaim, allowing the plaintiff's claim against the third defendants in part and allowing the third defendant's claim against the legal assistant:

(1) For relief on her plea of non est factum, Lee had to show that the document she executed was fundamentally different from that which she believed it to be and that she was not negligent in signing the document but took the precautions which a reasonably prudent person would have taken before signing it.

(2) On the facts, Lee's son tricked her into signing the mortgage and when she signed the last two pages of the mortgage document, she did not know the nature of the document. The documents Lee signed were fundamentally different from the documents she believed them to be. However, she was careless in signing the mortgage document. She deliberately chose not to read the pages she signed and relied instead on her son's explanation as sufficient without querying or checking, thereby depriving herself of the opportunity to be put on notice. Given that she was semi-literate in English and her working experience as a teacher, with a reasonable amount of common sense she should have realized that the pages she had been asked to sign were inconsistent with a testimonial. Lee bore the onus of proving that she was not careless and she failed to discharge it.

(3) On the facts, the legal assistant assumed the responsibility of acting as solicitor for Lee and her husband even though he had not met them and had not been contractually retained by them. It followed that the legal assistant owed Lee the same duty and standard of care he owed to a paying client. His conduct in signing the mortgage as a witness and issuing his attestation certificate was clearly negligent.

(4) It was no objection to Lee's claim in negligence that her loss was purely economic or that the statements made by the legal assistant were made to a third party resulting in financial loss to her. It was also clear that the legal assistant's negligence placed Lee in a position she should never have been in where she was at risk as a guarantor and mortgagor, and the only dispute was the extent of responsibility to attribute to him. The third defendants were vicariously liable for the legal assistant's negligence.

(5) However, Lee was contributorily negligent in executing the mortgage for the same reasons as those for which her plea of non est factum failed. Liability was apportioned in equal shares between Lee and the third defendants as employers of the negligent legal assistant.

(6) Although the third defendants did not plead contributory negligence and only applied to amend their defence to plead contributory negligence after the closing submissions, the balance of justice demanded that the amendment be allowed because the true defendant was the legal assistant, a personal litigant who would bear the primary responsibility for satisfying any judgment, and the plaintiff's plea of non est factum put the issue of her own carelessness at the forefront of the case. In any event, the third defendants had, in their original defence, pleaded that Lee recklessly or negligently signed the document.

(7) The legal assistant acted in breach of the implied obligations under his contract of employment with the third defendants that he would exercise reasonable skill and knowledge, care and diligence. The third defendants were therefore entitled to full indemnity from the legal assistant in the fourth party action.

- No undue influence – **Malayan banking v Hwang rose**

Held, allowing the bank's appeal in CA 89/96 and dismissing Hwang's appeal in CA 90/96:

- (1) Tan's failure to procure alternative financing arrangements was not caused or contributed to by any unhelpful or obstructive attitude or unreasonable conduct on the part of the bank, its officers or solicitors. The bank also gave Tan a reasonable opportunity to relieve the bank of their obligations under the standby letter of credit.
- (2) The bonds were bearer instruments and transferable by delivery, and a mortgage or pledge could be created thereon, depending on the intention of the parties. In this case, it was immaterial whether the bank held the bonds as a mortgagee or pledgee. In either case, the bank had an implied power to sell the bonds in the event of default by Hwang to pay the amount secured. The bank had given ample notice to the respondents to meet their obligations, and the bank were fully entitled to sell the bonds.
- (3) In selling the bonds the bank had a duty to act in good faith and to take reasonable steps to sell them at the true market value or the proper price prevailing at the time of sale. The respondents did not prove that the price of bonds was at the relevant time above that which the bank sold them.
- (4) On a natural construction of the guarantee it was a continuing guarantee. It remained in full force and effect after 7 April 1992 and covered the call made on the bank under the standby letter of credit after 7 April 1992.
- (5) **Each particular father and son relationship had to be looked at to see whether a presumption of undue influence arose. In this case, Tan Senior was an experienced businessman and knew the nature of the guarantee and the legal consequences of signing it. When Tan senior signed the guarantee he was not under any influence of his son and he exercised his judgment independently.**
- (6) As Tan was not the bank's agent and the bank had no actual or constructive notice of Tan's misrepresentation, the bank could not be responsible for any misrepresentation.

- husband and wife

- **Barclays bank v o'brien 1993** and **CIBC mortgages v Pitt 1993**
– where wfe can prove undue influence, may invoke defence against bank if –
 - Husb acting as agent fr bank in obt guarantee fr wife
 - Bank has actual or constructive notice of undue infl and x take reasonable stpes to prevent wife fr acting
- **ING Bank v Inselatu co pt ltd 2000**

Judgement:

-19. On the facts, the House of Lords held that the bank knew the parties were husband and wife and should therefore have been put on inquiry as to the circumstances in which the wife had agreed to stand as surety for the debt of her husband. The failure by the bank to warn the wife when she signed the security of the risk that she and the matrimonial home were potentially liable for the debts of the company or to recommend that she take legal advice fixed the bank with constructive

notice of the wrongful misrepresentation made by the husband to her and she was therefore entitled as against the bank to set aside the legal charge on the matrimonial home. I should add here that Lord Browne-Wilkinson, in summarizing his views (at page 431), extended the above stated principles beyond the husband-wife relationship to include cohabitants.

- **20. It would appear that their Lordships, both in the Court of Appeal and the House of Lords, were constrained to treat the wife with more "tenderness" on the justification that (as shown at p 422 of the report) "although the concept of the ignorant wife leaving all financial decisions to the husband is outmoded, the practice does not yet coincide with the ideal. In a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions."**
- **21. The policy considerations that might have influenced the learned Law Lords would obviously not apply in every case and certainly not to the facts of the case before me, as will appear later in my judgment. It is important to take heed of the cautionary note sounded by the House of Lords to "keep a sense of balance in approaching these cases" and not allow a law designed to protect the vulnerable to render the matrimonial home unacceptable as security to financial institutions and, I would add, render the female partner in a relationship immune to legal liability. With the greatest of respect, I am not sure the courts here should impose a burden on financial institutions to ensure that in every husband-wife or cohabitee situation, where the transaction appears to be of no real financial benefit to the wife/cohabitee, the financial institution must arrange a meeting separately with the wife to warn her of her potential liability and to advise her to take independent legal advice. It may be taking rather too narrow a view of the marital relationship to look only at the apparent financial benefit to a spouse from a commercial transaction entered into by the other.** If the law should presume undue influence arising in such relationships (and the mother – son relationship as in *Lim Lie Hoa v Ong Jane Rebecca* [1997] 2 SLR 320), should it not likewise presume financial benefit accruing to a wife from the commercial (and therefore bread-earning) activities of the husband? If so, then a wife who stands as surety for her husband in a loan transaction should be presumed to derive at least an indirect interest in the funds being made available to the husband.
- 22. *Barclays Bank v O'Brien* has been followed recently in Singapore in the case of *Bank of India v Sujanani Thakur Rochiram & Others* (High Court Suit No. 600005/1998 - unreported). In that case, Lee Sei Kin JC found on the facts that a son had been subject to the undue influence of his father when he executed guarantees and mortgages required by the bank to secure the facilities granted for the use of the partnership business of his parents. From evidence adduced at the trial, the Court came to the conclusion that the son had been completely overwhelmed and dominated by the father and the bank had actual notice of the father's undue influence on the son.
- 23. The *Bank of India* decision is unique in its facts and I do not see how it assists the 3rd Defendant in the instant case. There is no evidence in the affidavits of the 3rd Defendant to show that, being the wife, she was so completely subjugated by the will

of the husband that she could do nothing but obey him, and that the Plaintiffs knew or ought to have known of these circumstances.

- ***No undue influence; Lack of witness' signature***
- **24. The facts of this case are clearly distinguishable from *Barclays Bank v O'Brien in any event.*** Unlike Mrs O'Brien, the 3rd Defendant was a shareholder as well as director of the 1st Defendants. Mrs O'Brien was misled by her husband on the effect of the document she signed to secure his debt. This is certainly not the case with the 3rd Defendant. I note that in October 1996 when she was called upon to sign the Deed of Guarantee, she was *de facto* free of the husband, having entered into the Deed of Separation just two months back in August 1996 which declares, among other things, that she and her then husband have agreed "to live and will live separate and apart from each other effective from 27th June 1996". Further, the 3rd Defendant was required to guarantee the debts of a company in which she had an interest and continues to do so up to the hearing of this appeal although her interest and involvement in the business were significantly less than the husband's. It cannot therefore be said that she secured no financial benefit from the facilities offered to the 1st Defendants for which she stood surety. In fact, as the Deed of Separation contemplates the transfer of her shareholding to her youngest daughter upon her attainment of the age of majority and of whom the 3rd Defendant has custody, I would imagine that, as the mother, she would seek to ensure that the shareholding to be given to her child would not be worthless.
- 25. The 3rd Defendant is a businesswoman, being the director and majority shareholder of another company, Noahtu Trading Pte Ltd. and must be aware of the obligations she undertook as surety. As disclosed in the Deed of Separation, she also held the entire legal and beneficial interest in another company called Tamtu Investment Pte Ltd. She was therefore no stranger to the world of bankers and financial obligations. She had in fact participated in the management of the 1st Defendants' business and had communicated with the Plaintiffs herself in her capacity as director. It was also revealed that after the facilities under the 27 January 1997 offer had been utilized, she even had the business acumen to instruct the Plaintiffs to convert the outstanding debt from US\$ to Japanese Yen which unfortunately for the Defendants caused the debt to increase due to the appreciation of the Yen *vis-a-vis* the US Dollar.
- 26. It was not the wife's case that she did not sign the guarantee or even that she did not know what she was signing. She was well aware of the obligations that she undertook. Hence, the fact that the guarantee document does not bear the signature of a witness is completely immaterial to the case.
- 27. The affidavit of the intended witness, Diana Tee, is however significant as it shows that at the time the guarantee was signed by the wife there were no circumstances out of the ordinary that should have put the Plaintiffs on notice of the alleged undue influence operating on the 3rd Defendant. Neither did the 3rd Defendant allege that anyone else other than herself knew what pressures she had been facing.
- 28. In my opinion, no undue influence has been shown by the 3rd Defendant and even if the 2nd Defendant had attempted to exert such influence on her, it could have had no effect on her free will whether to sign or not to sign the Guarantee.

- **Dunbar bank v nadeem 1997** – whether husband acting as bank’s agent
- constructive notice means knowledge of 2 essential factors:
 - Transaction on face not to financial disadvantage of wife
 - Substantial risk of undue influence or misrepresentation by husband
- Whether transaction of benefit to wife – English cases
- Steps that bank should take – **royal bank of Scotland v ettridge no 2 (1998)**
- Where solicitor conscious of conflict, should not hesitate to ask person to seek independent advice
- No undue influence exercised

Oversea-Chinese Banking Corp Ltd v Chng Sock Lee and Another [2001] – difference between familial relationship and relationship in family business

Facts

The first and second defendants (respectively, ‘Chng’ and ‘Tan’), who were also mother and son, were the sole directors of a company (‘GDPL’). The plaintiffs (‘OCBC’) granted banking facilities to GDPL, which was secured by the personal guarantees of the defendants, as well as GDPL’s mortgage of certain properties.

GDPL defaulted on the overdraft facilities and OCBC claimed against the defendants, who denied liability on four grounds. First, the guarantee was voidable as it was signed under the influence of Tan’s father (the ‘father’) of which OCBC had constructive knowledge. Secondly, OCBC were aware of but had failed to disclose to them special circumstances which diminished the equity which GDPL had in the mortgaged properties. Thirdly, OCBC and GDPL had varied the principal contract such that it was substantially different from what they had guaranteed. Finally, OCBC had allowed GDPL and/or the father to make unauthorised withdrawals from GDPL’s account.

Held, **allowing the plaintiffs’ claim:**

(1) The father had not exerted any undue influence on the defendants. Both defendants knew that they were signing the guarantee for GDPL, and expected to profit from the property projects GDPL was involved in. Further, as GDPL was a family enterprise, there was no reason why the father would want to exploit or victimise them.

(2) OCBC did not have constructive knowledge of any undue influence, or of any circumstance that ought to have alerted them to it. OCBC’s solicitor did not witness any pressure being exerted by the father on the defendants when they signed the guarantee, and she did not regard the father as being extremely dominating as well. She had clearly and fully explained the legal ramifications of the guarantee to Chng. Since she was the only person through whom the defendants could impute knowledge to OCBC, it followed that OCBC could not be affected by any constructive notice.

(3) The signing of the guarantee was not manifestly disadvantageous to the defendants. There were the usual risks inherent in the venture, but they were not exploited or victimised, and there was clearly no disadvantage to them.

(4) OCBC had not failed to disclose unusual features existing prior to or at the time when the guarantee was signed. It could not be said that OCBC failed to disclose the sale of the properties, and reduce the overdraft with the progress payments, as the defendants

themselves had signed the sale and purchase agreements, and did not notify OCBC when progress payments were banked in. In the absence of any special arrangement, OCBC could not be expected to monitor each payment in by GDPL as they handled numerous such transactions daily.

(5) OCBC did not vary the principal contract. The facility agreement operated as an overdraft facility as well, and it was not for OCBC to check the purpose of each withdrawal so long as it was within the limit and properly mandated, which they were.

(6) OCBC did not facilitate unauthorised withdrawals by GDPL and/or the father as the account functioned as an overdraft account, and did not restrict withdrawals so long as they were within the limit. However, the four withdrawals with only the father's signature were unauthorised and should be deducted from the claim.

Per Lai J:

Although a contract of guarantee was not one where both parties must act with utmost good faith, there was however a duty not to misrepresent, by suppression of a falsehood in order to suggest that a particular factual issue in question was in fact true. Our common law accepted the principle requiring a beneficiary of the guarantee to disclose to the proposed surety 'unusual features' relating to the transaction with the principal obligor.

Standard Chartered Bank v Uniden Systems (S) Pte Ltd and Others [2003]

Facts

The first defendant ("the Company") was a customer of the plaintiff ("the Bank"). The second defendant ("Tan") was the managing director of the Company. The third defendant ("Choo"), a degree-holder director of the Company, was the wife of Tan. The Bank claimed against the Company as principal debtor, and against Tan and Choo as guarantors, a total sum of \$3,691,164.23 in respect of banking facilities, interest and costs. The Bank obtained judgment in default against the Company, and a summary judgment against Tan. The trial here was confined to the Bank's claim against Choo. Choo admitted signing the guarantee but alleged that the Bank's solicitor neither explained to her the nature of the documents nor advised her the consequences of signing the guarantee. Choo also alleged that she was under the undue influence of Tan when she signed the guarantee.

Held, allowing the plaintiff's claim against the third defendant:

(1) Choo knew that she was signing a guarantee as the Bank's solicitor would have mentioned to her the nature of the documents in passing. However, as she was not told, Choo did not appreciate the risks and consequences of signing an unlimited liability guarantee: at [68].

(2) **There was no actual undue influence, given that the Bank's representatives did not perceive any intimidation or overbearing or bullying conduct on Tan's part whenever they saw him with Choo: at [69].**

(3) **Choo would still have signed the guarantee even if she had been advised of the risks involved, as she willingly accepted Tan's dominance of her, trusted Tan and had complete faith in him, and did not think that Tan would put her in a risky**

position. Her will was not “overborne” when she signed the guarantee : at [70] to [71] and [73].

(4) Tan’s business was the source of the family income, and it was in Choo’s interest to support the business. The signing of the guarantee was not manifestly to her disadvantage: at [72].

(5) Even if Tan did exercise undue influence on Choo when she signed the guarantee, the Bank had neither actual nor constructive notice of his undue influence. There was nothing out of the ordinary in the couple’s relationship to warrant the Bank conducting further investigations before the signing of the guarantee: at [74].

[Observation: A solicitor who acts for both mortgagor and mortgagee in loan transactions is in a conflict of interest situation, notwithstanding that this is a common (albeit not commendable) practice in Singapore: at [65].]

The Bank of East Asia Ltd v Mody Sonal M and Others [2004]

Facts

The plaintiff, a bank incorporated in Hong Kong with a branch in Singapore (“the Bank”), commenced a suit against three members of a family (“the defendants”) in respect of a joint and several guarantee given by them to the Bank to secure overdraft facilities extended by the Bank’s Singapore branch to MTM Trading Pte Ltd (“the Company”). The defendants were directors of the Company. The first and third defendants were also shareholders of the Company. The Company had mortgaged to the Bank an apartment (“the Property”) to secure its own indebtedness. The Property was sold at a public auction for \$1.14m. The Company had been wound up prior to trial. The Bank claimed for the sum of \$639,293.19, being the balance owing after the net proceeds of sale of the Property had been applied in payment of the Company’s outstandings to the Bank and interest thereon. The defendants alleged that they had not been given a breakdown of the sum demanded from them despite numerous requests. The first and third defendants, the daughter and wife of the second defendant respectively, further pleaded that the guarantee was procured by the undue influence of the second defendant over them. They argued that the Bank should be fixed with constructive notice of the circumstances, as it did not take steps to satisfy itself that their agreement to stand surety had been properly obtained.

The defendants counterclaimed for \$310,000 in damages, being the difference between the alleged prevailing market price of the Property at the time of the auction of \$1.45m, and the actual price fetched of \$1.14m. They alleged that the Bank, by selling the Property at the auction despite being informed that there was a potential buyer willing to pay \$1.45m, breached a duty owed to the Company as mortgagor and to themselves as guarantors, to act in good faith and take reasonable steps to obtain the best price obtainable at the time. The Bank had also not acceded to the second defendant’s request that the reserve price be set at no lower than \$1.45m and to postpone the auction if the price was not reached. In the event, the Property was sold at the auction to the same prospective buyer who allegedly had been prepared to pay \$1.45m, and was resold four months later for \$1.36m.

Held, granting judgment for the plaintiff and dismissing the defendants’ counterclaim:

(1) The defence that the defendants had not been given a breakdown of the sum demanded had no merit. The Company had been provided monthly statements of account. The defendants as directors of the Company knew, or ought to have known, the state of the accounts. In any case, the Bank had annexed to their reply to the Statement of Claim detailed statements of account which were not challenged at the trial: at [3].

(2) The first and third defendants gave the guarantees as directors of the Company, and not to secure the indebtedness of the second defendant or a company in which he held an interest. As shareholders, they stood to gain if the Company used the facilities provided by the Bank advantageously. In these circumstances, the Bank was not put on inquiry, and accordingly could not be fixed with constructive notice for not taking steps to satisfy itself that their agreement to stand surety had been properly obtained: at [11] to [12].

(3) The counterclaim was misconceived. Although the Bank's alleged breach of duty could be used as a defence in equity to set off the alleged loss in the sale against the amount claimed under the guarantee, it could not form the basis of a counterclaim. The defendants as guarantors had no right to the equity of redemption: at [23].

(4) The Company had repeatedly made promises to the Bank that it did not honour. In the circumstances, it was understandable that the Bank refused to believe the second defendant when informed that there was a potential buyer at \$1.45m and pressed on with the auction. There was nothing to suggest that the Bank had acted in bad faith or failed to take reasonable steps to obtain the true market value of the Property at the time of sale. Therefore, the defendants did not have an equitable right of set-off: at [31] and [34].

- Beware of suits against prov negligent advice – **bank of baroda v rayarel 1995** and **banco exterior international v mann 1995** – burden of ensuring no undue inf shifted fr bank to sokicitors giving advice and prucing signatures – applied in **barclays bank v thomson 1997** and **Kenyon- brown v desmond banks 1999**

Basic terms of guarantee

1. Consideration clause

- **Burton v gray** – Memorandum worded ‘in consideration of ur company lending to Burton of thye sum of 1000 pounds I deposit with you several docs as security – debtor’s acct overdrawn to amt less than a thousand, held tt bankers had no valid security because cond precedent not fulfilled
 - Therefore such term not suitable for bank seucirty form
- Consideration onky if bank contg to meet cheques but if facility fully withdrawn then problem since antecedent debt not valuable consideration for guarantee
 - **Indian overseas bank v lim hug hiong 1990** – dir signed banjk gguarantee after loans disbursed; no further advances therefore no consideration for guarantee and bank;s claim against director failed
 - **Overseas union bank v lea tool 1998** – similar
 - Facts: In 1991, the plaintiff bank granted certain facilities to a company on the security of a joint and several guarantee signed by the

directors of the company, Tham and Li. When Li was removed as a director and the defendant Lew appointed in his place, the bank wanted Lew to be a guarantor in addition to Tham and Li. As required by the bank, a directors' resolution was passed in terms that the facilities were to be secured by the continuing joint and several guarantees of Tham, Li and Lew. In 1992, Lew signed a guarantee, in exactly the same standard form as the one signed by Tham and Li, on his own. The company defaulted and the bank brought this suit against all three guarantors. The bank relied on the 1991 guarantee against Tham and Li, and on the 1992 guarantee against Lew. The question was whether Lew was bound by the 1992 guarantee.

- Held, dismissing the plaintiff's claim:
 - (2) Alternatively, the 1992 guarantee was void for lack of consideration, as the facilities granted to the company had been fully drawn down when Lew signed the document. The 1992 guarantee was not a deed because it was not executed under seal. Merely signing on a blank space opposite the words 'signed, sealed and delivered' was not sufficient evidence that Lew intended to sign and deliver the document as a deed.
 - *Malayan banking v chong hin trading* 2001 – Malaysian HC to consider whether valid consideration where guarantee executed after loan agreement made but before loan disbursed – tem tt guarantee be procured; cort held tt loan agrement with conds yet to be performend cld x be termed as past consideration where execution of guarantee wa itself precond for release of loan
- Past consideration no consideration but forbearance to sue or extension of repayment date at guarantor's request wld be
- Subseq advances also
 - 'guarnatee given in consideration of bank making or contg advances or otherwise contg credit etc'
 - *overseas union bank v lew keh lam* 1999 – karthigesu JA – correct tt contg guarantees cover past and future facilities granted and therefore have valid consideration – guarantor does get sth ie grant of future facilities. Promise of this constit the consideration and not the subj matter f the promise. Do not confuse performance with consideration.
 - Followed in *empire international holdings v mok kwong yue* 2004 – tan lee meng J held tt for contg guarantee, promise to advance additional funds may be consideration for promise to guarantee repayment of debts already incurred and future advances
- if executed under seal, no consideration reqd – *devpt bank of sginapore v yeap teik leong* 1988
- *elephant gypsum v elevic trading* 2001 – Malaysian HC considered valiidy of signed but undated guarantee with no specified monetary limit –
 - court held tt undated guarantee cld be valid since signed by gurantors before stamped and no fraud or misrep

- lack of specification of limit could have rendered guarantee unlimited guarantee which would have been void at law
- must state correctly whose credit to be secured by guarantee – where in consideration of loan to A, unenforceable if advances made to B and not A: *K-Rex Finance v Yap Swee Hong* 1990

2. operative clause

- clause 1
- guarantees guarantor's liability
- 'we will pay to you on demand' etc
- period of limitation is not applicable to contracts – s6 Limitation Act is 6 yrs
- common law
 - where no time for repayment specified or simply expressed repayable on demand, cause of action of lender is accrued and time runs – *Tay Ivy v Tay Joyce* 1992
- exceptions
 - where guarantor undertakes to pay on demand, demand is condition precedent to liability and bank's cause of action only accrues when demand made and not complied with – *Re Brown's Estate* 1893

3. Continuing security

- clause 3
- ensures that principal debtor's total liability is secured i.e. security diminishes on each repayment
- continuing guarantee rather than specific guarantee – covers fluctuating or running account
- specific – advance of specified sum or for specific purpose
- repayment of specific sum or achievement of specified purpose discharges guarantee

4. indemnity provision

- banks will word a guarantee to take effect as guarantee and indemnity
- clauses 9 and 22

5. power to vary securities, grant time to and compound with debtor etc

- usu discharged in whole or in part in no of situation
- clause 8 – guarantee not prejudiced, diminished or affected in any way and not released in circumstances set out in clause 8

6. borrower's incapacity

- guarantor will be discharged if loan not recoverable from principal debtor on account of his incapacity, disability or company's irregular borrowing powers
- see 8f and 8g

7. unfair preference or undervalue

- if borrower pays debt, guarantor is discharged from liability
- but if payment by borrower amount so unfair preference or undervalue and set aside, bank will reserve right to recover guaranteed debt from guarantor
- clause 10

- clause 13 – preserves liab when change occurs in constin of borrower or bank

Execution of Guarantee

1. Formalities

- s6 civil law act
 - o incorp s4 statute of frauds 1677 – to be in writing and signed by guarantor or someone lawfully authorized by him
- witness by sol acting for guarantor
- avoid handing form to borrower to get signature in cxase of misrep or undue influence
- note possib of forgery – even co surety will not be held liable in this case – james graham v southgate

2. all guarantors must execute jt and several guarantee

- otherwise those who have already signed not bound
- Indian bank v G ramachandran 1991 – goh phai cheng JC – jt and several guarantee implies tt not binding unless executed by all htose named as guarantors therein – nto defence but condition precedent
- For creditor to whos tt gurantors who have signed have consented ot dispense with execution of document by other or others – Indian overseas bank v lim hug hiong 1990
- Indisan bank v raja suria 1993 –

Facts

The company Wesmapack requested the appellant Indian Bank for overdraft facilities to be secured, inter alia, by the personal guarantee of all its directors. The seven directors were named in Indian Bank's standard form of guarantee as joint and several guarantors of facilities granted to Wesmapack. A guarantee dated 19 January 1982 ('the first guarantee') was signed by the first six directors. Wesmapack drew on the overdraft facility on 1 February. On 2 February Indian Bank sent a sanction ticket to Wesmapack stating as security for the facilities the personal guarantee of all directors. The seventh director's signature was appended to a separate guarantee form dated 14 March naming only the seventh director as guarantor ('the second guarantee'). Wesmapack defaulted on repayments and Indian Bank sued all seven directors on two guarantees which they asserted constituted one transaction. The High Court dismissed the claim (see [\[1991\] 3 MLJ 241](#)), and Indian Bank appealed.

Held, dismissing the appeal:

- (1) The two guarantees could not be read together as part of one transaction. It could only be one transaction if there was some express or implied reference in one document to the other. As there was no incorporation by reference of either one of the guarantees into the other guarantee and was no evidence to show that the two were related, the one transaction principle was inapplicable here.
- (2) All co-sureties of a joint and several guarantee had to sign the guarantee unless it was shown that there was no such intention or that the requirement was waived. The trial

judge found that two of the six directors had been unaware at all times that the seventh director had not executed the first guarantee and that it was never their intention to waive the requirement that all seven directors sign the guarantee. The action therefore failed because there was no single guarantee which all the co-sureties executed.

- Hong loeng finance v goh khim teik 1994 –

Facts

The plaintiff finance company Hong Leong granted a \$4m loan to a company. The loan was secured by a guarantee executed by one Lim, the first defendant Goh, and the second defendant Chan on the understanding that two other directors, JL and GM, would also execute the guarantee. Only Lim and the two defendants executed the guarantee and the names of JL and GM were deleted. The company defaulted and was eventually wound up. Hong Leong commenced this action against the defendants, Lim having absconded. Chan admitted the execution of the guarantee but argued that it was intended that the guarantee also be executed by the two persons and since neither of them executed the guarantee, he was not liable under the guarantee.

Held, dismissing the plaintiffs' claim:

(1) Where a surety executed a document in the belief derived from the form of the document that it would be executed by all the sureties named in the document, he was relieved from his obligation if all the others did not sign.

(2) As far as Chan was concerned, he executed the guarantee on the basis or understanding that all five persons would sign the guarantee, and as JL and GM did not execute the guarantee, he was not bound by the guarantee.

- CGU international insurance v quah boon hua 2000 -

Facts

The plaintiffs were an insurance company who issued a performance bond to a company, Low Keng Huat (S) Ltd, at the request of the three defendants. The first two defendants were directors of the third defendants, Hua Tong Marble Works Pte Ltd (“Hua Tong”). Low Keng Huat (S) Ltd called on the performance bond and the insurance company paid on it. In this action, the insurance company sought reimbursement from the three defendants based on a letter of indemnity signed by them. There was a third director of Hua Tong who had not signed the indemnity. However, provision had been made in the letter of indemnity for all three directors of Hua Tong to sign. This action proceeded only in respect of the first defendant because the second defendant had been adjudicated a bankrupt while judgment in default of appearance had been entered against Hua Tong. The first defendant told the court that he had signed the letter only because the second defendant had told him that all the directors of Hua Tong would sign. He said that as he was only a 4.9% shareholder, he would not have signed if he had known that the third director was not going to sign.

Held, dismissing the plaintiffs' claim:

(2) The crucial test for such letters of indemnity was:- what was the intention of the parties? In this case, by making provision for all three directors of Hua Tong to sign, the

insurance company were representing to the first defendant that they required all three directors of Hua Tong to sign the letter of indemnity. **The first defendant signed the document under the impression that all three directors of Hua Tong were expected to and would sign the document. The first defendant, as a minority shareholder, would not have signed unless all the directors were signing. As contrary to the intention of the parties, the letter of indemnity was signed by only two directors, that indemnity would have no legal effect against the first defendant** (see ¶ 10).

- Overseas Union Bank v Lew Keh Lam [1999]

Facts

The appellant Overseas Union Bank ('OUB') had been granting Lea Tool & Moulding Industries Pte Ltd ('the company') banking facilities. In return, the directors would sign a guarantee as security. In 1992, the respondent Lew was appointed a director. He signed a guarantee, identical to the form signed by directors Tham and Li in 1991. The company defaulted and OUB claimed for money owed by the company from the three guarantors. OUB relied on the 1991 guarantee for its claim against Tham and Li; and the 1992 guarantee against Lew. The High Court ruled that OUB was not entitled to claim from Lew. First, Lew was to join Tham and Li as joint and several guarantors. Since all three did not sign on the same guarantee form, such a guarantee was invalid. Second, there was no consideration for Lew's promise to be a guarantor. The facilities granted by UOB had been fully drawn down and no new facilities were granted. UOB appealed. Lew became a bankrupt. He filed a motion to strike out UOB's appeal on the ground that UOB had failed to obtain leave of court before commencing the appeal against him pursuant to s 76 of the Bankruptcy Act.

Held, allowing the appeal and dismissing the respondent's motion:

(1) The court would construe the objective intention of the parties. On the facts, only Lew's name was on the 1992 guarantee form. There was no ambiguity that the form was being used as a sole personal guarantee. Further, the fact that UOB had filed a separate claim against Tham and Li as joint and several guarantors showed the objective intention of the parties was to create a separate personal guarantee against Lew.

(2) The guarantee signed by Lew was a continuing guarantee. As continuing guarantee secured past and future grant of facilities, it had valid consideration. The fact that UOB had not actually granted new facilities was only relevant to the issue of the performance of the contract and not the validity of the consideration. Thus there was a valid personal guarantee created between UOB and Lew.

(3) Leave to proceed with the appeal ought to be given retrospectively.

Partnership guarantee

- Bank of Scotland v Henry Butcher 2001 – HC England determined that claimant bank entitled to enforce partnership guarantee not signed by all of partners against partnership and individual partners
- Facts were that no resolution passed but partnership fully aware of its existence and it was in force

- Hence reasonable to imply that all partners had acquiesced in giving of guarantee
- Parties to guarantee were partners and partnership itself
- Affirmed by CA

CPF BOARD'S STATUTORY CHARGE

Introduction

- Central Provident Fund ("CPF")
- Contributions are deductible monthly from the wages of an employee
- Monies standing in the account of each CPF member are maintained in the following accounts:
 - a) An ordinary account
 - b) A medisave account; and
 - c) A special account
- Monies standing in the account may be withdrawn for several purposes, one of which is for the purchase of residential or non-residential property
- • Procedure for withdrawal
 - Application form – to confirm that all info is correct, check with clients! Get hard copy printed out and get client to sign it
 - Valuation Report
 - Proof of relationship (for residential properties) (but not relevant anyway since commercial properties x use CPF anyway)
- • Statutory Charge
 - this is created by statute
 - Charge is created by statute – S21(1) CPF Act – the monies are withdrawn, charge is created
 - Charge is notified on land register
 - ANC can be **registered against land register** but mortgage x if sep title not issued yet (ANC = application to notify charge)
 - Charge can be notified even if separate title has not been issued yet

Reqs by the Central Provident Fund Board ("the Board"):

- 1) The Board's letter of approval;
 - Board's letter of approval to determine the type of scheme governing the member's use of his CPF savings
 - Residential Properties Scheme ("RPS") allows the use of CPF savings for the purchase of private residential properties for home ownership or investment: Central Provident Fund (Residential Properties Scheme) Regulations (Rg 6)
 - Non-Residential Properties Scheme ("NRPS") allows use of CPF savings to purchase non-residential properties in Singapore for investment or for the

- member's own use: Central Provident Fund (Non-Residential Properties Scheme) Regulations (Rg 10)
- RPS does not govern the purchase of HDB flats, the latter is governed by the Central Provident Fund (Approved Housing Schemes) Regulations (Rg 12)
 - the Board requires applicants to submit the necessary application forms
 - the properties must be built on freehold or leasehold land which should have a remaining lease of at least 60 years
 - a CPF member, who is not an undischarged bankrupt, may withdraw his CPF savings to:
 - a) make direct payment to a property developer or vendor;
 - b) redeem the whole or part of his existing housing or non-residential property loan;
 - c) pay the monthly instalments of the housing or non-residential property loan;
 - d) pay legal fees, stamp duty, transfer fees and other related costs
 - e) pay towards capital reduction of any loan used for the purchase of the property
 - CPF member may use up to 100% of his existing CPF savings in his ordinary account and future monthly CPF contributions that are paid into his ordinary account to purchase a residential property and/or to pay the monthly instalments of the housing residential property loan
 - With effect from 1 July 2006, CPF members will no longer be allowed to use their CPF savings to purchase non-residential properties
 - One-year time bar on the re-use of the CPF savings to purchase another property or to redeem another housing loan
 - Can only re-use his CPF savings plus the accrued interest which was refunded into his ordinary account provided there is a lapse of one year from the date of signing of the sale and purchase agreement of that property previously purchased with his CPF savings
- 2) the Board's standard statutory charge;
- Registration of Deeds system, will use a common law Instrument to Register Statutory Charge
 - Land Titles system, will use a Land Titles form of Application to Notify Charge
- a) Application to Notify Charge (ANC)**
- For notification of charge in land register
 - For priority against subsequent charges/mortgages
 - Consent of co-purchasers
 1. if there are multiple parties, all parties have to consent to the property being charged to the CPF
 2. however, the charge is only created, for the share of A's interest in the land ... as soon as A has repaid his CPF loan, then his interest is charge free, irrespective of whether the rest of them still have charges for their interests with the CPF
 - Registration requirements
 - Particulars of parties clearly indicating who is withdrawing CPF finds

- Interest claimed e.g. interest in Sale and Purchase Agreement for properties under construction
 1. interest has to be properly claimed
- Reference to MM I/10297R

b) instrument to register statutory charge

- same as Application to Notify Charge (ANC), but this is for common law
- have to insert root of title, the type of property

3) the Board's standard Confirmation of Priority Arrangements;

- **Prior** to 1 September 2002, CPF Board required a first charge over the property if CPF funds were utilized by the CPF member for the purchase of property
- Bank was required to execute a Deed of Arrangement or Instrument of Postponement to regulate the distribution of the sale proceeds in the event of a mortgagee's sale or an acquisition of the property
- **Change which took effect**, CPF Board no longer requires a first charge over properties which are purchased or refinanced
- Instead, bank who finances the purchase or refinances the housing loan will have the first charge over the property
- Parties are required to execute a new document called the Confirmation of Priority Arrangements instead of a Deed of Arrangement
- 3 different forms of Confirmation of Priority Arrangements
- To set out priorities between Bank and CPF Board, CPF getting first charge (though note that bank will get paid first ultimately)
- Priorities are as set out above

4) the Board's Instrument of Postponement (where applicable);

- If use loan then use CPF monies later on
- Although mortgage registered first and CPF charge second, parties agree it effective as if CPF charge registered first
- See sample if possible
- To be used when the (bank's) Mortgage is registered prior to the CPF Board's Charge.
- Purpose of the document is to put on the Register the correct priority between the documents – subsequently anyone reading the Register would know that the CPF Board's charge is 1st in time.
- Such a situation arises when the CPF funds are used to pay back the mortgage rather than towards the purchase price.
- Applicable for properties where separate title has been issued
- To be used where bank's mortgage is registered before the CPF charge, i.e. homeowner has sought loan from bank and executed mortgage before the CPF charge

5) the Board's Memorandum of Mortgage filed in the Singapore Land Authority - Memorandum I/10287R

- the Board does this in its letter of approval

- thus all covenants and conditions of the Memorandum of Mortgage I/10287R are deemed to be additional terms and conditions of the Board's charge and letter of approval
- details of Priority Arrangements between Bank and CPF Board set out in clauses 8 to 11 of the Board's MM
- Board's MM contains general provisions covering the member's obligations:
 - a) to pay all taxes and other outgoings;
 - b) to keep the property in repair;
 - c) to comply with all notices served by the authorities;
 - d) not to make structural alterations without the Board's prior consent in writing;
 - e) not to sell transfer assign or otherwise dispose of the property except with the Board's prior consent in writing;
 - f) not to create or make any further or subsequent mortgage without the prior consent in writing of the Board
- None of the terms in the Board's MM can be varied by the members
 - CPF charge still registered FIRST but notwithstanding, parties agree that where property sold and proceeds x enough to pay everyone, priorities set out in memorandum will be followed and bank gets first bite
 - Makes sense
- Only one CPF board, one set of CPF monies. But can change banks – so should be able to repay the bank even with CPF charge ranking above and then change bank

Important Points

- You can use your CPF savings, and the future monthly CPF contributions in this account to buy a property and/ or to pay the monthly instalments of the housing loan up to **100%** of the Valuation Limit. This Valuation Limit is the lower of the purchase price or the value of the property at the time of purchase.
- The Board will release the CPF savings (including the second 10% downpayment) only on completion of all legal documentation, and after you have paid the first 10% downpayment. You would also need to settle the cash difference between the purchase price and your CPF lumpsum and the loan. The Board must also be able to lodge a charge on the property.
- You can use your CPF savings to pay the outstanding legal and stamp fees relating to the purchase of the property. However, CPF savings cannot be used for the monthly service, conservancy and other charges relating to the use of the property.
- The Board requires a charge on the property before the CPF savings can be released.
- Immediate family members (i.e. grandparents, parents, spouse, children and siblings) may jointly use their Ordinary Account balances to buy the property. However, the total CPF amount withdrawn (lump sum and monthly instalments) by all the joint owners should not be more than the limit allowed. Joint owners who are

not using their CPF savings for the property must also be immediate family members.

- *Can I use my CPF savings for renovation, improvements and repairs to the property?* No. CPF savings cannot be used for such purposes as these are consumptive in nature.
- *I intend to build my own house. Can I use my CPF savings to pay for the land and construction cost of the house?* Yes, you can. However, if there is an existing property on the land, the property must be **100% demolished** as certified by an architect. You can only withdraw your CPF savings after the Temporary Occupation Permit for the house has been issued. As such, you need to obtain a loan to finance the construction first, and later apply to use your CPF savings to repay this loan.
- If you are using your own savings to pay for the land and construction costs, you can be reimbursed for these from your CPF savings provided the house is constructed after 1 October 1993, and construction has commenced within 6 months from the completion date of the purchase of the land.
- *Can I sell, mortgage or transfer my property that has been bought with CPF savings?* Yes, you can. However, you must obtain the consent of the Board before the property is sold, mortgaged or transferred. When the property you bought with CPF savings is sold or transferred, you have to return the CPF savings withdrawn and the accrued interest to your CPF account.

Priorities of Distribution of sale proceeds

- **Cpf always gets first charge over the property because of the cpf act.** However, that is on paper. In reality, priority is as follows below. The bank gets paid first.
- • Eg. for a residential property where the mortgage is an “open” mortgage, ranking is as follows:

1. Mortgagee’s 1st Outstandings- the loan provided to the mortgagor by the bank or other financial institution. Pure housing loan + interest payable on housing loan

2. CPF 1st Outstandings- CPF money used to pay for purchase price/ instalments up to 100% of Valuation of Property (at the time of sale) plus legal and stamp fees in the purchase, and cost of upgrading under the HDB Main Upgrading Programme

3. In pari passu, (i) CPF 2nd Outstandings – beyond 100% of Valuation Limit⁸, and (ii) balance of interest still due to mortgagee after deducting interest paid above – this refers to the fact that upon default, extra interest is slapped on as a penalty. This extra interest is paid here. Pari passu means that they will be paid in proportion.

⁸ This happens when at the time of the sale, the property value is lower than when the mortgagor first bought it. So the COF 1st Outstandings will be the value of property at time it was sold. The CPF 2nd Outstandings will be the difference between mortgagor’s purchase price and value of property at time it was sold.

4. In pari passu, all costs and expenses and other money which CPF Board & Mortgagee are entitled to – cost and expenses of CPF Board and Bank in mortgage sale and discharge of charges

5. All other money, costs and expenses which Mortgagee is entitled to – remember, in an *open* mortgage, the Mortgagee has been offered other facilities by the bank, e.g. overdraft facilities and credit card facilities. These are to be paid here.

- Mortgagee's 1st outstandings = outstanding housing loan + interest on HL
- CPF Board's 1st outstandings = CPF principal sum up to 100% of Valuation Limit + CPF used for stamp duty, legal & survey fees
- CPF Board's 2nd outstandings = CPF principal sum beyond 100% of Valuation Limit (because using it to pay loan – to know the cap, see CPF board website) & accrued interest
- For more details please refer:
 - generally to MM I/10287R, &
 - in particular to Clauses 8.1, 9.1(b) & 9.1(i) to (n). 25
 - ⇒ The CPF Board has put in the priority between the CPF funds and the bank loan into the CPF's Memorandum of Mortgage (Clause 8.1, read with definitions in Clause 9.1) ∴ a deed of arrangement is no longer needed.
- Note that a mortgage by the bank in the open format secures more than just the housing loan. It includes all facilities such as an overdraft, a furniture loan, etc. Such facilities are not given ranking in the CPF Board's charge – Clause 8.1 of the CPF Board's Memorandum of Mortgage only mentions the "property loan". A "property loan" as defined in Clause 9.1(i) is a fixed loan taken by the mortgagor to finance the purchase of the property.

Question

- Alan buys a property at \$980,000.
- He has at present \$320,000 available in his CPF to pay towards the purchase price.
- What is the quantum of loan that Alan can borrow?
- What are the considerations that the Bank may have in granting him the loan?
 - **can use cpf and loan up to 95 percent.**
 - 95 percent of 980k – 320000 = max amt of loan
 - but considerations – credit worthiness, ability to finance taking into acct other financial liab eg car/tax – look also at salary, disposable income – also look at track record of defaulting on other loans etc
- Completion of Alan's house is scheduled for 1st November 2006. Alan is selling his HDB flat, but completion of the sale will only take place on 15th December 2006.
- When the sale of the HDB flat is completed, Alan will refund to his CPF account, a sum of \$200,000.
- How can Alan make use of his CPF refund to reduce the loan on his house?

- Completion means must pay in full purchase price
- Various options to do so
 - Can use this to make capital reduction of the bank loan (or not)= two options
 - If do so, then 2 options
 - With loan amt reduced, if carry on paying **same amt of mthly instalment** calculated on bigger loan, will reduce the term of loan (will pay off faster) – discretion on bank to agree.
 - Or keep it at same length but mthly instalment to do down
 - Can don't do capital reduction and leave CPF money there – term of loan remains unchanged
 - With the money in CPF, can buy stocks and shares or maybe second property if earning capacity allows this
- Bank can also grant short term bridging loan with cond tt when flat is sold, this will go off to pay the bridging loan – check this out!

TERMS AND CONDITIONS OF THE CPF RESIDENTIAL PROPERTIES SCHEME

1. OBJECTIVE OF THE SCHEME

This Scheme has been introduced to help CPF members purchase/build private residential properties for their own occupation or for rental.

2. USE OF CPF SAVINGS UNDER THE SCHEME

- a) A member who is not an undischarged bankrupt is allowed to withdraw his CPF savings in the Ordinary Account :-
- i) to make direct payment to a property developer or a seller for the purchase of a property;
 - ii) to repay a housing loan taken for the purchase of the property ;
 - iii) to repay a housing loan taken for the purchase of land and/or for construction of a house on that land;
 - iv) to pay the legal costs, stamp duty and survey fees incurred in connection with the purchase, refinancing and/or construction of the house; and
- b) CPF savings can be used to pay the purchase price of a property after a member has paid the first 5% of the purchase price of the property with his own funds. In the case of purchase of a property under the Executive Condominium Housing Scheme Act, a member can use the housing grant to pay the downpayment at the time of signing the Sale and Purchase Agreement and after he has paid the 5% cash payment. However, further CPF savings, if any, can only be released after he has paid all the cash difference.

3. WITHDRAWAL LIMIT

Withdrawal Limit for property with remaining lease of at least 60 years

- a) Where a member has **purchased** a property **before 1 Sept 02** and entered into a loan contract with the financier for a housing loan before 1 Sept 02, he is allowed to use his

CPF savings in his Ordinary Account to pay up to 100% of the Valuation Limit of the property. If the housing loan is still outstanding when this limit is reached, he may continue to use his CPF savings if he has the Available Housing Withdrawal Limit (“AHWL”) to repay the housing loan.

b) Where a member has **purchased** a property and/or signed a new loan contract with the financier **on or after 1 Sept 02**, he is allowed to use his CPF savings in his Ordinary Account to pay up to 100% of the Valuation Limit of the property. If the housing loan is still outstanding when this limit is reached, he may continue to use his CPF savings up to the applicable Withdrawal Limit (“WL”) to repay the housing loan, provided he also has AHWL.

Withdrawal Limit for property with remaining lease of less than 60 years but at least 30 years

c) Where a member has **applied** for the use of CPF to purchase a property with **remaining lease of less than 60 years but at least 30 years** (at the time of application), he is allowed to use his CPF savings in his Ordinary Account up to the applicable WL to pay for the purchase price and the housing loan. The applicable WL is set at a level that covers the estimated depreciated value of the property when the member reaches 55 years of age. Please refer to page 5 for details of the applicable WL.

Restrictions on use of CPF for multiple property purchases

d) Where a member has used CPF for a property (HDB flat or private property) before 1 Jul 06, and applies to use CPF for another property purchased on or after 1 Jul 06, he is required to set aside the prevailing Minimum Sum cash component, or Minimum Sum cash component shortfall if he is aged 55 and above, before he can withdraw any excess in the Ordinary Account for the property. Savings in the Special Account (including the amount used for investment) and Ordinary Account can be used to meet the prevailing Minimum Sum cash component, or Minimum Sum cash component shortfall if he is aged 55 and above. The withdrawal limit for the second and subsequent properties will be set at:

- i) 100% of the Valuation Limit for properties with at least 60 years of lease, or
- ii) the applicable WL for properties with remaining lease of less than 60 years but at least 30 years.

4. PRIORITY ARRANGEMENTS BETWEEN CPF BOARD AND FINANCIER

a) Properties bought before 1 Sept 02 and/or loan contracts with financier signed before 1 Sept 02

When the property is sold, the sale proceeds will first be used to repay the CPF savings used for payment of stamp duty, legal costs and survey fees, and CPF principal sum up to 80% of the Valuation Limit before repayment of the balance CPF principal sum, outstanding housing loan, CPF accrued interest, outstanding housing loan interest, and the Board’s and financier’s costs and expenses and all other sums owing to the financier in that order;

b) Properties bought on or after 1 Sept 02 and/or loan contracts with financier signed on or after 1 Sept 02

When the property is sold, the sale proceeds shall be applied to repay the financier and the Board in the following order of priority:-

- (i) First - repayment of the outstanding housing loan;
- (ii) Second - repayment of CPF principal sum up to 100% of the Valuation Limit plus CPF saving used to pay the legal costs, stamp duty and survey fees;
- (iii) Third - Equal ranking (pari passu)
 - repayment of CPF principal sum beyond 100% of the Valuation Limit and CPF accrued interest;
 - repayment of outstanding balance of the housing loan interests;
- (iv) Fourth - Equal ranking (pari passu)
 - repayment of the Board's legal costs and expenses;
 - repayment of financier's legal costs and expenses;
- (v) Fifth - repayment of any other moneys owing to financier under the mortgage

5. TYPES OF HOUSING LOAN

The housing loan should be for a fixed term and be secured by a mortgage on the property, which is owned by the member.

In addition, CPF savings may also be used to repay the following types of housing loan:-

- a) a housing loan for a fixed term and is secured by a mortgage which resulted from a transfer of the initial housing loan from one lender to another, provided that the initial housing loan was secured by a mortgage on the property;
- b) a housing loan obtained from a bona fide employer and is secured by a mortgage on the property and the member is required to repay the housing loan by monthly instalments as stipulated in the agreement entered into with the employer;
- c) a housing loan granted on a non-checking overdraft account by a bank in Singapore and is secured by a mortgage on the property.

In cases where the member has completed the purchase of the property with a checking overdraft account, the amount of loan that is treated as the housing loan is the lowest outstanding amount of the overdraft from the time it was granted to the date of application for withdrawal of CPF savings. This portion of the loan has to be converted to a term loan before CPF savings can be used to repay the loan. The excess loan is deemed to be a non-housing loan and cannot be repaid with CPF savings.

6. CPF BOARD'S CHARGE ON THE PROPERTY

A charge will be filed by the Board on the property to secure the return of CPF savings withdrawn plus accrued interest.

7. MINIMUM PERIOD OF LEASE

- a) The Scheme applies only to properties in Singapore which are on freehold land or have remaining leases of at least 30 years.
- b) Member can apply to use CPF to buy property with remaining lease of less than 60 years but at least 30 years if the remaining lease can last him up to at least 80 years old.

c) In the case of joint owners for properties with remaining lease of less than 60 years but at least 30 years, the age of the youngest member will be used to determine the eligibility to use CPF as well as the applicable WL.

8. REFUND OF CPF SAVINGS UPON SALE OF THE PROPERTY

When the property is sold or transferred, the member is required to return to his CPF Account the CPF savings withdrawn plus accrued interest, if he has not yet qualified for withdrawal of CPF savings under Section 15 of the CPF Act.

9. JOINT USE OF CPF SAVINGS

a) Members of the immediate family e.g. spouses, parents, children and siblings; or
b) Non-related singles (unmarried, divorced with Decree Absolute obtained or widowed) are allowed to jointly buy a property using their combined CPF savings. The total amount that can be withdrawn by all the co-owners is subject to the conditions stated in paragraph 3 above.

For application under 9(a), co-owners of the property who are not using CPF savings should also be members of the immediate family. Members are required to furnish the Board with certified true copies of the documents (certified by members' lawyers) showing the relationships among the co-owners (for example, marriage certificate, birth certificates, etc.) at the time of submission of application.

For application under 9(b), the non-related singles can only use their combined CPF savings to buy a property provided that each of them:

- (i) is not currently using CPF for lumpsum or monthly payments for any existing property (private residential property or HDB flat); and
- (ii) has made the requisite CPF refunds for monies withdrawn for housing purposes (if any).

10. OTHER CONDITIONS FOR USE OF CPF SAVINGS

- a) The amounts approved for withdrawal can only be released when all the necessary documents required by the Board have been executed and the difference between the purchase price and the aggregate of the loan (if any) and CPF lumpsum approved for payment of the purchase price has been paid with the member's own funds.
- b) Members who are owners of HDB flats (including HUDC Phase 3 & 4 flats) are required to obtain approval from HDB, where applicable, regarding the purchase of their private residential properties.
- c) The Board reserves the right to value the property before releasing CPF savings. The valuation fees shall be paid by the member.
- d) If the member or the co-purchaser is a non-Singapore Citizen or Permanent Resident, he is required to obtain approval from the Land Dealings (Approval) Unit for the purchase of the property, where applicable.
- e) For properties which are under construction, CPF savings will be paid progressively to meet the progress instalments to the developers.
- f) For properties which are constructed by unlicensed developers, CPF savings can only be released when the properties are completed up to the roofing stage.

- g) The consent of the Board must be obtained before the property can be sold, transferred or mortgaged.
- h) The property shall not be used for any immoral, illegal or unauthorised purposes.
- i) CPF savings cannot be used to repay non-housing loans (i.e. loans not taken for the purchase of the property)
- j) CPF savings cannot be used for purposes of repairs and/or renovation of the property

11. OTHER CONDITIONS FOR USE OF CPF SAVINGS FOR MULTIPLE PROPERTIES

- a) Members who already own a property bought with their CPF savings and wish to buy another property with CPF savings on or after 1 Jul 06, will be given a grace period if they intend to sell the existing properties. The grace period is as follows:
 - i) 6 months from date of issue of TOP if the new property is under construction
 - ii) 6 months from date of completion of purchase if the new property is a completed property.
- b) Where members bought their first property before 1 Jul 06, and apply to use CPF for the first property only after making an application to use CPF for the second property bought after 1 Jul 06, the multiple property (MP) rule will apply to the second property.

12. ADDITIONAL CONDITIONS FOR USE OF CPF SAVINGS FOR PURCHASE OF LAND AND CONSTRUCTION OF HOUSE

- a) A member is not allowed to use his CPF savings to pay directly for the land cost and the construction costs of the house. He would have to use his own funds and/or a loan to meet the said payments first. When the house has been completed up to the Temporary Occupation Permit stage, the member can then use his CPF savings to repay the loan. Reimbursement of the land and construction costs paid by him with his own funds can only be allowed if the house is constructed on or after 1 October 1993 and the construction of the house has commenced within six (6) months from completion date of purchase of the land. If the construction of the house has commenced more than six (6) months after the completion date of purchase of the land, he can only use his CPF savings to reimburse himself for the construction costs.
- b) Requests for reimbursement of CPF savings have to be made within six months after the issue of the Temporary Occupation Permit. The reimbursement will be in the form of a one-time payment. Monthly withdrawals are not allowed. Requests for further reimbursement from the members' future CPF savings are also not allowed.
- c) Members can submit their applications, with the following documents, three months before the issue of the Temporary Occupation Permit:
 - (i) a valuation report of the completed property prepared by a licensed valuer. Valuation report prepared by your financier will be considered on a case by case basis. The Board reserves the right to re-assess the value of the property, if necessary.
 - (ii) breakdown of contractors' construction costs.
 - (iii) original receipts to show evidence of the payments made from your own funds (if applying for reimbursement).
 - (iv) financier's Letter of Offer for the land/construction loan(s).

(v) architect's certificate to confirm that the old house was 100% demolished.

13. PENALTY FOR FALSE DECLARATION AND MIS-USE OF PROPERTY

Any member who has purchased/built a property under the Scheme by making a false statement or declaration, or furnishing any information or document which he knows to be false in material or who allows such property to be used for any immoral, illegal or unauthorised purposes, or who contravenes any of the conditions under the Scheme, shall be guilty of an offence under the CPF Act. The Board shall in such circumstances, be entitled to seize the property and sell it to recover the amount of CPF savings that has been withdrawn plus accrued interest.

14. DEFINITIONS

For the purposes herein:-

“**date of purchase**” refers to the date of the option to purchase the property granted by the seller. Where there is no option to purchase, then the date of purchase is the date of the sale and purchase agreement of the property.

“**Valuation Limit**” means the value of the property (as assessed by the Board) as at the date of purchase or the purchase price, whichever is lower or such other value of the property as the Board shall determine in accordance with its policy prevailing at the time of the member’s application.

“**Available Housing Withdrawal Limit (AHWL)**” means the Ordinary Account balance after setting aside the prevailing Minimum Sum cash component. Savings in the Special Account (including the amount used for investment) and Ordinary Account are used to meet the prevailing Minimum Sum cash component.

“**Withdrawal Limit (WL)**” means the total amount of CPF savings that can be withdrawn by the member for the property under the Scheme as determined by the Board as at:

- (i) the date of the member’s purchase; or
- (ii) if the date of purchase is before 1 Sept 02, the date of the loan contract entered into by the member and the financier for financing the purchase; or
- (iii) if both the dates of purchase and the loan contract are before 1 Sept 02, the date of the contract on or after 1 Sept 02 between the member and the financier agreeing that the new priority arrangement shall apply; or
- (iv) if none of the above occurs on or after 1 Sept 02, the date of the member’s first refinancing of the property, in accordance with the table set out below:-

Date of purchase of property/refinancing	New CPF Withdrawal Limit
1 Sep 2002 – 31 Dec 2003	150% of the Valuation Limit
1 Jan 2004 – 31 Dec 2004	144% of the Valuation Limit
1 Jan 2005 – 31 Dec 2005	138% of the Valuation Limit
1 Jan 2006 – 31 Dec 2006	132% of the Valuation Limit
1 Jan 2007 – 31 Dec 2007	126% of the Valuation Limit
From 1 Jan 2008 onwards	120% of the Valuation Limit