DUTIES OF A MORTGAGEE AND A RECEIVER: WHERE SINGAPORE SHOULD AND SHOULD NOT FOLLOW ENGLISH LAW

Dissatisfaction with the lack of accountability in receivership has led the UK Government to virtually abolish the administrative receivership. This article argues that Singapore should address directly the criticisms of receivership and depart from English law where appropriate. It analyses the contents of the duties of good faith and care owed by a mortgagee and a receiver to the mortgagor. In particular, it argues that two principles may be deduced from case law and leading treatises on receivership law from which a general duty of care may be developed and proffers some suggestions on the interactions of the principles in a few typical factual scenarios.

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I. Introduction

1 In 2002, the UK Parliament passed the Enterprise Act 2002 which made substantial changes to its insolvency and bankruptcy laws. The Act virtually abolishes administrative receivership,[1] an enhanced form of receivership, in favour of the wider application of administration. History has come full circle. Administration, which became law in the UK in 1986, was initially conceived as a stop-gap measure for receivership by the Cork Committee ("Committee"). The Committee argued that receivership had been helpful to preserve viable business capable of being rescued and avoid wasteful liquidation.[2] Noting that this option was not available where the company had not granted a global security package or where the charge holder had

1 Enterprise Act 2002 s 250.

2 Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558) [495]. Cork's exaggerated representation of the virtues of receivership has been criticised: see Gerard McCormack, "Receiverships and the Rescue Culture" [2000] 2 Company Financial and Insolvency Law Review 229 at 236. But see J Amour & Sandra Frisby, "Rethinking Receivership" (2001) 21 OJLS 73 who put forth the "concentrated creditor governance" theory and argued that receiverships can generate significant and worthwhile efficiencies.

refused to appoint a receiver, the Committee recommended the enactment of a new corporate insolvency procedure, the administration, whereby an administrator would be appointed by the court to rescue the business of an insolvent company or achieve a better realisation of the company's assets than liquidation.[3] Since then, the rescue culture began to take root in English insolvency law,[4] and 16 years later, has ironically led to the virtual demise of administrative receivership.[5]

2 The reasons for the dissatisfaction with administrative receivership were set out succinctly in a white paper published by the UK Government as part of the preparations for the Enterprise Act 2002.[6] First, the large number of administrative receivership appointments in the early 1990s may have represented precipitate behaviour on the part of lenders, causing companies to fail unnecessarily.[7] Secondly, there was widespread concern that administrative receivership failed to provide adequate incentives to maximise economic value and minimise costs. Although recent case law has mitigated this problem to a certain extent,[8] an administrative receiver's principal obligation is to his appointer.[9] Thirdly, administrative receivership failed to provide an acceptable level of transparency and accountability to the range of stakeholders with an interest in a company's affairs, particularly the unsecured creditors.[10] It can be seen that the crux of the criticisms is that the duties that mortgagees and receivers owed to mortgagors and other interested parties are minimal and very lax.

3 To enable administration to take on its now broader role, changes were made to the objectives of administration. Whereas previously an administration order might be made to effect a business or corporate rescue or a more advantageous realisation of the company's assets compared to liquidation, with the administrator given the discretion to decide on which objective to pursue, the new law contains a hierarchical ranking of objectives involving a complex interplay between rescuing the company, achieving a better result for the company's creditors as a whole than winding up and realising property

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3 Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558) [497].

4 *Powdrill v Watson* [1995] 2 AC 394 (HL) 415 at 430, 442.

5 On receiverships and the rescue culture, see Gerard McCormack, "Receiverships and the Rescue Culture" [2000] 2 Company Financial and Insolvency Law Review 229.

6 *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234).

7 *Ibid*, at [2.1].

8 *Medforth v Blake* [2000] Ch 86 (CA).

9 *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234) [2.2] and [2.3].

10 *Id*, at [2.2].

to make a distribution to secured or preferential creditors, which the administrator is enjoined to seek to achieve in the manner set out in the statute.

4 The English experience with the administrative receivership and administration holds many valuable lessons for Singapore. Singapore should no doubt evaluate the reforms carefully to determine whether they should be adopted. Although Singapore did not adopt the UK Insolvency Act 1986, her insolvency law remains very similar to English insolvency law. Our judicial management is largely modelled on the pre-Enterprise Act administration, and a receivership which extends to all or substantially all the borrower's assets is very much like an administrative receivership. Much of receivership law consists of judge made law and Singapore has followed English cases on receivership.[11]

5 A key consideration of whether to adopt the English reforms is how the benefits of doing that stack up against the costs. At the moment, the benefits are not clear. As the relevant provisions of the Enterprise Act 2002 only came into force about four years ago,[12] there is not enough evidence of how it has fared in practice. Next, the legislation whilst virtually abolishing administrative receivership leaves untouched other forms of receivership. So the complaints levelled against receivership remain live issues, although their weight would have been very much reduced. On the other hand, the costs of adopting the Enterprise Act 2002 are quite high. It is a very complex piece of legislation which the insolvency profession, financial institutions and business community will have to expend considerable time and money to be conversant with. And this is not to mention the inevitable opposition from the financial institutions to the abolishment of an institution that they have been using for many years. Therefore, at least for the interim, it would seem that a better solution for Singapore is to take the bull by the horns and address the criticisms of receivership identified in the UK white paper referred to earlier,[13] in particular, the lax duties that mortgagees and receivers owed to mortgagors.

6 The main purpose of this article is to argue that the current state of law on the duties that mortgagees and receivers owe to mortgagors is very unsatisfactory and that a general duty to exercise care ought to be imposed on them. The article shall proceed as follows. The second section sets out some of the duties of mortgagees and receivers

11 See, *eg*, *Roberto Building Material Pte Ltd v Overseas-Chinese Banking Corp (No 2)* [2003] 3 SLR 217 (CA).

12 From 15 September 2003 by virtue of the Enterprise Act 2002 (Commencement No 4 and Transitional Provisions and Savings) Order 2003 (SI 2003/2093) Art 2(1) and Sched 1.

13 Para 2; *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234) [2.1]–[2.3].

and compares their relative positions. The third section discusses the content of the general duty of good faith, arguing that lack of good faith includes not only fraudulent conduct but also deliberate or reckless conduct in causing harm to the mortgagor's interests gratuitously. The fourth section discusses the specific duties of a mortgagee in possession, where it will be shown that they are not as onerous as commonly portrayed and means no more than that the mortgagee should exercise "due diligence". The fifth section, which discusses the duties of care of a mortgagee and receiver, is the main part of this article. It explains the interaction between the classical approach, which offers little protection to the interests of mortgagors, and a recent alternative approach that is more sensitive on the need to protect the legitimate interests of mortgagors. It suggests that two principles may be deduced from case law and leading treatises on receivership law from which a general duty of care may be developed. The sixth section proffers some suggestions on how receivership law may be improved, and elaborates on the two principles underlying the proposed general duty of care.

II. Mortgagee and receiver

7 The function of a receiver is to exercise the powers conferred on him, in particular the powers of sale and management, to bring about a situation in which the secured debt is repaid.[14] His position is thus very similar to that of a mortgagee in the sense that the rights and powers conferred on the mortgagee were also meant for the purpose of repaying the secured debts. It is, therefore, logical that the duties owed by a receiver to the mortgagor, at any rate the common law duties developed by the judges, should bear a close resemblance to that owed by a mortgagee to the mortgagor. This has been confirmed by the courts, as the following discussion will show.

8 A receiver, like a mortgagee, owes the same general duty to exercise his powers in good faith and for proper purposes, and the specific duty to obtain the true market value when he exercises the power of sale.[15] Like a mortgagee, a receiver does not owe any general duty of care to the mortgagor.[16] A receiver, like a mortgagee, is entitled to sell the mortgaged property as it is and is under no obligation to improve it or increase its value.[17] Neither a receiver nor a mortgagee is under a duty to carry on the business of the mortgagor and both may

14 *Medforth v Blake* [2000] Ch 86 (CA) at 102; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [27]–[29].

15 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC) at 314–315.

16 *Id*, at 315; *Medforth v Blake* [2000] Ch 86 (CA) at 98.

17 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [28]–[29].

decide to close down the business, even though the outcome is disadvantageous to the mortgagor.[18]

9 Nevertheless, the analogy between a receiver and a mortgagee on the duties owed to the mortgagor is not exact. In *Silven Properties Ltd v Royal Bank of Scotland plc*,[19] the English Court of Appeal pointed out that in a number of respects the receiver is in a very different position from a mortgagee. Whilst a mortgagee has no duty at any time to exercise his powers to enforce his security,[20] a receiver has no right to remain passive if that course would be damaging to the interests of the mortgagor or mortgagee. In the absence of a provision to the contrary in the mortgage or his appointment, the receiver must be active in the protection and preservation of the charged property over which he is appointed.[21] His management duties will ordinarily impose on him no general duty to exercise the power of sale,[22] but a duty may arise if, for example, the goods are perishable and a failure to do so would cause loss to the mortgagee and mortgagor.[23]

10 It is submitted respectfully that for some of the duties owed to a mortgagor, there is a better analogy between a receiver on the one hand, and a mortgagee in possession, rather than a mortgagee *per se*, on the other hand. Although a mortgagee is entitled to remain passive, a mortgagee in possession is bound to exercise reasonable care to protect and preserve the mortgaged property.[24] Next, a mortgagee in possession, though coming under management duties, is under no general duty to exercise the power of sale and is entitled to decide when to sell the mortgaged property.[25] Therefore, the duties mentioned in the preceding paragraph as being applicable to a receiver but not a mortgagee, do apply to a mortgagee in possession. This should not be surprising. The appointment of a receiver and going into possession are simply alternative modes available to a mortgagee to enforce the mortgage. If a mortgagee in possession were to be subjected to a particular duty to the mortgagor, good reason will have to exist to not subject a receiver to the same duty. At one stage, it may have been thought that a good reason was the need to preserve the advantages to

18 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC) at 312–313; *Medforth v Blake* [2000] Ch 86 (CA) at 102.

19 [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [23].

20 *China and South Seas Bank Ltd v Tan* [1990] 1 AC 536 (PC) at 545.

21 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [23]. In *Knight v Lawrence* [1993] BCLC 215, mortgaged property was let and the receiver of rent was held liable for failing to trigger an upwards only rent review clause in the lease.

22 *Routestone Ltd v Minories Finance Ltd* [1997] BCC 180.

23 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [23].

24 *Ibid*.

25 *China and South Seas Bank Ltd v Tan* [1990] 1 AC 536 (PC) at 545.

be derived from the receivership system, particularly as a major impetus for its development was to avoid the aforesaid duties on a mortgagee in possession, but such an argument was rejected in *Medforth v Blake*.[26]

III. General duty of good faith

11 It is trite law that a mortgagee and receiver both owe a duty in exercising their powers to do so in good faith for the purpose of preserving, exploiting and realising the assets comprised in the security and obtaining repayment of the sum secured.[27] In *Downsview Nominees Ltd v First City Corp Ltd*,[28] a receiver breached this duty when he procured his appointment not for the purpose of enforcing the security thereunder but to disrupt an earlier receivership of a junior debenture holder. The debenture holder was also held to have breached this duty when it refused to assign the debenture to the junior debenture holder when the latter offered to redeem it.

12 There has been little discussion of the content of the above duty of good faith.[29] Rather than attempting to explain the concept of good faith, courts have recently tended to contrast bad faith with negligent conduct. In *Medforth v Blake*,[30] Scott V-C emphasised that the concept of good faith must not be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith.[31] Accordingly, breach of a duty of good faith requires some dishonesty, or improper motive, some element of bad faith, to be established. This approach is, it is respectfully submitted, absolutely right.[32] In a legal regime where the only duty owed by a mortgagee is the duty of good faith, courts may feel compelled to expand the boundaries of the duty of good faith, in appropriate cases, to encompass conduct that is grossly negligent. Now that a mortgagee and a receiver come under specific duties of care, there is no necessity to engage in such manoeuvres, at least in those instances where the duties of care apply.

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26 [2000] Ch 86 (CA) at 94–95.

27 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC) at 312; *The Law of Administrators and Receivers of Companies* (Gavin Lightman and Gabriel Moss eds) (London: Thomson Sweet & Maxwell, 4th Ed, 2007) at [10-005].

28 [1993] AC 295 (PC) at 317.

29 In *Kennedy v Trafford* [1897] AC 180 (HL) at 185, Lord Herschell remarked that it is very difficult to define exhaustively all that would be included in the words "good faith".

30 [2000] Ch 86 (CA).

31 *Ibid*, at 103. This proposition was accepted by Singapore's Court of Appeal in *Roberto Building Material Pte Ltd v OCBC (No 2)* [2003] 3 SLR 217 (CA) at [23], [24] and [28].

32 Sandra Frisby, "Making a Silk Purse out of Pig's Ears – *Medforth v Blake & Ors*" (2000) 63 MLR 413 at 418.

13 It is probably rare in practice for a mortgagee or receiver to exercise his powers not for the purpose of obtaining repayment but for an improper purpose. What is more likely to happen is that the mortgagee or receiver adopts a course of conduct which sacrifices the interests of the mortgagor even though its own interests are not at risk, *ie*, gratuitously. In doing so, the mortgagee or receiver may have ignored the interests of the mortgagor either deliberately or recklessly. Although such conduct is not fraudulent, the mortgagee or receiver cannot be said to have acted in good faith. No doubt a mortgagee and receiver are given rights and powers over the mortgaged asset for the benefit of the mortgagee, and they are entitled to sacrifice the interests of the mortgagor where that conflicts with the mortgagee's interests, but the mortgagee is not an absolute owner of the property entitling it or the receiver to deal with the property as they see fit.[33] Thus, in principle, where it can be shown that the mortgagee or receiver has caused harm to the mortgagor gratuitously, they would have breached their duty of good faith. Australian and Singapore courts have indeed so held.

14 In *Forsyth v Blundell*,[34] the mortgagee in negotiating a sale of the charged assets to Shell did not inform Shell of the interest expressed by a third party, nor inform the third party of Shell's offer. The High Court of Australia held that the conduct of the mortgagee did not consist merely of a lack of reasonable care, but in acting to ensure only that the sale would produce enough to pay what was owed to it, its conduct was deliberate and had breached the duty of good faith.[35] Next, in *How Seen Ghee v DBS Ltd*,[36] the mortgagee refused to sanction a sale of the mortgaged property by the mortgagor at a price above valuation, unless the mortgagor produced a repayment schedule for the shortfall between the debts owed and the sale price which the mortgagor was unable to do. The Singapore Court of Appeal held that the mortgagee had sacrificed the interests of the mortgagor without any discernible gain to itself and had breached its duty as a mortgagee.

15 The above also represents the English position. In *Medforth v Blake*,[37] Scott V-C remarked that Lord Herschell had in *Kennedy v De Trafford*[38] given an explanation of a lack of good faith that would have allowed conduct that was grossly negligent to have qualified even though the consequences of the conduct were not *intended* and

33 This was one of the reasons given in *Cuckmere Properties Ltd v Mutual Finance Co* [1971] Ch 949 (CA) at 969 (Cross LJ) for subjecting a mortgagee to a duty of care to exercise care to obtain the true market value when selling the mortgaged property.

34 (1972-1973) 129 CLR 477 (High Court of Australia).

35 *Ibid*, at 493–494 (Walsh J), 506–507 (Mason J).

36 [1994] 1 SLR 526 (CA).

37 [2000] Ch 86 (CA) 103.

38 [1897] AC 180 (HL) 185.

expressed his disagreement. Next, the learned judge held that shutting one's eyes deliberately to the consequences of one's actions may make it impossible to deny an intention to bring about those consequences so that such conduct amounts to bad faith.[39]

16 Due to the heavy burden of proof where fraud or dishonesty is alleged, lawyers are rightly reluctant to plead that a receiver or mortgagee has been fraudulent or dishonest and thus breached the duty of good faith. Now that a breach of that duty may be proved by intentional or reckless conduct that sacrifices the interests of the mortgagor gratuitously, it is to be hoped that where evidence of such conduct is available lawyers will so argue, instead of arguing that the mortgagee or receiver has been negligent. For example, the conduct of the receivers in *Medforth v Blake* in not asking for discounts for the pig-feed despite repeated reminders from the mortgagor that the discounts would be given if requested suggested strongly of a breach of their duty of good faith.[40] It is interesting to note that the amended statement of claim had, in addition to the main allegation of negligence, included an alternative allegation that the conduct was a breach of the duty of good faith, though it was accepted that there was no deceit or conscious or deliberate impropriety.[41] The concession was probably due to difficulties of proving that the receivers had deliberately ignored the interests of the mortgagor, which were exacerbated by the death of one of the receivers. Now that we have the benefit of the judgment of Scott V-C, it may be argued that the receivers were so reckless in not asking for the pig-feed that they had intentionally misconducted themselves. This is also supported by the suggestion that if a decision lay outside the range which the court thought might be arrived at by a reasonable commercial man, this might provide some evidence that the decision was not taken in good faith.[42]

IV. Specific duties of a mortgagee in possession

17 A mortgagee also comes under specific duties which equity imposes on it in the exercise of its power to go into possession, power of sale and power of appointment of receiver. By taking possession, the mortgagee becomes the manager of the charged property.[43] To ensure that the mortgagee-manager is diligent in discharging its mortgage and

39 [2000] Ch 86 (CA) 103.

40 Sandra Frisby, "Making a Silk Purse out of Pig's Ears – *Medforth v Blake & Ors*" (2000) 63 MLR 413 at 423; Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (CUP, Cambridge, 2002) at p 250.

41 [2000] Ch 86 (CA) at 91.

42 *The Law of Administrators and Receivers of Companies* (Gavin Lightman & Gabriel Moss eds) (London: Thomson Sweet & Maxwell, 4th Ed, 2007) at [10-008].

43 *Kendle v Melsom* (1998) 193 CLR 46 (High Court of Australia) at 64.

returning the property to the mortgagor,[44] the law has subjected it to duties. In the more recent cases, this is expressed to be a duty to take reasonable care of the property secured, which requires the mortgagee to be active in protecting and exploiting the security, maximising the return, but without taking undue risks.[45] It has also been said to be a duty to exercise "due diligence".[46] This approach and terminology is rather different from that used previously.

18 The older cases approached the matter not from the angle of a pre-existing duty, but from that of the liability of a mortgagee to account after its possession has come to an end, and that liability is stated to be a liability to account on the basis of "wilful default". Presently, it is difficult to understand what the judges meant by "wilful default" when they used this term in those cases. This is not only because wilful default is a concept which is conspicuously absent in all recent cases, but also because, although it is a term hallowed through usage, the courts have not explained what it means. According to Frisby,[47] the liability to account for wilful default is of ancient origin arising out of the account jurisdiction of Courts of Equity. She gave some examples of factual instances of "wilful default",[48] and concluded that these illustrations of liability give little guidance as to whether wilful default requires deliberate, reckless or simply unthinking conduct.[49]

19 Nevertheless, although the precise meaning of wilful default is not clear, the commentators are agreed that it does not amount to strict liability, and means no more than that the mortgagee should exercise "due diligence".[50] As an example, the proposition that the mortgagee will be charged with the utmost value the lands are proved to be worth has

44 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC) at 315.

45 *Palk v Mortgage Services Funding plc* [1993] Ch 330 (CA) at 337–338; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [13].

46 *Medforth v Blake* [2000] Ch 86 (CA) at 92, 99.

47 Sandra Frisby, "Making a Silk Purse out of a Pig's Ears – *Medforth v Blake & Ors*" (2000) 63 MLR 413 at 416.

48 *Id* at 416–417. These include the refusal to accept tenants, the disadvantageous letting of property, permitting a mortgagor to intercept profits or failing to receive the purchase price on a sale of the mortgaged property.

49 Sandra Frisby, "Making a Silk Purse out of a Pig's Ears – *Medforth v Blake & Ors*" (2000) 63 MLR 413 at 417.

50 Stannard, "Wilful default" (1979) Conv 345 at 348; Sandra Frisby, "Making a Silk Purse out of a Pig's Ears – *Medforth v Blake & Ors*" (2000) 63 MLR 413 at 417–418; Gavin Lightman & Gabriel Moss (eds), *The Law of Administrators and Receivers of Companies* (Thomson Sweet & Maxwell, London, 4th Ed, 2007) at [10-013]; *Megarry & Wade: The Law of Real Property* (Charles Harpum ed) (London: Sweet & Maxwell, 6th Ed, 2000) at [19-069]; *Fisher & Lightwood's Law of Mortgage* (Wayne Clark ed) (London: LexisNexis Butterworths, 12th Ed, 2006) at [29.65], [29.68]

been explained on the basis that liability must be limited by the circumstances of the case, and that the mortgagee will not be required to account for more than it has received unless it is proved that, but for its serious default, mismanagement or fraud, it might have received more.[51] It is true that the "due diligence" formulation does not of itself indicate the precise level of "diligence" (*ie*, care) which will be regarded as "due", recent authorities have tended to assimilate the "due diligence" standard with a duty to take reasonable care.[52]

20 Thus, while there may be historical reasons, now difficult to track down, for the older authorities to state that the liability of a mortgagee in possession is almost penal or to use some such similar language,[53] current understanding of the duties of a mortgagee in possession means that those propositions no longer hold true today. Nevertheless, they still get repeated airing in recent cases.[54] In *Medforth v Blake*,[55] Scott V-C held that a receiver who carries on the business of the mortgagor, just like a mortgagee in possession, must do so with "due diligence", which he explains requires the taking of reasonable steps to try to manage the business profitably. As he laid down this proposition which has done much to clarify and rationalise the law, regrettably he went on to suggest that the "particularly onerous duties" imposed on a mortgagee in possession may not be appropriate to apply to a receiver.[56] This dictum, if not handled carefully, is liable to confuse and adversely affect the development of this area of law. With respect, it is submitted that the venerable assertion that the liability of a mortgagee in possession is almost penal should no longer be repeated henceforth.

V. Duties of care

A. Introduction

21 The purpose of this part is to analyse the leading cases to show that the law on duties of care has developed unsatisfactorily over the last

51 *Fisher & Lightwood's Law of Mortgage* (Wayne Clark ed) (London: LexisNexis Butterworths, 12th Ed, 2006) at [29.68].

52 See, *eg*, *Palk v Mortgage Services Funding plc* [1993] Ch 330 (CA) at 338 and *Medforth v Blake* [2000] Ch 86 (CA) at 92, 102.

53 *Gaskell v Gosling* [1896] 1 QB 669 (CA) at 691 (Rigby LJ) ("almost penal liabilities imposed upon a mortgagee in possession"). The dissenting judgment of Rigby LJ was affirmed by the House of Lords in *Gosling v Gaskell* [1897] AC 575 (HL) at 589.

54 *Medforth v Blake* [2000] Ch 86 (CA) at 99 ("particularly onerous duties constructed by courts of equity for mortgagees in possession"); *Yorkshire Bank plc v Hall* [1999] 1 WLR 1713 (CA) at 1727 ("onerous obligations of a mortgagee in possession"), 1729 (mortgagee in possession is "liable to account on a strict basis" – seemingly suggesting a kind of strict liability).

55 [2000] Ch 86 (CA) at 102.

56 *Id*, at 99.

three decades and to introduce two principles that may be deduced from the cases and leading treatises on receivership law which it is thought justify and demarcate the imposition of a general duty of care on a mortgagee and receiver. It is apposite to start by summarising the two contrasting approaches that may be observed in recent case law and setting out the two principles before analysing the cases in detail.

B. Two different approaches

(1) The classical approach

22 The classical approach of equity, as recounted in *Downsview Nominees Ltd v First City Corp Ltd*,[57] is highly indulgent towards the mortgagee and receiver. Neither owes any general duty of care to the mortgagor. The only duty of care they owe is on a sale, and in the case of the mortgagee, in addition the duty to exercise due diligence when it is in possession.[58] Therefore, other than in a sale or when a mortgagee is in possession, a mortgagor cannot hold a mortgagee or receiver accountable for any prejudice it suffers, no matter how unreasonable or negligent the conduct of the mortgagee or receiver may be.

23 In the UK, it is well documented that this lack of accountability of the mortgagee and receiver has caused widespread discontent in the business community,[59] and it was this, more than anything else, that led to the demise of the administrative receivership. In Singapore, although there has been almost no public discussion of this matter, it is very likely that her business community would have shared the same sentiments as the UK business community.

24 Equity, in spite of its touted flexibility, has failed to impose appropriate duties of care on a mortgagee and receiver to meet the needs of a modern insolvency law. The crux for this failure, it is submitted, is that albeit equity had rightly characterised a mortgage for what it was – a security, and developed the doctrine of the equity of redemption to vindicate the interests of the mortgagor, on balance it failed to apply this insight to the further issues of how the rights of the mortgagee as a secured creditor should be balanced with that of the mortgagor as a residual owner. To hold that a mortgagee is not a trustee of the power of sale for the mortgagor and is thus entitled, once the power has accrued, to exercise it for its own benefit[60] is obviously correct, but to stop there and not take into account the interests of the

57 [1993] AC 295 (PC).
58 *Ibid*, at 315.
59 Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558) at [2.2] and [2.3]
60 *Warner v Jacob* (1882) LR 20 Ch D 220 at 224.

mortgagor when the rules on a mortgagee's duties to the mortgagor are being laid down is hardly satisfactory.

(2) A recent alternative approach

25 Over the last two decades, a few cases have taken a different and more sensitive approach that, whilst acknowledging the superior rights of the mortgagee, seeks to protect the interests of the mortgagor. Several reasons have been given for adopting this alternative approach: it accords with good commercial sense and comports with the duties of a mortgagee in possession, a mortgagee is not an absolute owner but a secured creditor, and whilst the conduct of the mortgagee and receiver affects the interests of the mortgagor, the latter has no say in the matter. All these reasons will be referred to when the cases are analysed in the ensuing paragraphs.

C. Two principles

26 It is submitted that there are two principles that unify the reasons mentioned in the preceding paragraph, and that they provide a satisfactory basis to develop a general duty of care owed by a mortgagee and a receiver to the mortgagor. Both principles draw their inspiration from the leading treatise on receivership law by Sir Gavin Lightman and Gabriel Moss QC.[61]

(1) First principle

27 The first principle is as follows: *provided a mortgagee or receiver acts in good faith, the mortgagee is entitled, and the receiver is bound to subordinate any conflicting interests of the mortgagor to what the mortgagee or receiver genuinely perceives to be the mortgagee's interests in securing repayment.*[62] It recognises that a mortgage confers rights, including priority to repayment of the debts secured by the mortgage, on the mortgagee. The mortgagee is, therefore, entitled, and the receiver bound, since he owes his primary duty to the mortgagee to have the debt discharged, to subordinate the interests of the mortgagor where those conflict with the mortgagee's interests in obtaining repayment.

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61 *The Law of Administrators and Receivers of Companies* (Gavin Lightman & Gabriel Moss eds) (London: Thomson Sweet & Maxwell, 4th Ed, 2007).

62 This is based on two propositions in Gavin Lightman & Gabriel Moss (eds), *id*, at [10-006] (Provided he acts in good faith, he is entitled to subordinate any conflicting interest of the mortgagor (as well as those of creditors and third parties) to what he genuinely perceives to be his own interest in securing repayment.) and [10-007] (As for a receiver, provided he acts in good faith, when deciding whether and if so how to exercise powers vested in him, he is likewise entitled and indeed obliged to give priority to the interests of the mortgagee in securing repayment.).

28 The first principle enjoys some support in the authorities. In *Shamji v Johnson Matthey Bankers Ltd*,[63] Hoffmann J explained that a mortgagee does not owe a duty of care to the mortgagor in exercising its power to appoint a receiver because the exercise of the power involves an inherent conflict of interests between a mortgagee and a mortgagor. Prior to that case, similar comments were made by Salmon LJ in *Cuckmere Brick Co Ltd v Mutual Finance Ltd*,[64] and very recently, Robert Walker LJ in *Yorkshire Bank Ltd v Hall*[65] accepted that the authorities can be seen as establishing that a mortgagee may, within limits, prefer its interests to that of the mortgagor where they conflict.

29 At this stage, the crucial point to note about the first principle is that it may be readily relied upon to deny that a mortgagee or a receiver comes under a duty of care to the mortgagor, especially where the premise that the interests of the mortgagee and mortgagor conflict is overlooked or not taken seriously, in which case it comes close to the classical approach. It is thus critical in applying the first principle to actual facts to pay particular attention to the issue whether there is a real conflict between the interests of the mortgagee and mortgagor. The cases will be analysed to show that, where a conflict of interests was relied on explicitly or implicitly to hold that a duty of care does not exist, the courts have, with respect, failed to pay sufficient attention to the issue.

(2) Second principle

30 The underlying premise of the first principle is that the interest of the mortgagee is in conflict with the interest of the mortgagor. What happens if the interests do not conflict? The treatise by Sir Gavin Lightman and Gabriel Moss QC suggests that in this case a duty of care ought to be imposed in the absence of some relevant countervailing consideration.[66] A pointer put forth as being relevant to the existence or absence of a duty of care is whether the exercise of the power in question involves the incurring of risks or liabilities or the expenditure (or forgoing) of money which would otherwise be available for the potential repayment of the mortgage.[67] This writer agrees in the main with those arguments, but submits respectfully that it is simpler and

63 [1986] BCLC 278 at 283–284, affirmed [1991] BCLC 36 (CA).

64 [1971] Ch 949 (CA) at 965–966.

65 [1999] 1 WLR 1713 (CA) at 1729.

66 *The Law of Administrators and Receivers of Companies* (Gavin Lightman & Gabriel Moss eds) (London: Thomson Sweet & Maxwell, 4th Ed, 2007) at [10-026] (Where the interests of the mortgagee and mortgagor are not in conflict, then it is suggested that as a matter of principle the courts should be ready to impose a duty of care upon a mortgagee or receiver in the absence of some relevant countervailing consideration.).

67 Gavin Lightman & Gabriel Moss (eds), *id*, at [10-027].

preferable to hold that a duty of care exists provided that there is no conflict of interests, and that issues such as the incurring of risks or liabilities or expenditure in connection with the exercise of the power in question go merely to what may reasonably be expected from the mortgagee or receiver in all the circumstances of the case. This leads us to the second principle.

31 The second principle is as follows: *where there is no conflict between the interests of the mortgagee and mortgagor, the mortgagee and receiver are not entitled to override or ignore the interests of the mortgagor and come under a duty to exercise reasonable care.* It is a corollary of the first principle and delimits it, namely, that the subordination of the mortgagor's interests is restricted to what is strictly necessary to protect the value of the mortgage to the mortgagee. This accords well with good commercial sense.

32 Unlike the first principle, the position of the second principle is at best tenuous under English law. Certain statements of Salmon LJ in *Cuckmere Brick Co Ltd v Mutual Finance Ltd*[68] supported the spirit of the second principle. But in *Yorkshire Bank Ltd v Hall*,[69] Robert Walker LJ effectively rejected the second principle, albeit that did not form part of the ratio of his judgment.

D. Evolution of the law

(1) The Cuckmere *case – An alternative approach*

33 In *Cuckmere Brick Co Ltd v Mutual Finance Ltd* ("*Cuckmere*"),[70] the English Court of Appeal held that while a mortgagee is, once the power of sale has accrued, entitled to sell at any time it thinks fit even though by waiting a higher price could be obtained, it owes a duty when it decides to sell to exercise reasonable care to obtain the true market value of the property. Two reasons were given for the imposition of this duty. First, the mortgagor is vitally affected by the result of the sale but has no role in it.[71] Secondly, the mortgagee is not an absolute owner selling its own property.[72] It may be seen that although the court did not explicitly rely on the first principle to reach its conclusion, its reasoning is entirely consistent with it.

34 Although *Cuckmere* has since been accepted as good law by the highest authorities, including the Singapore Court of Appeal in *Roberto*

68 [1971] Ch 949 (CA) at 966.
69 [1999] 1 WLR 1713 (CA) at 1729.
70 [1971] Ch 949 (CA) at 966 (Salmon LJ), 972 (Cross LJ), 977–978 (Cairns LJ).
71 [1971] Ch 949 (CA) at 966 (Salmon LJ).
72 *Id*, at 969 (Cross LJ).

Building v OCBC (No 2),[73] the new approach it stood for has had a more chequered history. *Cuckmere* was a departure from the classical approach. All the three lord justices who heard the case acknowledged that *dicta* on whether a mortgagee owes a duty of care in addition to the duty of good faith were conflicting,[74] and stated that they preferred those which held that the duty existed. The reasoning in *Cuckmere* moved beyond the then prevailing doctrinal limitations of equity to take cognisance of commercial realities and espouse a duty of care on sale. Thereafter, there were signs that this new approach might spread and lead to the development of similar duties of care in relation to other powers of a mortgagee. Unfortunately, before that came to fruition, the Privy Council delivered two judgments which reasserted the classical approach,[75] albeit the ratio of *Cuckmere* was affirmed. A major reason for this rapid reversal in course is that the reasoning in *Cuckmere* did not rely on equitable doctrines but drew its inspiration from the law of negligence. When that branch of law, in particular the liability for pure economic loss, subsequently underwent a severe contraction, the nascent developments started by *Cuckmere* were not spared and the courts reverted to the classical approach. It was only some years later that a determined Court of Appeal resurrected the spirit of *Cuckmere*.[76]

35 The juridical nature of the duty of care on sale was not discussed in the *Cuckmere* case, but it is clear that Salmon LJ had the tort of negligence in mind. His Lordship, in describing how the mortgagee's sale of the mortgaged property impacts on the mortgagor, said that the proximity between them could scarcely be closer, and that they are "neighbours".[77] The other two judges did not dissent from this proposition. This characterisation of the duty of care was later accepted in some cases,[78] and there were signs that its scope may be extended. When *Standard Chartered Bank v Walker*[79] was decided in 1982, Lord Denning MR suggested that a mortgagee owes a duty of care when choosing the time to sell.[80] This was about the period when the English courts were holding that duties of care for pure economic loss existed on facts that previously were thought not to give rise to any such

73 [2003] 3 SLR 217 (CA) at [53], [54].

74 [1971] Ch 949 (CA) at 966 (Salmon LJ), 972 (Cross LJ), 977 (Cairns LJ).

75 *China and South Seas Bank Ltd v Tan* [1990] 1 AC 536 (PC) and *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC).

76 *Medforth v Blake* [2000] Ch 86 (CA).

77 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 (CA) at 966.

78 *Standard Chartered Bank v Walker* [1982] 1 WLR 1410 (CA) at 1415 (Lord Denning MR), 1418 (Watkins LJ); *American Express International Banking Corp v Hurley* [1985] 3 All ER 564 at 571; *Knight v Lawrence* [1993] BCLC 215 at 221.

79 [1982] 1 WLR 1410 (CA).

80 *Ibid*, at 1415. In *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [15], it was said that this view of Lord Denning cannot stand with later authorities.

duties.[81] *Anns v Merton LBC*,[82] where Lord Wilberforce pronounced his famous two-stage test for determining the existence of a duty of care, is a powerful symbol of the expanding reach of the tort of negligence in that period.

(2) Privy Council reasserted classical approach

36 Shortly thereafter, by about the late 1980s, the English courts began to retreat significantly from an expansive view of the scope of the law of negligence.[83] Whereas under the two-stage test in *Anns v Merton LBC* a duty of care exists if it is reasonably foreseeable that carelessness may cause damage unless there are considerations which negative or reduce the scope of the duty, the new approach starts by looking at situations in which a duty has been held to exist and then moves on to ask whether there are considerations of analogy, policy, fairness and justice for extending it to cover a new situation.[84] At about that time, the Privy Council delivered two very important judgments that reasserted and clarified the classical approach. *China and South Seas Bank Ltd v Tan* ("*Tan*")[85] held that the law of negligence has no application in this area of law and effectively gave a mortgagee *carte blanche* to act as it wishes on whether to realise the mortgage even though its conduct may have caused gratuitous harm to the mortgagor. *Downsview Nominees Ltd v First City Corp Ltd* ("*Downsview*")[86] similarly rejected the relevance of tort law. Arguably, that does not necessarily mean that equitable duties of care, whether general or specific, could not in future be held to

81 *Eg*, *Hedley Byrne & Co v Heller & Partners* [1964] AC 465; *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA). This process led to Lord Wilberforce's famous two-stage test in *Anns v Merton LBC* [1978] AC 728 (HL) at 751–752 and reached the peak in *Junior Books Co Ltd v Veitchi Co* [1983] AC 520 (HL). For an account, see *Markesinis and Deakin's Tort Law* (Simon Deakin, Angus Johnston & Basil Markesinis eds) (Clarendon Press, Oxford, 6th Ed, 2007) at pp 125–127.

82 [1978] AC 728 (HL).

83 The two-stage test in *Anns v Merton LBC* [1978] AC 728 (HL) was subsequently overruled in *Murphy v Brentwood DC* [1991] 1 AC 398 at 471–472 (Lord Keith of Kinkel), though doubts had appeared earlier in some cases, including *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co* [1985] AC 210 (HL) at 240–241 and *Yuen Kun Yeu v AG of Hong Kong* [1988] AC 175 (PC) at 183, 191. Note that Singapore has declined to follow *Murphy v Brentwood DC* [1991] 1 AC 398, preferring instead a two-stage test but which is different from the two-stage *Anns* test: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 (CA) at [73] ("In our view, a coherent and workable test can be fashioned out of the basic two-stage test premised on proximity and policy considerations, if its application is preceded by a preliminary requirement of *factual* foreseeability." [emphasis in original])

84 *Stovin v Wise* [1996] AC 923 (HL) at 949 (where Lord Hoffmann expressed the contrast between the approaches of the courts pre- and post-*Anns*).

85 [1990] 1 AC 536 (PC) at 545.

86 [1993] AC 295 (PC) at 316.

arise, but any such prospect was ruled out; the judgment rejected any extension of the duty of care on sale propounded in *Cuckmere* beyond the exercise of a power of sale.

37 In *Tan*,[87] the bank had advanced a loan secured by a mortgage of shares and a guarantee. When the debtor defaulted, the shares were allegedly worth more than the outstanding debts. The bank did not realise the mortgage, and after the shares had become worthless, demanded repayment of the debts from the surety. On the bank's application for summary judgment against the surety, the Hong Kong Court of Appeal gave the surety unconditional leave to defend, holding that it was arguable that the surety's liability was extinguished or greatly reduced by the bank's breach of a duty owed to the surety to exercise the power of sale over the mortgaged shares. The court held that although there were dicta in some cases that a mortgagee owed no duty of care in deciding when to exercise its powers of sale, it was arguable that such a duty existed,[88] as suggested by Lord Denning in *Standard Chartered Bank v Walker*.[89] The Court acknowledged that what was put forward as negligence was not very strong and that the bank's conduct could have been perfectly reasonable, but on the assumption that the duty of care did exist, the court held that it was *prima facie* unreasonable to delay selling the shares for a substantial length of time on a falling market.[90] The Privy Council allowed an appeal by the bank. Lord Templeman, delivering the judgment of the Privy Council, held that the bank owed no duty to the surety to exercise its power of sale over the mortgaged securities and could decide in its own interest whether to sell and when to do so. Therefore, since the bank had done no act injurious to the surety or inconsistent with his rights, nor failed to perform any act which it was under a duty to do, equity would not intervene to protect the surety.

38 *Tan* does not seem to have attracted much discussion from the commentators.[91] With respect, the judgment in *Tan* is very unsatisfactory. The reasoning was entirely formal; it did not consider

87 [1990] 1 AC 536 (PC) reversing [1988] 2 HKLR 202 (CA, Hong Kong).

88 [1988] 2 HKLR 202 (CA, Hong Kong) at 207.

89 [1982] 1 WLR 1410 (CA) at 1415.

90 [1988] 2 HKLR 202 (CA, Hong Kong) at 207–208.

91 *China and South Seas Bank Ltd v Tan* [1990] 1 AC 536 (PC) 543 which held that the law of negligence has no application on the extent of the duty owed by a mortgagee to a surety was decided before *Knight v Lawrence* [1993] BCLC 215 but the latter case was still decided based on the law of negligence. Indeed, in *Downsview*, the New Zealand Court of Appeal based its judgment on the tort of negligence and that was also the basis on which the arguments were initially presented before the Privy Council. The Privy Council was "considerably troubled by the approach" and requested both sides to reconsider the whole question of the foundation and extent of the duties owed by a mortgagee and its receiver. See *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC) at 310–311.

whether and how the law may protect the interests of the surety without undermining the value of the mortgage as a security. In theory, there could be many reasons why the bank in *Tan* did not sell the shares. The actual reasons will never be publicly known. It is, however, possible to construct a few simple scenarios to see the kind of conduct of the bank that the Privy Council, in holding that the bank was not accountable to the surety, had condoned.

39 First, the bank might have legitimate commercial reasons for thinking that its interests were better served by not selling, even though selling was in the surety's interests. If that was the case, the bank was certainly entitled to prefer its own interests to that of the surety. Second, the bank might have neglected to consider whether to sell the shares, or it might have sat on the matter and procrastinated. Such conduct, though not amounting to bad faith, would fall below the standard of care and skill that a reasonably competent bank would display. In this case, the bank would have harmed the interests of the surety, not because of its decision to subordinate the surety's interests that conflicted with its superior interests, but due to its negligence. Third, the bank might have decided that it was not necessary to sell the shares to obtain repayment of the loan secured since it could demand repayment from the surety. This may be unlikely in practice and was not pleaded in the case itself. The burden to prove such an allegation was a heavy one, and it would be difficult to adduce evidence to discharge that burden. However, it could not be said definitively that this was not in truth what had happened. To make our analysis more complete, let us assume this was indeed the reason why the shares were not sold. The bank would then have sacrificed the interests of the surety gratuitously. Such conduct, as explained earlier,[92] would have amounted to a breach of the bank's duty to exercise its powers in good faith.

40 On the aforesaid scenarios, the bank was only entitled to act the way it did in the first scenario. But the second scenario was pleaded and since there was *prima facie* evidence that the bank had acted unreasonably in delaying to sell for a substantial length of time on a falling market, as pointed out by the Hong Kong Court of Appeal, leave should have been given to the surety to defend. In giving the bank summary judgment, the Privy Council *might* well have exonerated negligent conduct of the bank which had caused gratuitous harm to the surety. With respect, there does not seem to be any convincing legal or public policy to justify that.

92 See para 13 of the text.

41 We turn now to consider *Downsview Nominees Ltd v First City Corp Ltd*,[93] where Lord Templeman again delivered the judgment of the Privy Council. His Lordship rejected the argument that a general duty of care in negligence existed, holding that the duty of care arose in *only* one specific situation as enunciated in *Cuckmere*, which applies to a receiver as well.[94] The following reasons were given. First, to impose a general duty of care is inconsistent with the rights of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgagee.[95] Second, the general and specific duties of a mortgagee leave no room for the imposition of a general duty of care.[96] Third, duties in equity would be unnecessary if general duties in negligence exist.[97] Fourth, a debenture holder dissatisfied with the performance of a receiver can remove him. A subsequent debenture holder or the company itself may redeem or put the company into liquidation.[98] Fifth, in the UK, the harsh consequences of receivership may be averted by putting the company into administration.[99] Sixth, if the duty of care is imposed, a receiver will be tempted to sell as speedily as possible. A receiver who manages will run the risk of being sued if the financial condition of the company deteriorates.[100]

42 With respect, it is submitted that none of the above reasons are satisfactory. Taking them in the same order as presented above, the reasons are as follows. First, a general duty of care may be imposed consistently with the rights of the mortgagee as a secured creditor. This duty does not call for those rights to be diluted. Rather it only seeks to ensure that the mortgagee does not arrogate to itself rights beyond that of a secured creditor. Second, this is an argument for the *status quo* which hardly qualifies as a reason. Had this "reason" been accepted in *Donoghue v Stevenson*,[101] it would not have laid the foundation for the modern law of negligence. The question to ask is whether at this stage of the development of the institution of receivership, the time has come to bring together the specific duties from which to derive a more general principle. Third, this did not address the possibility of a general equitable duty of care. Fourth, it is unrealistic to rely on the debenture holder to protect the interests of the company. When a debenture holder

93 [1993] AC 295 (PC). For a discussion of the case, see Alan Berg, "Duties of a Mortgagee and a Receiver" [1993] JBL 213; Harry Rajak, "Can a Receiver be Negligent?" in *The Corporate Dimensions* (Barry Rider ed) (Jordans, London, 1998); Richard Nolan, "*Downsview Nominees Ltd v First City Corporation Ltd* – Good News for Receivers – In General" (1994) 15 Co Law 28.

94 [1993] AC 295 (PC) at 315.

95 *Ibid*.

96 *Ibid*.

97 *Ibid*.

98 *Id*, at 315–316.

99 *Id*, at 316.

100 *Id*, at 316.

101 [1932] AC 562 (HL).

is fully secured, there is very little reason for it to remove a receiver that is underperforming. And even when it is under secured, the perspectives of the debenture holder and the company are likely to be very different. Redemption of the debenture and putting the company into liquidation are hardly adequate remedies. Fifth, Lord Templeman was clearly mistaken on this point, since a debenture holder entitled to a global security was entitled to veto the making of an administration order. Whilst this is no longer the case in England after the Enterprise Act 2002, the same continues to apply in Singapore,[102] judicial management being Singapore's equivalent of the English administration. Sixth, where piecemeal sale will not realise enough to pay off the debts owed to the debenture holder, a receiver will have to consider whether it would be better to carry on the business of the company. In any event, this reason begs the question why in the first place a receiver does not owe a duty to the mortgagor to exercise care in deciding whether to carry on the business or not.

(3) Oscillation between classical and alternative approach

(a) Introduction

43 The purpose of this part is to trace the development of the law post-*Downsview*. It will be seen that although the law had oscillated between the classical approach and the new alternative approach, the former still dominates. *Downsview* did not command universal acclaim,[103] and in *Medforth v Blake*,[104] the English Court of Appeal held that a receiver who carries on the business of the mortgagor must do so with due diligence. However, on the whole, the classical approach continues to prevail. *Tan* and *Downsview*, being Privy Council decisions, are technically not binding on English courts. But English courts have generally accepted that they represent English law as well.[105] Partly, this is because the two cases proceeded on the basis that there is no difference between English law and Hong Kong law and New Zealand law respectively. Another reason is that the two cases merely reasserted the classical approach. Professor Goode remarked that it was long thought

102 Companies Act (Cap 50, 2006 Rev Ed) s 227B(5).

103 *Palk v Mortgage Services Funding plc* [1993] Ch 330 (CA) at 338 (Nicholls V-C expressed difficulty with the idea that a mortgagee's duties in and about the exercise of his powers of letting and sale are narrowly confined to obtaining a proper market rent in the former and a proper market price in the latter); Gavin Lightman & Gabriel Moss, *The Law of Receivers of Companies* (Sweet & Maxwell, London, 2nd Ed, 1994) at [7-13]; Goode, *Principles of Corporate Insolvency Law* (Thomson Sweet & Maxwell, London, 3rd Ed, 2007) at [9-47].

104 [2000] Ch 86 (CA).

105 *Eg*, *Yorkshire Bank plc v Hall* [1999] 1 WLR 1713 (CA) at 1728; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [27].

that *Downsview* "accurately reflected the classical approach of English law towards the duty of mortgagees and their receivers, an approach generally mirrored in Australian and Canadian jurisprudence".[106] In Singapore, *Downsview* was cited with approval by the Court of Appeal in *Roberto Building Material Pte Ltd v Overseas-Chinese Banking Corp (No 2)*.[107]

(b) The *Yorkshire* case – rejection of second principle

44 The dominance of the classical approach over the alternative approach was vividly illustrated in *Yorkshire Bank plc v Hall* ("*Yorkshire*").[108] The facts were unusual. Directors of a company had borrowed money from a bank to subscribe for shares in the company. As security for the loan, they charged their shares and properties to the bank. They later lost control of the company and became non-executive directors. They were concerned that the company's business was not run properly and requested the bank to intervene, or even to appoint some of its employees as directors. The bank refused, saying that it was not its practice to do that. The shares later became worthless. An issue that arose for consideration was whether the bank owed a duty to the directors to intervene. Robert Walker LJ, who delivered the only reasoned judgment in the Court of Appeal, held that the law on a mortgagee's duty to the mortgagor was set out in *Tan*, *Downsview* and *National Bank of Greece SA v Pinios Shipping Co (No 1)*.[109] Accordingly, apart from bad faith (which was not asserted against the bank), it had no duty to intervene in the company's thoroughly confused affairs in the hope of preserving the value of its security.

45 The decision is plainly justified on its facts. The shares charged to the bank constituted about 30% of the ordinary shares of the company. Under the company's articles, all the ordinary shares had become disenfranchised, and the limited voting rights attached to the preference shares have become exercisable. Thus, it was very doubtful that the bank had the power to appoint directors or to go further than what the directors had done in relation to the company's affairs.[110] Robert Walker LJ was perfectly justified to remark that those facts "make this a singularly inappropriate case for this court to take a leap forward … in setting new standards in the duties owed by mortgagees".[111] Further, it may be added that even if the bank were to owe a duty to the directors, it was only a duty to exercise reasonable care and skill and

106 Roy Goode, *Principles of Corporate Insolvency Law* (London: Thomson Sweet & Maxwell, 3rd Ed, 2007) at [9-47].
107 [2003] 3 SLR 217 (CA) at 53.
108 [1999] 1 WLR 1713 (CA).
109 [1990] 1 AC 637 (HL).
110 [1999] 1 WLR 1713 (CA) at 1728.
111 *Ibid*.

nothing more. It did not seem that the bank had the necessary expertise to manage the company's business in property dealing, and in particular to resolve the difficulties the company was in.

46 Unfortunately Robert Walker LJ, in addition to approving the law set out in *Tan* and *Downsview*, went further and strengthened the pro-mortgagee bias of the classical approach. Counsel for the directors had argued that an equitable duty of care exists in circumstances in which there is no conflict between the interests of a mortgagee and those of the mortgagor.[112] The argument was rejected by the learned judge, albeit it was unnecessary for him to express an opinion on it. He held that such a principle would be fraught with uncertainty and difficulty, and there is no warrant for it in the authorities.[113] He accepted that it is true that the authorities can be seen as establishing that a mortgagee may, within limits, prefer its interest to that of the mortgagor where they conflict. But, according to him, that is no basis for imposing "undefined and novel duties" merely because there is for the time being no such conflict.[114] It is not clear whether by that statement Robert Walker LJ meant that any duty that hitherto had not been recognised is undefined and novel, or that there is still room for the imposition of new duties, provided that they are not undefined or novel, whatever that may mean. From the tenor of the judgment, it seems that the former is more likely. But whatever the truth is, the dictum effectively spells the end of both the new approach and the second principle.

47 With respect, Singapore courts should reject the dictum. It is hard to see what the learned judge will regard as adequate to give rise to a duty of care if the lack of conflict of interests is not enough. Will he accept that it is proper to impose a duty if the interests of the mortgagee and mortgagor are *aligned*?[115] In this case, there is less need for a duty of care, since the mortgagee will want to take action to promote its own interests and this will benefit the mortgagor as well. Still, as the mortgagee may nevertheless be negligent in looking after its own interests, it should not be allowed to foist the losses it thereby suffers on the mortgagor. That is the position where the mortgagee has failed to perfect its security.[116] But if Robert Walker LJ is right, the mortgagee is not liable to the mortgagor.

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112 [1999] 1 WLR 1713 (CA) at 1729.

113 *Ibid*.

114 *Ibid*.

115 An example of this is when the mortgagee is under-secured, though this is not invariably the case. See *Palk v Mortgage Services Funding plc* [1993] Ch 330 (CA) where the mortgagee preferred to lease out the property and wait for the market to improve, whereas the mortgagor preferred an immediate sale.

116 *Wulff v Jay* (1872) LR 7 QB 756.

(c) *Medforth v Blake* – Implicit support for second principle

48 *Medforth v Blake*[117] was decided shortly after *Yorkshire*. Receivers had carried on the business of a pig farm and the court was asked to decide a preliminary point of law whether the receivers owed the mortgagor a duty of care in managing the pig farm. Scott V-C, in a robust judgment, distinguished *Downsview* and earlier adverse authorities[118] and held that the specific duty of care on sale is not the only duty of care owed by a receiver. Although a receiver owes no duty to the mortgagor to carry on the business previously carried on by the mortgagor, if he decides to carry it on he owes a duty to manage it with due diligence, which requires the receiver to take reasonable steps to try to manage the business profitably.[119] Several reasons were given for imposing this duty on a receiver. First, if a mortgagee in possession which carries on business is liable for loss caused by his failure to do so with due diligence, there is no reason why a receiver should not owe duties beyond that of good faith, when conducting the mortgaged business.[120] Secondly, since a receiver owes a duty to take reasonable care in conducting a sale, he should similarly owe such a duty when carrying on a business.[121] Thirdly, it does not make commercial sense that a receiver who manages a pig farm and is guilty of glaring managerial incompetence, such as feeding the pigs only once a week or failing to inoculate weaners against diseases which it is common practice to do, is not held liable to the mortgagor.[122] Fourthly, duties are imposed to ensure that a receiver, while managing the property with a view to repayment of the mortgaged debt, nonetheless in doing so takes account of the interests of the mortgagor and others interested in the mortgaged property.[123] Fifthly, equity, as is the common law duty of care, is flexible in adjusting the scope of duties owed so as to make them fit the requirements of the time.[124] Sixthly, imposing such a duty on receivers does not undermine the receivership system.[125]

117 [2000] Ch 86 (CA). For a detailed discussion of the case, see Sandra Frisby, "Making a Silk Purse out of Pig's Ears – *Medforth v Blake & Ors*" (2000) 63 MLR 413.

118 [2000] Ch 86 (CA) at 95–99. It has been pointed out that the methods used by Scott V-C to distinguish earlier contrary authorities are problematic. See Sandra Frisby, "Making a Purse out of Pig's Ears – *Medforth v Blake & Ors*" (2000) 63 MLR 413 at 419; Gerard McCormack, "Receiverships and the Rescue Culture" [2000] 2 Company Financial and Insolvency Law Review 229 at 240 ("fancy footwork" in escaping the constraints of previous case law).

119 [2000] Ch 86 (CA) at 102.

120 *Id*, at 99.

121 *Id*, at 99.

122 *Id*, at 93, 99.

123 *Id*, at 102.

124 *Id*, at 102.

125 *Id*, at 94–95.

49 Scott V-C did not rely on the second principle explicitly in his reasoning. However, his reasoning is consistent with it. Both recognise that a mortgagee is not an absolute owner of the mortgaged property, a mortgage is only a security and where the interests of the mortgagee do not conflict with those of the mortgagor, a duty of care may be imposed on the receiver.

50 Whilst *Medforth v Blake* is to be lauded, its impact on the law is limited. Scott V-C did not, and realistically could not, repudiate the classical approach entirely. What he had done was to refuse to follow the classical approach on the particular issue he was asked to decide. More ominously, any hope that subsequent courts will continue the work of *Medforth v Blake* in chipping away at the classical approach has been dashed by two recent cases, *Silven Properties Ltd v Royal Bank of Scotland plc*[126] and *Den Norske Bank ASA v Acemex Management Co Ltd*,[127] both decisions of the English Court of Appeal. It will be convenient to describe the facts and reasoning of these two cases before analysing them together.

(d) The *Silven* case – Reaffirmation of classical approach

51 In *Silven Properties Ltd v Royal Bank of Scotland plc* ("*Silven*"), receivers were appointed to a property company. In the hope of adding value to some of the mortgaged properties, the receivers obtained advice from planning consultants on the prospects of obtaining planning permission and the expected uplift in price if permission was obtained. Satisfied with the advice, they instructed the planning consultants to make planning applications. But two months later, they changed their mind. They decided not to continue with any application for planning permission or the negotiations to grant a lease of a vacant property, but instead to sell the mortgaged properties, in the state they were in, immediately. The judgment did not state the reasons for the receivers' decisions, except to note that the reasons were disputed. The reasoning process of Lightman J, who wrote the judgment of the Court of Appeal, may conveniently be broken down into three steps. First, he held that a mortgagee is entitled to sell the mortgaged property as it is and is under no obligation to invest money or time to improve it or increase its value.[128] He rejected counsel's argument that *McHugh v Union Bank of Canada*[129] stood for a contrary proposition.[130] The mortgage in that case was of horses which the mortgagee needed to drive to the market if he was to sell them. The Privy Council held that the mortgagee owed a duty

126 [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA).
127 [2003] EWCA Civ 1559; [2005] 1 BCLC 274 (CA).
128 [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [16].
129 [1913] AC 299 (PC)
130 [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [16].

to take proper care of the horses whilst driving them to the market. According to Lightman J, the case was to be understood as imposing a duty on a mortgagee to take care to preserve, not *increase*, the value of the security and, thus, it afforded no support for counsel's arguments. Secondly, he held that the primary duty of the receivers was to bring about a situation where a secured debt was repaid.[131] Thirdly, therefore, as a matter of principle, the receiver had to be entitled, like the mortgagee, to sell the property in the condition it was in, and in particular without awaiting or effecting any increase in value in the property, spending money on repairs or otherwise making the property more attractive before marketing it for sale.[132]

52 The law set out in *Silven* was affirmed in *Den Norske Bank ASA v Acemex Management Co Ltd* ("*Den Norske*").[133] The mortgagee of a ship which arrested the ship upon the mortgagor's default refused to allow the ship to travel to Hamburg, its destination, to discharge a cargo of bananas; instead the cargo was discharged overboard at Panama and the ship later sold there. An argument was raised that the mortgagee, having decided to sell, had not taken reasonable care to obtain a proper price because it was obviously more sensible to have allowed the ship to proceed to Hamburg to discharge its cargo in the ordinary course of events and arrest the vessel there.[134] Longmore LJ, who wrote the only reasoned judgment of the Court of Appeal, held that in reality this was an argument that the bank ought to have deferred the arrest and sale of the ship until it arrived in Hamburg.[135] He rejected the argument as it falls foul of the many statements in the cases that the mortgagee is entitled to decide the time at which he sells without regard to the interest of the mortgagor, and these statements cannot be side-stepped by saying, in the case of a moveable chattel such as a ship, that the mortgagee has to take care to sell at the place where the best price is available, because to transfer a chattel from one place to another will inevitably take time and mean that the sale is deferred.[136]

53 Two points should be noted about the *Silven* case. First, with respect, *McHugh v Union Bank of Canada* does not stand for the proposition that Lightman J ascribed to it. There was simply no question of increasing the value of the horses in that case, the only complaint being that the horses were driven too hurriedly to the market and as a result some died and others were put out of condition.[137] What the Privy Council decided was simply that the mortgagee, having

131 *Id*, at [28].
132 *Id*, at [28], [29].
133 [2003] EWCA Civ 1559; [2005] 1 BCLC 274 (CA).
134 *Id*, at [21].
135 *Id*, at [25].
136 *Id*, at [25].
137 *McHugh v Union Bank of Canada* [1913] AC 299 (PC) at 305.

decided to sell the horses, should take reasonable care when rendering the mortgaged property saleable; in fact, this is also what Lightman J held to be the ratio of that case,[138] before he went on to draw the distinction between a duty to preserve a security and a duty to increase its value. In today's context, *McHugh v Union Bank of Canada* would be best understood as falling within the broader rule in *Cuckmere*, that a mortgagee owes a duty to take reasonable care in effecting the process of sale to obtain the true market value of the property.[139]

54 Next, the distinction drawn between preserving the value of security and increasing its value is most unfortunate. First, conceptually, there is no clear line dividing efforts directed at one rather than the other. Consider the facts in *Knight v Lawrence*,[140] where the receiver was held liable for failing to trigger an upwards only rent review clause. Should a service of notice for rent review be characterised as a step to preserve the value of the mortgaged property or one to increase its value? The answer depends on the perspective adopted. It may be seen as the former on the basis that this was part of the bargain struck with the tenants when the property was let so it was integral to the intrinsic value of the property. It may also be seen as the latter since the efforts would have led to the security being more valuable, unlike, say, keeping the property in repair. Secondly, the distinction was not drawn in earlier cases and is inconsistent with them. In all the situations where it has been held that a mortgagee or receiver comes under a duty of care, the issue has always been whether the mortgagee or receiver has done what may reasonably be expected from an ordinarily competent mortgagee or receiver,[141] not whether what they had done or omitted to do was concerned with preserving or increasing the value of the security. In some situations, the discharge of duty would not have required a mortgagee or a receiver to increase the value of the security, as in *McHugh v Union Bank of Canada*. In others, that would be required, at any rate where that is understood as meaning that the security has become more valuable as a result of efforts by a mortgagee or receiver. For example, a mortgagee in possession is required to lease out the property at a proper rent, and a receiver who carries on the business of the company must take reasonable steps to do so profitably. In fact, Lightman J himself stated that a mortgagee in possession is required to

138 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [16].

139 In *Roberto Building Material Pte Ltd v OCBC (No 2)* [2003] 3 SLR 217 (CA) at 63, the Singapore Court of Appeal, citing *Lee Nyet Khiong v Lee Nyet Yun Janet* [1997] 2 SLR 713 (CA) at [36] emphasised that it is the process of effecting the sale that is critical in the formulation of the duty of care laid down in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 (CA).

140 [1993] BCLC 215.

141 Gavin Lightman & Gabriel Moss, *The Law of Administrators and Receivers of Companies* (London: Thomson Sweet & Maxwell, 4th Ed, 2007) at [10-039].

be active in protecting and exploiting the security, maximising the return, but without taking undue risks.[142] The distinction is thus inconsistent with both well-established law on the duties of a mortgagee in possession and the recent rule enunciated in *Medforth v Blake*.[143] In fact, the proposition that a mortgagee and receiver is only required to preserve, but not increase, the value of security will, if most actions are characterised as increasing the value of security, deprive the duty to exercise reasonable care in the aforesaid two situations of much of its force.

55 We now assess the *Silven* and *Den Norske* cases together. It is submitted that they expose the internal tension of the current state of law arising from the co-existence of the classical approach and a modicum of the alternative new approach, and how the courts have leaned in favour of the classical approach. As the duties of care have been engrafted on a landscape without any such duty, *in principle* it becomes necessary, in relation to any conduct complained of, to decide whether it falls within the sphere occupied by the two specific duties of care. Consider the case where a receiver carries on the business of the company but then decides to end it and sell the company's assets, in the process terminating a project of the company that would otherwise have been completed. The act is of course a decision on when to sell the charged assets, but it is no less a decision in the course of carrying on the company's business. It does not make much sense to insist that the act can only be either the former or the latter, but not both. However, this is exactly what the law requires to be done, and the outcome of that exercise is critical. The receiver will only come under a duty of care if two conditions are satisfied: the act is not a decision on time of sale, but is a decision in the conduct of the company's business.

56 In both *Silven* and *Den Norske*, arguments were advanced that the relevant decisions in question were made in the process of sale,[144] and in the former case, ought to be considered together with the earlier decision to seek planning permission and lease out a vacant property. The arguments were rejected on the basis that those decisions related to the unfettered discretion of the receiver (in *Silven*) and the mortgagee (in *Den Norske*) to sell as and when they saw fit. Other than that, no explanation was given for rejecting the arguments, even though it was clear that an alternative analysis was possible. Take the case of *Silven*. The receivers' decision not to continue with the application for planning permission or the negotiations to lease a vacant property but to sell the

142 [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [13].

143 [2000] Ch 86 (CA).

144 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [11]; *Den Norske Bank ASA v Acemex Management Co Ltd* [2003] EWCA 1559; [2005] 1 BCLC 274 (CA) at [21].

mortgaged properties immediately is undeniably a temporal decision on sale, but it is also perfectly sensible to adopt a broader context and see it as a management decision. This is because the mortgagors being property holding companies, trading and leasing of properties are quintessentially the businesses of such companies. But Lightman J would have none of that, insisting that the receiver must enjoy absolute freedom to sell when he sees fit, and is under no duty to increase or improve the value of the properties by awaiting or committing time or money.[145] Next, in the *Den Norske* case, the decision not to proceed to Hamburg to discharge the bananas there but to discharge them overboard in Panama may similarly be viewed from a broader pair of lenses and be seen as a decision taken within the context of the manner of sale. Longmore LJ was willing to accept that a short delay to enable the property to be properly advertised,[146] or perhaps transporting the property to another place where there is no true market for the property in the place where the mortgagee proposes to sell, are acceptable, but not the case here as ships are regularly sold in Panama and to require it to be sold in Hamburg would incur costs and delay the sale.[147] His approach is thus more nuanced than that of Lightman J, but at the same time he was also more explicit in his rejection, saying that the many statements that the mortgagee is entitled to decide the time at which he sells without regard to the interest of the mortgagor "cannot be side-stepped".[148]

VI. Conclusion

57 It has been argued that several aspects of the law on the duty of a mortgagee and a receiver to the mortgagor are unsatisfactory. They are summarised here and suggestions made on how the law may be improved. First, insufficient attention has been given to the general duty of a mortgagee and a receiver to exercise their powers in good faith. Lack of good faith includes not only fraudulent conduct, but also deliberate or reckless conduct in causing harm to the mortgagor's interest gratuitously. Where the evidence supports such a conclusion, courts should follow the lead taken in *Forsyth v Blundell*[149] and *How Seen Ghee v DBS Bank*[150] and not shy away from holding that the duty of good faith has been breached.

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145 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [28].

146 *Meftah v Lloyds TSB Bank plc* [2001] 2 All ER (Comm) 741 was cited to support this proposition.

147 *Den Norske Bank ASA v Acemex Management Co Ltd* [2003] EWCA 1559; [2005] 1 BCLC 274 (CA) at [25].

148 *Ibid*.

149 (1972–1973) 129 CLR 477.

150 [1994] 1 SLR 526 (CA).

58 Next, the law has gone far beyond what is necessary to protect a mortgagee's legitimate interests as a secured creditor. The classical approach has been so accommodating to mortgagees and receivers that they are allowed to harm the interests of mortgagors gratuitously. Whilst no doubt a mortgagee is entitled and a receiver is bound to prefer the superior interest of the mortgagee to any conflicting interest of the mortgagor, there is no legal or economic reason why they should be allowed to go further and inflict harm on the mortgagor gratuitously. Although some courts have in recent years adopted an alternative to the classical approach which is more sensitive to the interests of the mortgagors, the classical approach still dominates. The current state of the law is thus a patchwork of two conflicting viewpoints that is incoherent and does not make commercial sense. More specifically, two points should be noted.

59 First, it is incoherent that a mortgagee only comes under a duty of care after it has gone into possession and in conducting a sale of the mortgaged property. These steps form only part of the total security package. The arguments for imposing a duty of care when selling, as enunciated in *Cuckmere Brick Co Ltd v Mutual Finance Ltd*,[151] that the mortgagor is vitally affected by the result of the sale but has no role in it, and that the mortgagee is not an absolute owner, apply to all aspects of the mortgagee's action or inaction in relation to the mortgage. These arguments apply similarly to the duty of care of a receiver which is limited to only conducting a sale or carrying on the business of the mortgagor. Secondly, the most recent cases have reasserted the primacy of the classical approach and adopted a very restrictive view of the scope of the specific duties of care on sale and carrying on the business of the mortgagor. An act of a mortgagee or receiver, so long as it may be seen as a decision regarding the time to sell the mortgaged property, will be so characterised, thus absolving a mortgagee or a receiver from owing any duty of care to the mortgagor, even though it may be characterised differently such that the mortgagee or receiver comes under a duty of care. But perhaps the most ominous sign of all recent developments is that the duty of a receiver to exercise due diligence in carrying on the business of the mortgagor was not mentioned in Lightman J's comprehensive statements in *Silven* on the duties owed by mortgagees and receivers, even though *Medforth v Blake* was mentioned in his judgment.[152]

60 This article's survey of the leading authorities over the last three decades leads ineluctably to one conclusion. Equity, even if it had been right to adopt the classical approach in the nascent stages of the law's

151 [1971] Ch 949 (CA) at 966, *per* Salmon LJ; at 969, *per* Cross LJ.

152 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997 (CA) at [22], [27].

development, has failed to evolve and respond to the widespread criticisms of the excessive rights it has conferred on mortgagees and receivers over the last few decades. This has done great harm not only to the rights of mortgagors but also to the institution of receivership. It was the lack of accountability that equity endorses which contributed to the virtual abolition of the administrative receivership in the UK. Learned commentators have argued that a general duty of care should be imposed on mortgagees and receivers.[153] This writer respectfully concurs. As the arguments are well rehearsed, it is not necessary to repeat them here. Rather, it is proposed to say a little about the content of such a duty and what it will actually entail in practice.

61 It was argued earlier that two principles provide a satisfactory basis to develop a general duty of care. The basic point about the proposed general duty of care is that it must not prejudice the control and priority to payment conferred by a mortgage on the mortgagee but otherwise the mortgagee or receiver must exercise reasonable care with regards to the mortgaged property. The first and second parts of that proposition are captured in the first and second principles respectively. For ease of reference, they are set out here again. The first principle is that, provided a mortgagee or receiver acts in good faith, the mortgagee is entitled, and the receiver is bound to subordinate any conflicting interests of the mortgagor to what the mortgagee or receiver genuinely perceives to be the mortgagee's interests in securing repayment. The second principle is that where there is no conflict between the interests of the mortgagee and mortgagor, the mortgagee and receiver are not entitled to override or ignore the interests of the mortgagor and come under a duty to exercise reasonable care.

62 If the above suggestion is accepted, there are a few questions that should be asked to determine whether a mortgagee or receiver had acted in good faith and exercised reasonable care. The central question is whether the conduct of the mortgagee or receiver is referable to and necessitated by a *real* conflict between the interests of the mortgagee and mortgagor? If the conduct may be so justified, that is the end of the enquiry since the mortgagee or receiver is entitled to prefer the interests of the mortgagee even when this inflicts harm on the mortgagor. If the conduct is not so referable, the receiver or mortgagee has not acted in good faith, as they would have sacrificed the mortgagor's interests gratuitously, and is liable accordingly. In this case, it is irrelevant that the interests of the mortgagee and mortgagor are actually in conflict. This will be a rare occurrence in practice. Next, if the conduct is so referable but the alleged conflict of interests turns out on closer analysis to be

153 Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge: CUP, 2002) at pp 251–252, 261–272; Roy Goode, *Principles of Corporate Insolvency Law* (London, Thomson Sweet & Maxwell, 3rd Ed, 2007) at [9-48].

unreal, the mortgagee or receiver would have either breached the duty of good faith or the duty of care, depending on whether the conduct is intentional or negligent.

63 The crux of the above questions is whether the conflict of the mortgagee's interest with the mortgagor's interest is real. In *Shamji v Johnson Matthey Bankers Ltd*,[154] Hoffmann J assumed that the appointment of a receiver "involves an inherent conflict of interest". That is probably true in most cases, but it cannot be taken as a given. If the mortgagee has nothing to lose by deferring the appointment temporarily whilst the mortgagor has much to gain from it, it can hardly be said that there is a real conflict of interests here. The same argument applies to a decision on whether to sell and the time to sell the mortgaged property, where it is generally assumed that there is inevitably a conflict of interests.

64 The question of how the interests of the mortgagee and mortgagor interact and play out over time is very complex; it is not possible for this article to deal with it comprehensively. But just to bring home the point that careful analysis is required, it is proposed to consider another aspect of Hoffmann J's reasoning in *Shamji v Johnson Matthey Bankers Ltd*. The learned judge had said that a duty of care on sale was imposed on the mortgagee in *Cuckmere* since there can be "no real conflict of interest between mortgagor and mortgagee".[155] This analysis is clearly correct, because in that case a decision having already been made to sell the mortgaged property, which was not challenged, the only issue was whether the sale had been conducted properly. It may be thought that both the mortgagee and mortgagor would, therefore, be interested in obtaining the best price for the property and would work towards that. But that is not necessarily the case. The mortgagee was of course interested in selling the mortgaged property at a sufficient price to pay off the debts in full, but it would not get to enjoy any surplus if the property was sold for a higher price. The mortgagor was, however, most interested in selling the property at the best price available. This gives rise to what US jurists have termed an agency problem,[156] which may be resolved either by bargaining between the parties or, where that is not possible or the transaction costs would be too high, by the law. It is a truism that banks generally enjoy much stronger bargaining power than the companies that borrow from them. There is no reason why

154 [1986] BCLC 278 at 284, affirmed [1991] BCLC 36 (CA).

155 [1986] BCLC 278 at 283.

156 In the most general sense of the term, an agency problem arises whenever the welfare of one party, termed the "principal", depends upon actions taken by another party, termed the "agent". The problem lies in motivating the agent to act in the principal's interest rather than simply in the agent's own interest. Viewed in these broad terms, agency problems arise in a broad range of contexts that go well beyond those that would formally be classified as agency relationships by lawyers.

banks would want to agree with the borrowers that they are under a duty to exercise care. In fact, on the contrary, banks will want to bargain to exclude the duty or limit their liability if the duty is breached.[157] So this is a strong case for the law to intervene to subject the mortgagee to a duty of care, which was what was done in *Cuckmere*.[158]

65 The question of whether the conduct of a mortgagee or receiver is negligent is one on the content of the duty of care. "A mortgagee or receiver is only to be adjudged negligent if he has acted as no mortgagor or receiver of ordinary competence acting with ordinary care and (where appropriate) on competent advice would act."[159] This will to a certain extent involve judges in making judgments on business matters, but that is unavoidable and, in any event, judges have already been doing this in other contexts, including adjudicating on whether an insolvency practitioner has failed to exercise reasonable care and skill.[160] So long as judges adopt a broad view of the facts and are vigilant against relying on the benefit of hindsight in their decisions, they will not impose commercially unrealistic demands on mortgagees.

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157 On the applicability of the Unfair Contract Terms Act (Cap 396), see discussion in *The Law of Administrators and Receivers of Companies* (Gavin Lightman & Gabriel Moss eds) (London: Thomson Sweet & Maxwell, 4th Ed, 2007) at [10-054].

158 [1971] Ch 949 (CA).

159 Gavin Lightman & Gabriel Moss (eds), *The Law of Administrators and Receivers of Companies* (Thomson Sweet & Maxwell, London, 4th Ed, 2007) at [10-039].

160 *Eg*, *Re Keypak Homecare Ltd* [1987] BCLC 409; *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760. See Vanessa Finch, "Corporate Insolvency Law: Perspectives and Principles" (Cambridge: CUP, 2002) at p 266.