Beckkett Pte Ltd v Deutsche Bank AG and Another and Another Appeal
[2009] SGCA 18

Case Number : CA 125/2007, 126/2007

Decision Date : 27 April 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Chan Seng Onn J; Andrew Phang Boon Leong JA

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Parties : Beckkett Pte Ltd — Deutsche Bank AG; PT Dianlia Setyamukti

Civil Procedure – Bifurcation order – Scope of bifurcation order – Whether bifurcation order required pledgor to prove actual loss at trial

Credit and Security – Mortgage of personal property – Stocks and shares – Scope of duty of pledgee to pledgor and guarantor when selling pledged shares – Pledgee failing to ascertain market price of shares before agreeing to private sale – Proper basis for valuation of shares – Whether shares sold at undervalue – Whether claim by company in respect of shares pledged by its subsidiary allowable

Damages – Compensation and damages – Sale of pledged shares by pledgee at undervalue – Whether value of shares of company affected by value of shares of its subsidiary and sub-subsidiaries – Whether principle of no reflective loss applied – Whether trial judge was right in awarding only nominal damages

Equity – Remedies – Rescission – Whether pledgor who pledged shares of subsidiary had standing to set aside other shares pledged by its subsidiary and sub-subsidiaries – Whether sale of pledged shares could be set aside – Whether pledgee acted in bad faith in sale of pledged shares or exercised its power of sale for improper purpose – Whether purchaser of pledged shares was bona fide purchaser – Whether purchaser of pledged shares had notice of pledgee's breach of duty to obtain best price for pledged shares or any impropriety in sale – Whether purchaser of pledged shares had obligation to safeguard rights of pledgor vis-a-vis pledgee

Tort – Conspiracy – Conspiracy by unlawful means – Elements of conspiracy by unlawful means – Differences between conspiracy by lawful means and conspiracy by unlawful means – Whether pledged shares sold at undervalue pursuant to conspiracy between pledgee and purchaser – Whether sale of pledged shares involved any unlawful means – Whether there was intention on part of pledgee or purchaser to injure pledgor

27 April 2009 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 The proceedings before us are an appeal (Civil Appeal No 125 of 2007) by Beckkett Pte Ltd ("Beckkett"), a Singapore company, and a cross-appeal (Civil Appeal No 126 of 2007) by Deutsche Bank AG ("the Bank"), a German bank with a branch in Singapore, against the decisions of Kan Ting

Chiu J ("the Judge") on a claim by Beckkett and a counterclaim by the Bank in Suit No 326 of 2004 (see *Beckkett Pte Ltd v Deutsche Bank AG* [2008] 2 SLR 189 ("the Judgment")). The Judge dismissed both the claim and the counterclaim.

2 The claim by Beckkett is for various reliefs against the Bank and PT Dianlia Setyamukti ("DSM"), an Indonesian company, in connection with the sale by the Bank to DSM of shares in four Indonesian companies which were pledged to the Bank ("the Pledged Shares") to secure the repayment of a bridging loan of US$100m made by the Bank ("the Bridging Loan") to PT Asminco Bara Utama ("Asminco"), an Indonesian company. The Bridging Loan was guaranteed by Beckkett, its ultimate parent company. The counterclaim by the Bank is against Beckkett as guarantor for payment of the unpaid balance of the Bridging Loan after accounting for the proceeds of sale of the Pledged Shares.

The background

The Swabara group of companies

3 Beckkett is an investment holding company incorporated in Singapore. Prior to February 2002, Beckkett owned approximately 74.2% of the issued share capital of an Indonesian company, PT Swabara Mining and Energy ("SME"). SME, in turn, owned 99.9% of the share capital of Asminco which owned 40% of the shares in PT Adaro Indonesia ("Adaro"), an Indonesian company, and 40% of the shares in PT Indonesia Bulk Terminal ("IBT"), an Indonesian company. Beckkett and these four Indonesian companies are collectively referred to in this judgment as "the Swabara Group". The main and most substantial asset in the Swabara Group was the indirect holding (through Asminco) of a 40% share in Adaro. Adaro owned a coal mine in Kalimantan (one of the largest in Indonesia) which produced a low-ash, low-energy coal known as "Envirocoal". This asset was the "crown jewel" of the Swabara Group. IBT owned and operated a bulk terminal for Adaro's coal mine.

4 Beckkett itself is a wholly-owned subsidiary of Asian Mining Energy Corporation ("ASMEC"), a company incorporated in Mauritius whose shareholders were divided into three groups as follows:

(a) Metropolitan Investment Corporation ("MIC") owning 29.191% of its shares;

(b) PT Unigaruda Masabadi ("UM"), owning 29.191% of its shares; and

(c) Indopac Development Corporation Ltd ("Indopac"), Timko Company Ltd ("Timko") and Jade Age International Corporation ("Jade Age"), collectively owning 41.618% of its shares.

5 MIC was part of the group of companies called "the Tirtamas Group", owned and controlled by Mr Hashim Djojhadikusumo ("Hashim") while UM was part of another group of companies called "the RGM Group", owned and controlled by Mr Sukanto Tanoto ("Sukanto"). MIC and UM will be referred to collectively as "the Passive Shareholders". Together they owned 58.382% of ASMEC and thus controlled Beckkett.

6 Indopac, Timko and Jade Age, on the other hand, were companies controlled by a group of four individuals who also held various management positions in the Swabara Group. These four individuals are:

(a) Graeme Robertson – Chairman, Chief Executive Officer and President Director of SME, Asminco, Adaro and IBT, as well as the managing director of New Hope Corporation Limited ("New Hope") which is also a shareholder of Adaro, and sole executive director of Indocoal Pty Ltd;

(b) Allan Buckler – Chief Operations Officer and director of SME, Adaro, IBT, as well as Chief Operations Officer and director of New Hope;

(c) Terry Smith – Deputy Operations Director and Commissioner of SME, Adaro and IBT, as well as Operations Officer and director of New Hope; and

(d) Indra Aman – General Legal Counsel and director of SME and Adaro, as well as President Commissioner of Asminco.

The four individuals are collectively referred to as "the Management Group" in this judgment.

The Bridging Loan and the share pledge agreements

7 Prior to 1997, Asminco owned 15% of the shares in Adaro and 20% of the shares in IBT. In December 1997, Asminco acquired a further 25% of Adaro shares and 10% of IBT shares from the Tirtamas Group and another 10% of IBT shares from a company called Swabara Bumi. Asminco obtained the Bridging Loan from the Bank to fund the purchase. The Bridging Loan was provided subject to the terms of a bridge facility agreement dated 24 October 1997. The Bridging Loan was intended to be repaid in six months from the proceeds of a syndicated loan and a convertible bond to be arranged by Deutsche Morgan Grenfell, but subject to market circumstances and on a "best efforts" basis.

8 The following securities were given by the Swabara Group to secure the repayment of the Bridging Loan:

(a) the joint and several guarantee of Beckkett and SME ("the Guarantee"); and

(b) the Pledged Shares comprising: (i) Beckkett's 74.2% shareholding in SME ("the SME Shares"); (ii) SME's 99.9% shareholding in Asminco ("the Asminco Shares"); (iii) Asminco's 40% shareholding in Adaro ("the Adaro Shares"); and (iv) Asminco's 40% shareholding in IBT ("the IBT Shares"), each pledge being subject to a separate share pledge agreement (collectively "the SP Agreements") containing identical terms and conditions.

Beckkett was both a pledgor of the SME Shares and a guarantor to secure the repayment of the Bridging Loan. The Guarantee is governed by English law, while all the SP Agreements are governed by Indonesian law.

9 The Bridging Loan was disbursed in October 1997 and used to pay off a US$16.5m loan extended by Sukanto to ASMEC, and the remaining $83.5m was used to acquire the additional 25% shareholding in Adaro and the 20% shareholding in IBT (see [7] above).

10 Asminco defaulted in repaying the Bridging Loan when it became due in May 1998. The Bank agreed to roll over the Bridging Loan for three months to enable Asminco to obtain alternative financing, but Asminco defaulted again. Thereafter, Asminco remained in default, and for about three years from August 1998 to June 2001, Beckkett was either unable or unwilling to repay the Bridging Loan. During this period, the Bank made numerous efforts to refinance and restructure the Bridging Loan. It held at least 19 restructuring meetings with the Management Group, but without success. The Bank also made two refinancing proposals on 2 December 1998 and 19 April 1999 but these were rejected by Beckkett. In January 2000, the Bank sought partial repayment of the Bridging Loan and also a proposal from Beckkett on how to repay the balance, but this attempt was also ignored. According to the Bank (and Beckkett has not denied this), the shareholders of Beckkett refused to

provide Asminco with funds to repay the Bridging Loan and refused to agree to sell the Pledged Shares or to obtain refinancing from third parties to repay the Bridging Loan.[note: 1]

The sale of the Pledged Shares

11 The impasse came to a head at a meeting on 27 June 2001 when the Bank informed Beckkett's shareholders that, unless they put in money to repay the Bridging Loan or voluntarily gave up their shares, the Bank would have to take action to enforce the security. As Beckkett remained intransigent, the Bank entered into negotiations to sell the Pledged Shares to DSM. Beckkett was deliberately kept in the dark about the negotiations. On 21 November 2001, the Bank and DSM agreed to the sale and purchase of the Pledged Shares at about US$46m on the terms of a sale and enforcement agreement governed by Singapore law ("the S&E Agreement"). The sale price was allocated among the Pledged Shares as follows:

(a) US$800,000 for the SME Shares;

(b) US$44.2m for the Adaro Shares;

(c) US$1m for the IBT Shares; and

(d) US$100 for the Asminco Shares.

12 The sale was completed on 15 February 2002 and the Pledged Shares were transferred to DSM and its nominees as follows:

(a) the Adaro Shares and the IBT Shares to DSM;

(b) the SME Shares to PT Mulhendi Sentosa ("Mulhendi"); and

(c) the Asminco Shares to PT Akabiluru ("Akabiluru").

13 Beckkett was informed of the sale on 18 February 2002 when it received a letter from the Bank's Indonesian lawyers disclosing the sale of the SME Shares for US$800,000. That notification was followed on 14 March 2002 by a letter from the Bank's Singapore solicitors demanding payment from Beckkett of US$86,888,969.31, being the balance of the Bridging Loan and interest thereon ("the Unpaid Loan") as at 21 February 2002. Apart from the name of the purchaser of the SME Shares and the price at which the SME Shares were sold, Beckkett was not provided with any other details on the sale of the Pledged Shares. Beckkett had to commence pre-action discovery proceedings in May 2002 against the Bank before it was eventually given the details of the sale of the Pledged Shares. These are not the only unusual features in the case. For example, there is no evidence before the court as to whether the Bank had obtained a valuation of the further 25% Adaro shares and 20% IBT shares when it provided the Bridging Loan to Asminco to finance the purchase of the shares.

14 Beckkett refused to pay the Unpaid Loan and commenced an action on 27 April 2004 against the Bank to set aside the sale of all the Pledged Shares and/or for damages for selling the Pledged Shares at an undervalue. Beckkett joined DSM as a second defendant on 28 February 2005 after obtaining information on the role of DSM in the purchase of the Pledged Shares.

15 Adaro and IBT were eventually sold to an international consortium of investors and financiers in 2005 pursuant to a US$950m leveraged buyout, which was completed sometime in June 2005. However, prior to this event, Beckkett had unsuccessfully applied to the High Court for an injunction to restrain the sale by DSM of the Adaro Shares and the IBT Shares. The application was dismissed on the ground that damages would be an adequate remedy (see *Beckkett Pte Ltd v Deustche Bank AG* [2005] SGHC 105). The grounds of the judgment of the court did not indicate whether or not Beckkett offered to pay the Unpaid Loan in order to redeem the Adaro Shares and the IBT Shares.

Beckkett's claims in Suit No 326 of 2004

16 The reliefs claimed by Beckkett against the Bank and DSM are for:

(a) a declaration that the sale of the Pledged Shares was invalid, null and void and for an order to set it aside;

(b) a declaration that the equity of redemption over the Pledged Shares be restored to Beckkett, SME and Asminco;

(c) an order that the Bank and DSM return the Pledged Shares to Beckkett, SME and Asminco;

(d) alternatively, damages to be assessed.

17 Beckkett's claims against the Bank were based on the following grounds:

(a) The Bank failed to exercise the power of sale for a proper purpose and in good faith.

(b) The Bank failed to take reasonable care to obtain a proper price for the Pledged Shares in selling them at a grossly undervalued price of US$46m.

(c) The Bank conspired with DSM to sell the Pledged Shares to DSM, as a front for the Management Group, at an undervalue.

18 Beckkett's claims against DSM were based on the following grounds:

(a) DSM, as a front for the Management Group, conspired with the Bank to purchase the Pledged Shares at an undervalue.

(b) DSM was not a *bona fide* purchaser as it had notice that the Bank was in breach of its duties as pledgee when DSM purchased the Pledged Shares at US$46m.

19 The Bank and DSM joined issue with Beckkett on all these allegations.

20 The trial began on 20 February 2006. After the close of Beckkett's case on 18 July 2006, the Bank made a submission of no case to answer on 19 July 2006 and elected not to call any evidence on its counterclaim. DSM, however, elected to give evidence. The trial concluded on 21 September 2007 after the filing of written submissions, followed by a last round of oral submissions.

Decision of the trial judge

21 In a reserved judgment (*ie*, the Judgment, see [1] above), the Judge made the following findings:

(a) The Bank did not act with due care in the sale of the Pledged Shares with respect to the Asminco Shares, the Adaro Shares and the IBT Shares (at [151]), and the SME shares (at [152]).

(b) Beckkett, as pledgor of the SME Shares, had a direct claim for damages against the Bank if the SME Shares were sold at an undervalue, but Beckkett failed to prove that those shares were sold at an undervalue (at [112]–[113]).

(c) Beckkett had no standing to set aside the sale of the Pledged Shares (other than the SME Shares) which it did not own or pledge to the Bank (at [144]).

(d) (d)Beckkett, as guarantor of the Bridging Loan, did not have a direct claim for damages for the sale of the Asminco Shares, the Adaro Shares and the IBT Shares at an undervalue as Beckkett did not own these shares (at [87] and [142]), but it was entitled to raise any undervalue in their sale by way of defence to the Bank's counterclaim (at [87]).

(e) Beckkett was under a duty to adduce evidence at the trial of the actual loss it had suffered arising from the sale of the Pledged Shares by reason of an order made by an assistant registrar on 18 November 2005 ("the Bifurcation Order"), and since it had failed to adduce any evidence of such loss, it could not make out its claim for damages against the Bank (at [146]–[149]).

(f) Beckkett had failed to prove that the Bank and DSM had conspired with each other in the sale of the Pledged Shares to DSM as a front for the Management Group (at [114]–[124]) and that DSM was not a *bona fide* purchaser of the Pledged Shares (at [130]–[134]).

(g) The sale of the Pledged Shares was carried out by unlawful means (in that no valid court approval had been obtained from the Indonesian courts), but there was no conspiracy between DSM and the Bank with the intention to injure Beckkett (at [125]–[127] and [138]–[141]).

(h) Even if Beckkett had made out a case against the Bank and DSM, it was not equitable for the court to aside the sale of the Pledged Shares as (at [144]):

> (a) Beckkett has no claim to the [Pledged Shares] except for the SME shares it pledged;
>
> (b) the shareholdings in Adaro and IBT have been transformed by the leveraged buyout after the sale; and
>
> (c) the value of the shares has … benefited from investments and developments made, as well as the sharp increase in coal prices that has taken place after the sale.

22 In the result, the Judge dismissed Beckkett's claim to set aside the sale of the Pledged Shares, awarded nominal damages of $1,000 to Beckkett in relation to the Bank's failure to discharge its duties in selling the SME Shares and dismissed the Bank's counterclaim against Beckkett for lack of proof (at [152]).

Issues on appeal in Beckkett's claim and the Bank's counterclaim

Beckkett's appeal

23 Beckkett has appealed on the following grounds:

(a) The Judge erred in finding that DSM was a *bona fide* purchaser for value without notice in that:

(i) DSM had notice of the Bank's breach of mortgagee's duties, especially to act in good faith and for a proper purpose in the sale of the Pledged Shares;

(ii) DSM itself did not act in good faith in the purchase of the Pledged Shares; and

(iii) DSM had conspired with the Bank to injure it (Beckkett) through unlawful means.

Accordingly, the sale of the Pledged Shares should have been set aside.

(b) Even if the proper remedy lay in damages, the Judge erred in awarding Beckkett nominal damages of $1,000 since Beckkett had proved that the Adaro Shares and the IBT Shares had been sold at an undervalue, and the Judge should have ordered that the loss to Beckkett arising from the sale of the Pledged Shares be assessed.

(c) The Bifurcation Order did not require Beckkett to adduce evidence of its actual loss at the trial but only to establish liability against the Bank for breach of duty in selling the Pledged Shares at an undervalue, which Beckkett had established.

(d) The Judge erred in holding that DSM and the Bank did not conspire to injure Beckkett through unlawful means as:

(i) the implementation of the S&E Agreement involved the use of unlawful means; and

(ii) the terms of the S&E Agreement clearly evinced an intention on the part of the Bank and DSM to injure Beckkett.

The Bank's cross-appeal on the counterclaim

24 With respect to the cross-appeal, the Bank's contention was that the Judge was wrong in dismissing it as Beckkett had admitted receipt of the Bank's letter of demand for repayment of the Unpaid Loan and had acknowledged the debt in its own audited annual accounts.

Issues for the court's decision

25 Having regard to the grounds of appeal and the arguments of counsel before us, the following are the issues for the decision of this court:

(a) Did the Bank exercise the power of sale in good faith and for a proper purpose when it sold the Pledged Shares to DSM?

(b) Did the Bank take reasonable care to obtain the best price for the Pledged Shares when it sold them at US$46m to DSM, *ie*, did the Bank take care not to sell the Pledged Shares at an undervalue?

(c) If the Bank sold the Pledged Shares at an undervalue in breach of its duty as pledgee, was it necessary for Beckkett to adduce at the trial evidence of its actual loss, given the Bifurcation Order?

(d) Was DSM a *bona fide* purchaser of the Pledged Shares?

(e) Was there a conspiracy between the Bank and DSM to sell the Pledged Shares by unlawful means to injure Beckkett?

(f) If issue (d) or (e) or both are established, should the court set aside the sale of the Pledged Shares?

(g) Did the Bank prove its counterclaim on the evidence before the court?

26 Before we consider the grounds of the appeal, it is desirable that, at the outset, we clarify the nomenclature and the law applicable to the issues set out at [25] above. Although the shares were "pledged" to the Bank under the SP Agreements, it is common ground between the parties that: (a) the duties of the Bank as pledgee would be the same as those of a mortgagee; and (b) Singapore law (unless expressly provided otherwise) would apply to determine the rights and liabilities of the parties in relation to the sale of the Pledged Shares. Accordingly, in this judgment, the terms "pledge", "pledgor" and "pledgee" are used interchangeably with the terms "mortgage", "mortgagor" and "mortgagee".

Beckkett's appeal: Duties of mortgagee owed to mortgagor in sale of mortgaged property

27 It is settled law that a mortgagee, in exercising his power of sale, has a duty to act in good faith and also a duty to take reasonable care to obtain the true market value or the proper price of the mortgaged property at the date on which he decides to sell the property. In *Good Property Land Development Pte Ltd v Societe General* [1989] SLR 229 ("*Good Property Land*"), the High Court held (at 234, [4]–[5]), following the decision of the English Court of Appeal in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 ("*Cuckmere*"), which was approved by the Privy Council in *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, that:

> As far as this court is concerned, the law is as stated in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 where the Court of Appeal decided that a mortgagee had two duties: one to act in good faith and the other 'to take reasonable precautions to obtain … the true market value of the mortgaged property at the date on which he decides to sell it': per Salmon LJ at p 966. …
>
> These duties do not preclude the mortgagee from preferring his own interest to that of the mortgagor provided that he does not disregard the interests of the mortgagor. He is not a trustee of his power of sale vis-a-vis the mortgagor. Thus, the mortgagee is not required to wait for the most propitious market conditions to sell or to delay a sale in the hope of obtaining a better price. He is also not required to consult the mortgagor as to the time and manner of sale. He can sell by private treaty or public auction provided that he takes adequate steps to publicize the sale and bring it to the notice of a reasonable number of prospective buyers.

Good Property Land was followed in several High Court decisions (*Kian Choon Investments (Pte) Ltd v Societe General* [1990] SLR 167 ("*Kian Choon*"), *Sri Jaya (Sendirian) Berhad v RHB Bank Berhad* [2001] 1 SLR 486 and *Tai Sea Nyong v Overseas Union Bank Ltd* [2002] 4 SLR 811), and approved by this court in *How Seen Ghee v Development Bank of Singapore Ltd* [1994] 1 SLR 526. *Cuckmere* was earlier followed by this court in *Ng Muimui v Indian Overseas Bank Ltd* [1984-1985] SLR 286, *Malayan Banking Berhad v Hwang Rose* [1997] 2 SLR 1, and *Lee Nyet Khiong v Lee Nyet Yun Janet* [1997] 2 SLR 713 ("*Lee Nyet Khiong*").

28 In the interest of clarity, it may be pertinent to note that a breach of the two duties of a

mortgagee ordinarily results in a mortgagor claiming different reliefs. A failure to take reasonable steps to obtain the true market value or proper price (which for convenience, we will refer to as "the best price" in this judgment) for the security will usually lead to a claim for damages, but not a claim to set aside the sale, for the obvious reason that the complaint here would not be that the mortgagee is not entitled to sell but that the mortgagee has sold at an undervalue. On the other hand, where there is a breach of the duty to act in good faith, the sale itself may be bad in law. An example would be a sale involving a conflict of interest on the part of the mortgagee, *ie*, where the mortgagee has sold the property to his nominee or to any family relation or any company in which he has an interest or where the sale is effected for the purpose of preventing the mortgagor from redeeming the security. Where the purchaser is an independent third party, the mortgagor must prove that the purchaser is not a *bona fide* purchaser or that the purchaser has notice of bad faith or impropriety on the part of the mortgagee. In such a case, the court may set aside the sale in order to allow the mortgagor to redeem the security. A completed sale by a mortgagee is not liable to be set aside merely because it has taken place at an undervalue, as undervalue is not, by itself, evidence of bad faith or impropriety (see Danckwerts LJ's judgment in *Property & Bloodstock Ltd v Emerton* [1968] Ch 94 at 114, cited with approval by Pumfrey J in *Corbett v Halifax Building Society* [2003] 1 WLR 964 ("*Corbett*") at [27] and [33]).

29 The difference between the two remedies is discussed in Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at para 6.4.57:

> The precise application of the twin concepts of good faith and reasonable care may depend, to some extent, *upon the nature of the remedy sought by the mortgagor*. The two tests tend to operate under 'different and mutually exclusive conditions.' *The subjective requirement of good faith relates usually to the avoidance of conflicts of interest which may lead the court to set aside improperly transacted sales. By contrast, the objective requirement of reasonable care more readily generates, in cases of breach, a mere monetary liability in respect of the financial loss caused by the mortgagee's carelessness*. Thus, where the mortgagor brings an action against ***both*** the mortgagee ***and*** the purchaser for the setting aside of a sale, the court intervenes only if fraud or bad faith is shown to attach to the transaction. Where, however, the mortgagor seeks his remedy solely against the mortgagee and sues only for an accounting between them in respect of the sale price achieved, the court assesses the propriety of the mortgagee's conduct by reference to the rather higher standard represented by the test of reasonable care. [emphasis added; emphasis in original in bold italics]

30 In this judgment, we will examine, *inter alia*, these two issues separately:

(a) with respect to Beckkett's claim against the Bank for damages, whether the Bank took reasonable steps to obtain the best price for the Pledged Shares; and

(b) with respect to Beckkett's claim to set aside the sale of the Pledged Shares to DSM, whether the Bank acted in bad faith or for an improper purpose, and whether DSM had notice of such bad faith or impropriety.

Beckkett's claim against the Bank for damages

Clause 5(a) of the SP Agreements: Effect on duties of the Bank

31 The Bank argued, on the basis of contract, that Beckkett, as pledgor, had waived any claim for breach of the Bank's duty to obtain the best price for the Pledged Shares on the ground that cl 5(a) of the SP Agreements expressly gave the Bank the right to sell them in any way and at any price of

its choice. This argument, which was advanced before the Judge, was not dealt with by him in the Judgment. As it has been argued before us, we will now consider it.

32 Clause 5(a) of each of the SP Agreements (which are subject to Indonesian law) reads:

> If an Event of Default shall have occurred, the Bank may, without demand for payment or notice of intention and without obtaining any decree, order or authorisation of the court, all of which the [pledgor] hereby irrevocably and unconditionally waives, immediately or at any other time as the Bank shall in its sole discretion determine sell all or any part of the Pledged Collateral [the Pledged Shares] at a public sale or (to the fullest extent permitted by law) privately, at such price and upon such terms and conditions as the Bank shall in its sole discretion determine. The [pledgor] irrevocably and unconditionally authorises and empowers the Bank to appear wherever necessary, to draw up and to sign deeds of sale and purchase covering the Pledged Collateral or any part thereof and transfer deeds … and in general to do everything necessary or beneficial to pass good title to the Pledged Collateral or any part thereof to the purchaser or purchasers thereof, including any such actions as may be required to acquire from competent authorities consent for the transfer of any Pledged Collateral or any part thereof, to sign and submit applications in connection therewith and to register or cause to be registered the Stock and any other part of the Pledged Collateral being shares of capital stock or other securities, in the name of the purchaser or purchasers thereof on the records of the relevant issuer. The purchaser of any of the Pledged Collateral shall hold the same absolutely free from any claim or right of any kind of the [pledgor] including repossession, all of which rights the [pledgor] hereby irrevocably waives and releases.

33 The Bank's arguments on cl 5(a) are:

> (a) that cl 5(a) vests in the Bank the sole right to determine the price (whatever it may be and howsoever it is arrived at) at which to sell the Pledged Shares ("Proposition 1");
>
> (b) that cl 5(a) gives the Bank the right to do whatever is necessary to sell the Pledged Shares to a third party and to set the terms and conditions of the sale ("Proposition 2"); and
>
> (c) that cl 5(a) releases and waives any rights to claim back the Pledged Shares ("Proposition 3").

34 In support of these propositions, the Bank relies on the evidence of Beckkett's expert witness, Harahap, on the effect of cl 5(a) under Indonesian law. With respect to Proposition 1, Harahap's answer under cross-examination was as follows:[note: 2]

> Q. Do you agree, just on its terms, on the face of it, it says, on such price and on such terms as the bank shall in its own discretion determine? The contract gives the bank the right to choose the price; to sell at the price that it, at its own discretion, determines. … That would be *given effect* to by the Indonesian courts; correct?
>
> A. Yes, correct. Yes, but as long as it does not contradict against the law that applies.
>
> [emphasis added]

In relation to Proposition 2, Harahap's answer was as follows:[note: 3]

Q. … So the bank can choose, at its sole discretion, the other terms and conditions on which the sale takes place. Such a contractual clause is *valid*, is it not? ... The parties agreeing with each other on such a clause; that is *valid*?

A. Yes, *valid*.

…

Q. [Reading cl 5(a)] Basically, that gives the bank the right to do whatever is necessary to sell it to a third party, sign documents, and so on for that purpose. Would you accept that that is *valid* under Indonesian law?

A. It is *valid* as long as it does not contravene against the mandatory law.

[emphasis added]

As regards Proposition 3, Harahap's answer was as follows:[note: 4]

Q. [Reading cl 5(a)] The borrower, Asminco, completely releases and waives any rights to claim back the shares including the right of repossession; that would be *valid* under Indonesian law as well?

A. It is *valid* as long as it does not contravene against the mandatory law.

[emphasis added]

35 In our view, the answers of Harahap do not support the meaning the Bank attempts to attribute to cl 5(a) or the three propositions of the Bank. The answer with respect to Proposition 1 went no further than that the contractual terms (such as cl 5(a)) were effective under Indonesian law. And the same answers were given with respect to Propositions 2 and 3. Counsel for the Bank proved, through Harahap, that cl 5(a) was valid under Indonesian law and no more. But Harahap was not asked, and he did not answer, whether what the Bank had actually done was covered by cl 5(a). The Judge was fully aware of this point as shown by the following exchange:

MR SHANMUGAM: I will wait, with interest, to hear from my friend as to why clause 5(a) has no application either in Indonesian or Singapore law.

COURT: *It is not that it has no application; it is how it applies*, Mr Shanmugam. Nobody says it cannot apply.

MR SHANMUGAM: Right. On the face of it, sir, at such price and such terms.

[emphasis added]

36 In our view, cl 5(a) is not a *carte blanche* to the Bank for it to do anything it likes. It is intended to provide that, so long as the pledgee discharges its obligations (and here we are referring to obligations implied by law) in exercising the power of sale, it may sell the Pledged Shares "*at such price and upon such terms and conditions as the Bank shall in its sole discretion determine*" [emphasis added]. Clause 5(a) cannot be interpreted as an immunity clause against the Bank acting arbitrarily and in reckless disregard of the rights of the pledgor.

37 Clauses, like cl 5(a), in security agreements have been examined by the Singapore and English courts. Such clauses are narrowly construed (see *Fisher and Lightwood's Law of Mortgage* (LexisNexis Butterworths, 12th Ed, 2006) ("*Fisher*") at para 30.22, p 630). In *Bishop v Bonham* [1988] 1 WLR 742 ("*Bishop*"), the mortgagee relied on the following clause:

> If the depositor shall fail to pay on demand any moneys hereby secured or shall default in respect of any of the depositor's obligations … then and at any time thereafter you may without notice to the depositor sell the securities or any of them in such manner and upon such terms and for such consideration … as you may think fit. You shall have no liability for any loss howsoever arising in connection with any such sale …

38 The English Court of Appeal held that the general duties to take care to obtain a proper price and to act in good faith in realising a mortgagee security were obligations implied by the mortgagee-mortgagor relationship which could only be excluded by clear and express words. Such words are construed strictly. The Court of Appeal (at 752), cited *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 where the House of Lords held at 850:

> Since the presumption is that the *parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly* and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a *reasonable businessman would realise that he was accepting* when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only. [emphasis added]

39 The mortgagee in *Bishop* ran a similar argument (to that of the Bank in the present case) that words such as "as you may think fit" empowered the mortgagee, absent fraud, to sell without taking any precaution or without making inquiries at all. The Court of Appeal rejected the argument at 753–

754, stating that:

> With due respect to that argument, in my judgment it involves a misconstruction of the words "as you may think fit." In my judgment where the general law imposes a duty on a person to act with reasonable care in carrying out a particular transaction, the natural construction of words authorising a person to carry out such a transaction in such manner and upon such terms and for such consideration *"as you may think fit" is as authorising that person to carry out the transaction in such manner (and so on) as he thinks fit*, ***within the limits of the duty of reasonable care imposed by the general law*** – no more, and no less. The words do not in my judgment give the recipient authority, or carte blanche, to act as he thinks fit in disregard of that duty, and cannot properly be so read, even if the second sentence of clause 3 is read in conjunction with them …
>
> … Similarly, in my judgment, *an authority given to a mortgagee to sell the mortgaged property in such manner, upon such terms and for such consideration as he may think fit, must be read as subject to the implicit limitation that it is to be exercised* ***properly****, within the limits of the general law, that is to say, with the exercise of reasonable care to obtain a proper price*.
>
> [emphasis added; emphasis in original in bold italics]

40 In *Kian Choon* ([27] *supra*), L P Thean J adopted the same approach. There, the mortgagee relied on the following parts of an exclusion clause:

> (a) SG may without prejudice to its rights as mortgagees in possession elect at its sole option and discretion to exercise any or all of the following rights:
>
> …
>
> (ii) sell either as mortgagees under its powers of sale or as attorney for KCI by private treaty or otherwise the whole or any part or parts of the mortgaged property to whomsoever and subject to such terms and conditions as SG may deem fit;
>
> …
>
> (b) For the avoidance of doubt it is hereby agreed and declared that SG shall be at liberty to exercise any or all of the aforesaid rights or in any order or manner as it may in its sole and absolute discretion deem fit.

After referring to *Bishop*, Thean J stated that he did not propose to put a final construction on the clause (as he was dealing with the issue of injunctive relief in that case), but his *prima facie* view (at 181, [34]) was that the clause did not:

> … enable the bank to dispose of the property without any regard to the rights of the plaintiffs as mortgagor. In my view, *they do not exonerate the bank from their obligations to act in good faith and to take reasonable care to obtain the proper price or the 'true market value' thereof*. [emphasis added]

41 We would also construe cl 5(a) strictly, and so construed, it does not pass muster as an immunity clause. In fact, cl 5(a) implicitly and expressly obliges the Bank to obey whatever laws that may be applicable in order to "pass good title" and even expressly provides that, if the collateral is sold by private treaty, the Bank's discretion is circumscribed "to the fullest extent permitted by law".

In the circumstances, the Bank's claim of immunity from breach of mortgagee's duties under cl 5(a) fails.

Is proof of loss necessary before a pledgee can be liable for breach of duties?

42 In the court below, the Bank argued that if Beckkett failed to prove that it had suffered any loss as a result of the sale of the Pledged Shares to DSM, then its claims against the Bank, including the claim to set aside the sale, must be dismissed, whether or not the Bank had breached its pledgee's duties (including that of good faith).[note: 5] In support of this argument, the Bank relied on the following passage from the judgment of the High Court in *Good Property Land* ([27] *supra*) at 237–238, [10]:

> In my view, the first and primary task of the court is to determine whether the price at which the mortgaged property was sold was the best price reasonably obtainable at the time of sale. It is only after the court has determined that the price was not the best price that the court will go on to decide whether this was due to fraud, bad faith or breach of duty (which, of course, includes negligence) on the part of the mortgagee. If the defendants are able to establish at the trial of the action that they have sold the mortgaged property at the proper price at the time of sale, these allegations must necessarily fall to the ground. The only exception to this principle is a sale to the mortgagee himself. In that situation, the court will set aside the sale, irrespective of the price, on the ground that it is not a sale at all.

43 The Judge rejected the Bank's argument on the ground that the High Court's decision in *Good Property Land* did not have the effect contended by the Bank (see [89] of the Judgment). The Judge also pointed out that subsequent decisions which followed or approved *Good Property Land* did not construe the law in the manner suggested by the Bank.

44 We agree with the Judge. The question of setting aside the sale of the security in *Good Property Land* did not arise as the purchaser there was not made a party to the proceedings. In that case, the bank had negotiated unsuccessfully with various buyers but eventually decided to sell the security (a hotel) by closed tender to 43 selected brokers and hotel owners. Before the tender closed, the bank called it off and sold the hotel by private treaty for about $181m based on expert valuations. An interested party (who had offered a lower price earlier) made a higher offer of $186m after he learnt of the sale at $181m. The mortgagor sought to set aside the sale on the ground of bad faith. At the hearing, the mortgagor admitted that it wanted to set aside the sale not to redeem the security but to have it sold again so that it could fetch a higher price. The court found that, since the bank had taken reasonable steps to sell the hotel at the best price, there was no breach of duty on its part, and the fact that a higher price was offered *after* the sale did not prove that the bank had not obtained the best price at the material time. It was in that context that the court held that, if the bank had obtained the best price at the time of sale, the mortgagor would have suffered no loss, and therefore the other issues of bad faith, fraud or negligence on the part of the bank became irrelevant.

45 In *Lee Nyet Khiong* ([27] *supra*), this court analysed the mortgagee's duty to obtain the best price. Its analysis included an examination of the process of selling the collateral, *ie*, the steps taken by the mortgagee in the factual matrix of the case. A sale at a reasonable price does not mean that there is no breach of the duty to take reasonable efforts to obtain the best price. In *Lee Nyet Khiong*, this court held at [36] that:

> We were unable to accept this submission, which, with respect, missed the point. In the circumstances of this case, the *relevant question is not whether the price for which the*

property was sold by the appellant was reasonable but whether the appellant as a mortgagee, in exercise of the power of sale, had taken reasonable efforts to obtain the best price that was available in the circumstances. The fact that $6.85m was very near the value provided in the valuation and was a reasonable price was quite irrelevant in this case. [emphasis added]

In that case, the advertisement for the sale of the mortgaged property gave a woefully inadequate description of the property. It did not provide details which would have attracted a wider group of potential purchasers. The advertisement appeared only once, meaning that the chance of potential purchasers missing it was high. Further, only two weeks was allowed for the submission of tenders, which was wholly unreasonable, given that the mortgaged property was worth a large sum of money and a prospective purchaser would have had to make necessary searches and investigations and organise his finances. The mortgagee also discarded a second offer, which was significantly higher, without exploring it or entering into negotiations, ignoring the commonsensical approach which would have been to indicate the second offer to the first offeror to see if he would be prepared to match it. It was on the basis of these facts that the court held that the mortgagee had breached its duty to take reasonable steps to obtain the best price.

4 6 *Lee Nyet Khiong* may be contrasted with *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp (No 2)* [2003] 3 SLR 217 ("*Roberto Building Material*"). In that case, the sale price was lower than the book price of the security. The court said at [63]:

> It is settled law that in effecting a sale of mortgaged property, the receiver must exercise reasonable care as to the manner in which the sale is carried out so as to obtain its true market value. Just because the sale price obtained is 15% less than their book values is neither here nor there. That does not *per se* suggest a lack of reasonable care. *It is the process of effecting the sale which is critical*. [emphasis added]

In that case, the court noted that the receiver had, following expert advice, exposed the mortgaged securities to as wide a market as possible. In effecting the sale, the receiver also took care to appoint two different professional firms, one to value the securities and the other to conduct the auction. On those facts, the court held that the fact of the sale price of the securities being much lower than their book value did not *per se* suggest a lack of reasonable care on the part of the receiver and that it was the process of effecting the sale that was critical. Accordingly, the court held that the receiver had not breached his duty.

Did the Bank take reasonable steps to obtain the best price?

47 Beckkett's case on the issue of whether the Bank had taken reasonable steps to obtain the best price for the Pledged Shares is straightforward. It is that the Bank did not do so in that it:

> (a) failed to advertise and publicise the sale of the Pledged Shares, and in particular the Adaro Shares and the IBT Shares, to the attention of potential competitive bidders;
>
> (b) failed to accept its own internal valuations and/or to obtain independent valuations of the Pledged Shares; and
>
> (c) failed to negotiate with DSM for the best price for the Pledged Shares (in particular, the Adaro Shares and the IBT Shares) by reference to its internal valuations or any independent valuations.

48 Before Beckkett commenced these proceedings against the Bank, it had no information on how

the sale of the Pledged Shares had been effected or what steps had been taken by the Bank to obtain the best price for them. Accordingly, Beckkett had to seek evidence through the court's discovery process to prove these allegations. It was on this basis that Beckkett was able to obtain certain documents that it is now relying on as evidence of the Bank's breach of duties as a mortgagee. On the basis of these documents disclosed, the Judge found that the Bank had failed to take due care when it sold the Pledged Shares in the manner that it did, *ie*, by private treaty to DSM without any independent valuation and without notice to other potential buyers (see [150]–[152] of the Judgment).

49 In support of its allegations against the Bank in reliance on the Bank's own documents, Beckkett also highlighted the omission of the Bank to disclose the following types of evidence to the court:

(a) minutes or notes of meetings or correspondence between the Bank and potential purchasers;

(b) information and data relating to the operations, coal resources, profits, cash flows and financial reports of SME, Asminco, Adaro and IBT which the Bank would have provided to the purchasers to enable them to know the value of the Pledged Shares and make a competitive bid for them;

(c) internal documentation on the process of the sale of the Pledged Shares and the negotiation of their price;

(d) minutes of meetings with or written advice from the Bank's coal mining experts or consultants; and

(e) instructions to the Bank's marketing agents and valuers for the sale of the Pledged Shares.

50 Before us, the Bank has not made any serious attempt to argue that the Judge was wrong to find that it had not taken reasonable steps to obtain the best price for the Pledged Shares. In our view, any such attempt would have been futile, given the evidence adduced before and accepted by the Judge and in the light of the law as stated by this court in *Lee Nyet Khiong* and *Roberto Building Material*. We have no doubt that, on the evidence, the Bank had failed to take reasonable steps to obtain the best price for the Pledged Shares, particularly in relation to the Adaro Shares and the IBT Shares. We will elaborate on our reasons for finding so below.

51 We agree with Beckkett's submission that the Adaro Shares and the IBT Shares were "unusual" assets in that they could not be easily priced except by experts familiar with the coal industry and the global market for the type of coal produced by Adaro. A valuation by such experts is essential to ascertain the best price for the Adaro Shares and the IBT Shares. In *Fisher* ([37] *supra*), the authors had this to say at para 30.30:

> The need for the mortgagee to exercise informed judgment in exercising its power of sale means that *a prudent mortgagee will take advice*, for example, *with regard to valuation*, as to the most appropriate mode of sale, as to how best to advertise and as to the appropriate reserve price. *The more unusual the property, the more likely a failure on the part of the mortgagee to seek such advice would put him in breach of his duty*. [emphasis added]

Similarly, in Clyde Croft & Jan Johannsson, *The Mortgagee's Power of Sale* (LexisNexis Butterworths, 2nd Ed, 2004), the authors state at para 8.5 that:

The mortgagee must have a reasonably accurate estimate of the value of the mortgaged property before he or she sells either privately or by auction, in the latter case in order to fix a reserve which represents a 'proper price' … [emphasis added]

52 We should point out that DSM did produce in evidence a valuation report given by an Indonesian firm of valuers. However, the valuation was obtained, not for the purpose of negotiating the price with the Bank, but for the purpose of *justifying* the sale price of US$46m in an application to obtain the court approvals of the South Jakarta District Court for the sale of the Pledged Shares to it (see [97] below). The Judge, correctly, ignored this valuation as having no probative value. In our view, the facts speak for themselves as to a real likelihood of an undervalue. In 1997, the Bank lent US$100m to finance the purchase of 25% of Adaro's equity and 20% of IBT's equity. In 2001, the Bank sold Beckkett's 40% share in Adaro and 40% share in IBT for US$44.2m and US$1m respectively, *without giving any explanation as to how it had arrived at such prices and why it considered them to be, collectively, the best price it could have obtained*. In our view, this fact in itself is sufficient to show a *prima facie* undervalue with regard to these shares in the absence of any evidence that there was a collapse in the Indonesian or world market for coal or some other fact affecting the value of the shares in Adaro.

53 Accordingly, we affirm the Judge's finding that the Bank had failed to discharge its duty to take reasonable steps to obtain the best price for the Pledged Shares, in particular the Adaro Shares, and that Beckkett is entitled to damages against the Bank for any loss it might have suffered as a result.

Was the sale of the Pledged Shares for US$46m at an undervalue?

54 We next consider whether Beckkett has proved that the sale price of the Pledged Shares at US$46m was a sale at an undervalue. We have mentioned earlier (see [21] and [22] above) that the Judge found that Beckkett had failed to prove that the SME Shares had been sold at an undervalue but that he made no finding on whether the Adaro Shares and the IBT Shares had been sold at an undervalue, even though he had made an extensive examination of the valuation reports on those shares. In our view, the Judge should have made a finding on whether the Adaro Shares and the IBT Shares had been sold at an undervalue as the Bank owed a duty to Beckkett, as guarantor of the Bridging Loan, to account for the proceeds of any sale of those shares, particularly where, as here, the Bank was also suing Beckkett (by way of a counterclaim) for the Unpaid Loan. In our view, a finding on whether the Adaro Shares and the IBT Shares were sold at an undervalue should still have been made for the reason that any diminution in the value of those shares would have resulted in a diminution in the value of the SME shares pledged by Beckkett. In this connection, Beckkett has accepted, correctly, that it has no direct claim for damages for this loss since it did not own those shares. Its argument, however, is that the Bank sold the SME shares at less than their market value since the Adaro Shares and the IBT Shares were sold at an undervalue.

55 In the Judgment, the Judge dealt with this argument in two ways. First, he accepted the Bank's submission that Beckkett was not entitled to claim for reflective loss arising from the sale of the shares at an undervalue because Beckkett failed to "render the principle [of no reflective loss as laid down in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson*"), referred to by this court in *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR 597 ("*Townsing*")] inapplicable by removing the risk of double recovery and prejudice to the other shareholders or creditors of Asminco and SME in allowing Beckkett to proceed with its claim, as suggested in *Townsing*" (at [104]). Reference may also be made to the recent English case of *Barclays Bank plc v Kufner* [2009] 1 All ER (Comm) 1 which applied the principle to a claim by a guarantor of a loan against a bank for negligence in depriving the corporate principal debtor (of which the guarantor was a shareholder) of a yacht which the debtor could have used to repay the loan. In that case, the court held that the principle of

no reflective loss was applicable because the debtor was in a position to sue the bank for negligence (at [43]).

56 In our view, the Judge's finding in the present case that there was a risk of double recovery is not supported by the evidence as the SME Shares and the Asminco Shares had been sold to DSM's nominees. The new owners of SME and Asminco would have no reason to sue the Bank nor would they be able to sue the Bank since they had purchased their respective shares from the Bank, and the Bank would, accordingly, never be subject to any action for double recovery. To apply the principle of reflective loss against Beckkett on the facts of this case would cause grave injustice to Beckkett.

57 Secondly, the Judge held that, even if Beckkett could claim reflective loss from the sale of those shares, it did not follow that the SME Shares had a market value of more than US$800,000 as that depended on what liabilities SME had and on its value as a going concern. We agree with this conclusion, but, in our view, Beckkett is entitled to claim for any loss arising from the undervaluation of the SME Shares flowing from the sale of the Adaro Shares and the IBT Shares at an undervalue. The Judge found on the evidence that "[Beckkett] had not done enough to establish the value of SME, or the value of the SME shares Beckkett [had] pledged to [the Bank]" (at [112] of the Judgment). This was a critical finding against Beckkett. Was this a correct finding on the evidence? We now examine the evidence, particularly with reference to the valuations of the Adaro Shares and the IBT Shares.

(1) Valuation of the Adaro Shares and the IBT Shares

58 Beckkett's case is that the Adaro Shares and the IBT Shares were sold to DSM at a gross undervalue. Beckkett initially relied on its own valuation and on the Bank's internal valuations to prove the undervalue. With regard to the former, Beckkett referred to an equity valuation of the Adaro Shares and the IBT Shares prepared by its expert, one Jugmans. His evidence, and the evidence of two other witnesses (whose valuations Jugmans had referred to) showed the combined value of the Adaro Shares and the IBT Shares to be between US$210.8m and US$249.8m. The Judge found that Jugmans' valuation contained incorrect assumptions, information gaps and other deficiencies, and implicitly accepted the Bank's submission that the evidence of the three experts "was so flawed in theory and practice that no reliance could be placed on them" (at [145] of the Judgment). As a result, Beckkett ultimately reverted to its reliance on the Bank's own valuations on the equity values of the Adaro Shares and the IBT Shares.

59 The Bank's own internal valuations were as follows:

(a) a valuation undertaken by Deutsche Capital Singapore and prepared for the Bank which priced the combined value of Adaro and IBT at US$689.3m as at August 1999;

(b) an offer from AG Rheinbraun (a reputable German company) made in October 1999 to purchase majority interests in Adaro and IBT on the basis that the combined enterprise value of the two companies was US$650m, with an indication that the figure could be increased by up to another US$50m;

(c) an internal memo of the Bank dated 19 November 1999 to which was attached a valuation, based on a combined discounted cash flow enterprise (equity plus debt), of between US$568m and US$1,060m; and

(d) a combined discounted cash flow valuation dated 28 December 2000 of the enterprise

value of Adaro and IBT at US$785m, and equity value at US$666.8m.

Beckkett also produced evidence that, in January 2005, Adaro and IBT were valued at US$950m in a leveraged buyout by an international consortium of investors. However, there was some evidence that coal prices had experienced an unprecedented hike between 2003 and 2004 to reach historic highs.

60 On the basis of the Bank's internal valuations and using the illustration given by the Judge at [97] of the Judgment, Beckkett submitted that the value of US$240m for its 40% holdings in Adaro and IBT, after deducting the amount of US$132m being the amount owing to the Bank under the Bridging Loan, gave a surplus (or a loss in value of the SME Shares) of US$77.7m (and after accounting for the Judge's decision to reduce this figure by 10% in view of Beckkett's 40% indirect minority interests). Beckkett contended that, in comparison with this valuation, the sale of the Adaro Shares and the IBT Shares in January 2002 to DSM at US$44.2m and US$1m respectively was at a gross undervalue.

61 In response, the Bank questioned the reliability of its own valuations on the ground that they had not been tested by cross-examination, to which the Judge correctly observed that the Bank had not explained why the valuations were unreliable and what the proper valuation should be (see the Judgment at [99]). However, having rejected the Bank's criticisms of its own internal valuations, the Judge also ignored them as being unhelpful in determining the value of the Adaro Shares and the IBT Shares at the date of their sale. Having rejected all the valuations adduced by Beckkett, the Judge held that there was no evidence before him that the Adaro Shares and the IBT Shares had been sold at an undervalue. This decision was critical to Beckkett's entire claim for damages, which was dismissed on this ground, even though the Bank had breached its duties as mortgagee in the sale of the Pledged Shares. The Judge further held that, even if the Adaro Shares and the IBT Shares had been sold at an undervalue, this was an irrelevant issue as Beckkett did not own these shares. The Judge was of the view that the relevant issue before him was whether the SME Shares had been sold at an undervalue, *ie*, whether the sale price of US$800,000 for Beckkett's 74.2% shareholding in SME was at an undervalue. That depended on the financial condition of SME, which represented the true market value of the SME Shares. He concluded that Beckkett "had not done enough to establish the value of SME" (at [112]). In the result, the Judge rejected Beckkett's contention that the SME Shares had been sold at an undervalue. We turn now to examine this aspect of the Judge's decision.

(2) Valuation of the SME Shares

62 The only evidence available before the Judge was SME's unaudited 2001 consolidated financial statements ("SME's 2001 financial statements"). At [110]–[113] of the Judgment, he said:

> 110 It was common ground between Beckkett and [the Bank] that SME was a debt-laden company. SME's consolidated financial statement for the period ended 31 December 2001 showed that SME had a negative shareholders' equity of US$19.8m, after taking into account the investments in the 40% holdings in Adaro and IBT at cost, at US$92.4m.
>
> 111 Even if one takes the fair market value of those shares at US$96.9m, SME was still a company with a negative value. On that basis, the SME shares were not undervalued at US$800,000.
>
> 112 However, the point is really that whatever the value of SME's assets may be, the value of SME as a company can only be determined by taking into account all the relevant factors, including its assets and liabilities. The shares of a technically-insolvent company can be valuable,

eg, because its assets are valued at cost and have actually appreciated in value, or because it may have good prospects of becoming profitable, or for other reasons. Consequently, one needs to look at more than the assets of a company, or its financial statements, to ascertain the market value of the company's shares. Although Beckkett made reference to the values of the Adaro and IBT shares, it had not done enough to establish the value of SME, or the value of the SME shares Beckkett pledged to [the Bank].

113 The critical factor is the fair market value of the 74.2% SME shares Beckkett pledged and [the Bank] sold, and neither Beckkett nor [the Bank] had established that.

63 Before us, Beckkett has contended that the Judge's analysis of the value of SME was wrong for the following reasons:

(a) SME was not a debt-laden company, SME's 2001 financial statements were unaudited, and DSM had refused to produce SME's audited statements and also those of Asminco for 2001 and beyond.

(b) On the basis of SME's 2001 financial statements, the SME Shares had "negative equity only if the 40% stakes in Adaro and IBT were reflected at their historical net book cost of US$102 million instead of at their market value".[note: 6] But, if the historical book cost was replaced by the combined market value of Adaro and IBT of about US$240m (based on the 2000 equity values of Adaro and IBT of US$605.3m and US$61.5m respectively in the Bank's internal valuation of 2000), Beckkett submitted, on its calculations, that SME would have a positive value of US$118m in shareholders' equity.

(c) The Judge's valuation of the SME Shares as having negative value and his consequent finding that the sale of the SME Shares at US$800,000 was not at an undervalue was based on a miscalculation. He had taken the value of the SME Shares as being US$96.9m (which, to begin with, was the value of SME Shares put forward by Beckkett prior to the 10% discount for minority interest (see [60] above)) and had deducted the amount of the Unpaid Loan from this figure to conclude that the SME Shares had a negative value. The figure of US$96.9m was in fact the *net* value of the SME Shares *after* taking into account the amount of the Unpaid Loan. The Judge had thus double-counted the Unpaid Loan in his valuation of the SME Shares. When properly calculated, based on the market value of US$240m for the 40% shareholding in Adaro and IBT (at [97] of the Judgment), the computation should have yielded a finding that SME had a positive equity value of at least US$118m.

64 Although the Judge made a detailed analysis of the value of the SME Shares, he was fully aware that it was an exercise in futility without evidence as to the value of the Adaro Shares and the IBT Shares, since the value of those shares were imputable to the value of the SME Shares. Without a finding on the market value of SME's indirect 40% shareholding in Adaro and IBT (held through Asminco) when these shares were sold by the Bank, it was clearly impossible for him to determine the value of the SME Shares. SME's 2001 financial statements would disclose the total debts of SME as at 2001, but it could shed no light as to SME's value as a going concern or its net asset value without imputing a market value to its 40% shareholdings in Adaro and IBT (held through Asminco). Their investment value was stated at US$102m, but there was no evidence as to whether this represented the book value or the market value (Beckkett contends the figure represented the historic book value as mentioned at [63(b)] above). However, it seems unlikely that it represented their market value as it bore no resemblance whatever to the price at which the Bank sold them in May 2001 (at US$45.2m). Furthermore, for the same reason, the Judge's conclusion that the SME Shares were not sold at an undervalue, based on the assumption (at [111] of the Judgment) that the fair market value

of those shares was US$96.9m, was clearly a mistake. As pointed out by counsel for Beckkett, the US$96.9m was the value of the Adaro Shares and the IBT Shares on the assumption that the Bridging Loan had been discounted or fully paid. The correct finding should have been that there was no evidence to show what the value of the SME Shares was, and therefore there was no evidence that the sale of the SME Shares at US$800,000 was at an undervalue. We might add that, by parity of reasoning, even if the SME Shares had been sold for US$1.00, there would still be no evidence that that was at an undervalue in these circumstances.

65 As a result of the Judge's finding that the SME Shares were not sold at an undervalue and/or that there was no evidence that they had been sold at an undervalue, the Judge dismissed Beckkett's claim for damages on the ground that no loss at all had been proved. This finding relates to two separate issues of fact: (a) the sale at an undervalue; and (b) the resultant loss. We agree with the logic that if there was no sale at an undervalue, there could be no liability for loss, but we respectfully disagree that there was no evidence of undervalue with respect to the sale of the Pledged Shares at US$46m. In our view, there was ample *prima facie* evidence that the Pledged Shares, especially the Adaro Shares, had been sold at an undervalue. The value of the SME shares would be determined substantially by the value of the Adaro Shares (although not so much the IBT Shares, whose value was dependent on Adaro being a viable coal-producing company). We will now examine this aspect of the case.

(A) PRIMA FACIE EVIDENCE OF UNDERVALUE

66 What then is the evidence of undervaluation? The first piece of evidence was the Bank's own internal valuations of the Adaro Shares and the IBT Shares as at 1999 and 2000. The internal valuation of Deutsche Capital Singapore for the Bank had priced Adaro and IBT at US$689.3m as at August 1999 while the combined discounted cash flow valuation dated 28 December 2000 found that Adaro and IBT had an equity value of US$666.8m. As at those dates, the Adaro Shares and the IBT Shares together had a market value many times higher than the price of US$45.2m at which they were sold to DSM, even if allowances were to be made to the different bases on which the valuations were made. Beckkett had produced these valuations, not to prove the value of the Pledged Shares at the date they were sold to DSM, but to show that they had been sold at a gross undervalue.

67 The second piece of evidence is the disparity between the sale price and the price at which the Swabara Group bought the Adaro Shares and the IBT Shares in 1997. As mentioned earlier, Adaro's coal mine in Kalimantan, which produced a low-ash, low-energy coal known as "Envirocoal", was the "crown jewel" of the Swabara Group. In 1997, the Swabara Group purchased 25% of Adaro's equity and 20% of IBT's equity using the US$100m loan which it had obtained from the Bank. Four years later in 2001, the Bank sold 40% of Adaro's equity and 40% of IBT's equity (and also the SME Shares and the Asminco Shares) at a total price of US$46m (of which US$800,000 was for the SME Shares). This price was roughly about 25%–30% of the combined price at which the Swabara Group financed its earlier purchase of 25% of Adaro's equity and 20% of IBT's equity. No explanation was given by the Bank as to why or how the value of the Adaro Shares and IBT Shares had fallen so drastically during this period. Indeed, the Bank's internal valuations (although they referred to the value of Adaro and IBT as operating companies) showed that the Adaro Shares and the IBT Shares had increased in value in 2000. This meant that the value of the shares had fallen by more than 50% in less than one year!

(B) PROOF OF LOSS

68 In the present case, we are satisfied that the Pledged Shares had been sold at an undervalue. However, the law also requires that Beckkett must prove that it has suffered a loss as a result of the

Bank breaching its duty to obtain the best price for the Pledged Shares. To do this, Beckkett must adduce evidence of the best price the Pledged Shares could have fetched if the Bank had discharged its duty in the exercise of its power of sale. With respect to this issue, the Judge decided that Beckkett had failed to adduce sufficient evidence of its loss, and accordingly dismissed its claim. The Judge made this ruling on the basis that Beckkett was under an obligation to adduce evidence of its actual loss at the trial of the action, and not at an inquiry for damages after liability had first been determined. In connection with this issue, it may be pertinent to note that in *Apple Fields Ltd v Damesh Holdings Ltd* [2004] 1 NZLR 721 ("*Apple Fields*"), the Privy Council said at [22]:

> Section 103A [of the Property Law Act 1952 (NZ)] codifies the duty which, under the general law, a mortgagee exercising a power of sale would be taken to owe to the mortgagor … It does not produce a duty breach of which is actionable without proof of damage. If a mortgagor wants an inquiry as to damages for breach of the s 103A duty, the mortgagor must, in Their Lordships' opinion, *satisfy the Court that it has suffered at least some damage*. [emphasis added]

(3) The Bifurcation Order

69 The Judge, in a reserved judgment, held that Beckkett had an obligation to adduce evidence of its loss at the trial itself under the terms of what is known as the Bifurcation Order (see [21(e)] above). The issue had been raised during the trial when counsel for Beckkett was cross-examining one of DSM's witnesses. Counsel for DSM objected to the line of questioning by counsel for Beckkett. There was an exchange of comments and views among all three counsel as well as the Judge on the purpose of the Bifurcation Order. At the conclusion of this exchange, the Judge did not rule expressly on this issue. That this was the case is evidenced in Beckkett's written submissions (filed after the trial had concluded) on this aspect of the case. At paras 561, 569, 570 and 581 of its written submissions, Beckkett argued as follows:

> 561. *It is clear from Beckkett's pleaded case that Beckkett has from the outset sought damages to be assessed at a separate hearing, after this … Court has made its findings on the liabilities of [the Bank] and DSM. Neither [the Bank] nor DSM has ever raised any issue with the nature of the relief sought by Beckkett, which is for damages to be assessed*.
>
> …
>
> 569. In any event, insofar as [the Bank] asserts that, as a matter of law, Beckkett has to quantify the precise loss suffered at this trial, such assertion is without basis.
>
> 570. It is clear from the authorities that where the plaintiff claims for damages to be assessed, the plaintiff need not prove the precise loss suffered at the trial. So long as the plaintiff can show he has an arguable case that he suffered loss, the quantum of his loss is to be assessed at the assessment hearing.
>
> …
>
> 581. As a matter of law, [the Bank]'s submission that there will be no separate hearing to assess damages if damages are to be assessed based on the value as at November 2001, is plainly wrong. On the evidence, Beckkett has demonstrated more than an arguable case that it has suffered loss as a result of the breaches of duties by [the Bank] and the conspiracy perpetrated by [the Bank] and DSM. Beckkett is clearly entitled to an enquiry as to damages to determine the quantum of [its] loss, regardless of whether damages are to be assessed based on current value or the value as at November 2001. There is accordingly no basis for [the] Bank to assert that

Beckkett has to prove [its] precise loss at this trial.

[emphasis added]

70 The Judge dealt with these submissions at [147]–[149] as follows:

147 Beckkett however argued:

> At this stage, it is not necessary to prove the exact loss in the value of SME shares. It would be sufficient to prove that any sale of the pledged shares in Adaro and IBT at an undervalue will *inevitably* cause a loss in the value of the shares in the companies upstream. This, Beckkett has amply proved. [emphasis in original]

148 There were two difficulties with this argument. First, the loss in value of the SME shares caused by the sale of the Adaro and IBT shares was not really in issue. The true issue was whether the SME shares were sold at an undervalue for US$800,000, and [the Bank's] internal valuations of Adaro and IBT shares did not show whether the SME shares were worth more than US$800,000.

149 Second, the reference to "at this stage" and the implication that the presentation of the proof can, or is to, be done at a later stage were misconceived. *This trial of this action was not divided such that liability is to be determined at the first stage, to be followed by the assessment of damages in the second stage*. There was [the Bifurcation Order] made on 18 November 2006, but that was a limited and specific bifurcation. The order was necessary because of Beckkett's claim for damages in respect of the pledged SME shares for damages "based on the difference between the current market value of the SME shares and the price at which it [*sic*] was sold in or about November 2001". *The order was that for the 2005 value the shares were to be determined at a later stage because the parties were not ready to deal with that at the trial*. (It is not entirely clear why the 2005 value was considered important, as the action was filed in 2004, and the [B]ifurcation [O]rder was sought and made in 2006.) As the proof of undervalue at the time of sale in November 2001 is an entirely separate matter from the 2005 valuation, the former was not deferred. *Beckkett was therefore obliged to prove that at the hearing, or face the consequences. As it has not proved its loss, it is only entitled to nominal damages*.

[emphasis added]

The Judge held that the Bifurcation Order meant that the issues of liability and damages based on the value of the Pledged Shares at 2001 were to be determined at the trial, but that the damages based on their 2005 value were to be deferred to a later stage because the parties were not ready to deal with them at that stage.

(A) WHAT WAS THE PURPOSE OF THE BIFURCATION ORDER?

71 The issue as to whether Beckkett was obliged to prove its actual loss at trial by reason of the Bifurcation Order is critical to the success of Beckkett's appeal in the present case. If the Judge's decision, that Beckkett had such an obligation and was fully aware of it, is correct, that would be the end of this appeal. It is therefore necessary for us to examine carefully the background to the making of the Bifurcation Order so as to determine its purpose.

72 The application for the Bifurcation Order was made by DSM after Beckkett had filed its amended

statement of claim in which it claimed against the Bank and DSM for the following reliefs: (a) an order to set aside the sale of the Pledged Shares; and (b) in the alternative, *for damages to be assessed*, either at their 2001 value or 2005 value, whichever was appropriate under the law. Beckkett sought damages, to be assessed at 2001, against the Bank because its case was that the Bank had sold the Pledged Shares in 2001 in breach of its mortgagee's duties. Beckkett sought damages against DSM calculated as at 2005 because DSM (who was joined as the second defendant in 2005) had sold the Adaro Shares and the IBT Shares to an international consortium in 2005. Accordingly, DSM would not have been in a position to return the Pledged Shares, and therefore might have to pay damages on the basis of their 2005 value. Beckkett also claimed damages at their 2005 value against the Bank on the basis that, if it were entitled to set aside the sale, it should be awarded damages as at 2005 since the Pledged Shares, and in particular the Adaro Shares and IBT Shares, could not be restored to them. This would explain why Beckkett was claiming damages based on their 2005 value (which had puzzled the Judge). The reason why the claim for damages based on the value of the Pledged Shares as at 2005 was deferred under the Bifurcation Order was not because the parties were not ready to deal with that claim but because it was neither convenient nor efficient to do so until the court had determined the issue of whether the sale could or should be set aside, having regard to the fact that DSM had already disposed of the Adaro Shares and the IBT Shares.

73 It was against this background that DSM made an application on 11 November 2005 in Summons in Chambers No 5762 of 2005 for the following order:[note: 7]

> In respect of *[Beckkett's] claim for damages calculated based on the "current market value of shares* in [SME], [Asminco], [Adaro] and [IBT], all questions and/or issues, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, relating to any such liability of [the Bank] and/or [DSM] to [Beckkett] *for damages calculated based on the current market value of the said shares, be tried after the outcome of the trial* or determination of the Court on all other questions and/or issues in this cause or matter; [emphasis added]

In this application, the phrase "current market value" referred to the market value as at 2005 (either because DSM was joined as the second defendant on 28 February 2005 or because the application was made in 2005). When this application came before the assistant registrar ("the AR") on 18 November 2005 (see [21(e)] above), Beckkett opposed the application on the ground that since valuations of the Pledged Shares as at 2001 would be produced, there should be no reason why the same valuers could not value them as at 2005. DSM disagreed, and argued that, until the court had decided the issue whether Beckkett was entitled to set aside the sale *vis-à-vis* DSM, it was neither necessary nor efficient to hear any evidence on the 2005 value of the Adaro Shares and the IBT Shares at the trial. DSM wanted its liability to be determined first, and for damages computed as at the 2005 value to be assessed at a subsequent hearing. The Bank supported the application.

74 After hearing arguments, the AR made the following order:[note: 8]

> Court: Issue of the basis for damages to proceed, ie whether 2001 or 2005 valuation. However, the *actual valuation at 2005 for purposes of damages, is to be assessed at a later stage*. This is without prejudice to Plaintiff's applications in relation to discovery or otherwise relating to 2005 valuation, if it is able to establish that it is relevant to liability. [emphasis added]

75 It seems clear to us that DSM's application and the Bifurcation Order were solely concerned with the 2005 value of the Pledged Shares and nothing more. We have mentioned earlier that the issue of the scope of the Bifurcation Order was considered by the Judge but he made no decision on it. This issue surfaced between Beckkett and DSM when one Soeryadjaya (a witness for DSM) was cross-examined by Mr Chong, counsel for Beckkett. This took place after Beckkett had closed its case

against the Bank and the Bank had elected not to give evidence. Mr Chong wanted to elicit, from Soeryadjaya, evidence on the dealings between Adaro and a company called Coaltrade, which he considered to be relevant in showing the true value of the Adaro Shares as at 2001. Allegations were made by Beckkett that Adaro's profits had been siphoned to Coaltrade such that Adaro appeared to be less profitable than it really was. Counsel for DSM, Mr Tan, objected to this line of questioning on the grounds that it was irrelevant as DSM did not even know about the existence of Coaltrade until *after* the sale of the Pledged Shares in 2001 and that Beckkett simply had no basis to make such allegations. The exchanges between Mr Chong, Mr Tan, counsel for the Bank (Mr Ang), and the Judge then proceeded as follows:[note: 9]

MR TAN: Sir, perhaps at this stage I should raise my point.

The issue of Coaltrade has come before your Honour several times. Your Honour will recall that … there were lengthy arguments on the relevance of Coaltrade and further discovery on Coaltrade, and your Honour ruled that for purposes of liability, Coaltrade was not relevant.

…

I would ask again that this area not be gone into, consistently with how your Honour has ruled twice before.

…

MR TAN: …

The suggestion that Beckkett is making is: at the same time that DSM acquired their interest in Adaro and IBT, they also acquired the interest in Coaltrade. That's not been established, and that's a critical part of this kind of an argument.

DSM bought only Adaro/IBT and the other companies from the [B]ank. Coaltrade was not there; DSM didn't even know about Coaltrade at that time. That was the deal, and that was the complaint that Beckkett has made before this court.

I think what they are saying -- which is what we argued in chambers, your Honour -- is: supposing they are able to establish liability on the part of the [B]ank and/or [DSM]. Then, *when they go for an assessment of damages*, they say that the real value of Adaro and IBT may perhaps include Coaltrade, to the extent that that is an adjunct of Adaro and IBT.

That's a separate issue which we will fight then; but the issue here is, how can you say now that when [DSM] bought IBT and Adaro, they, as part of the whole scheme, also bought Coaltrade, knowing that the value was different, and therefore this is part of the conspiracy?

…

MR CHONG: I don't understand the basis of my learned friend's submission. Is he saying it's not relevant? It's relevant, it's in my pleadings, your Honour.

MR TAN: *I am saying it's not relevant to liability*, sir, and the pleadings are such. It was brought before your Honour, exactly the same pleadings, and the pleadings relate only to damages. That was how your Honour ruled.

MR CHONG: Your Honour, I went back to check and I argued that with my learned friend, about the bifurcation.

I think your Honour should know that the order made by the [AR] on bifurcation was not bifurcation as I also recall, that liability and damages [are] bifurcated.

His bifurcation was very narrow, and I'll show it to you now, your Honour. Page 3. Your Honour, one of the issues which emerged during this hearing, and in fact from the pleadings, *Beckkett's principal claim is to set aside the sale and purchase agreement and for the equity [of] redemption to be restored to the original pledgors. That is the principal claim*.

But, for whatever reason, if that could not be performed … then there will be an issue of damages, and that issue would have a further issue as to whether damages [are] to be assessed by reference to 2001 or 2005.

That is exactly what Mr Kwek said …

... In fact, your Honour, when I go through the cross-examination, I will only be showing Coaltrade documents from 2001 to 2004. I don't need to go into 2005. The bifurcation is an extremely limited bifurcation.

...

COURT: I am sorry; *I don't understand "extremely limited bifurcation"*.

…

COURT: Can we look at the application, because basically everything said is in the context of the application, and I think we will have the best assistance by looking at that.

…

MR CHONG: …

This was a long application, the main remedy of which was to vacate the trial.

Insofar as liability or damages, the prayer that was sought was:

> "In respect of the plaintiff's claim for damages, calculated on the current market value of shares in SME, Asminco, Adaro and IBT, all questions and/or issues whether of fact or law, and whether raised by the pleadings [or] otherwise relating to any such liability of the first and/or second defendants can be tried after the outcome of the trial or the determination of the court on all other questions … issues in this cause."

So the application was also specific only to the issue of calculating the damages by reference to current market value.

…

COURT: This is all getting very complicated. Let's just move one step back.

Are you saying that now *with regard to the restoration of the shares?* That is if you succeed in the issue before me, this court.

MR CHONG: Yes.

COURT: This is very interesting; I'll tell you why.

When it comes to that, you will have a lot of other matters that the court will have to take into account in a situation like that: third party interests, change of circumstances, investments made and all of that, improvements.

A court will not do that without taking all those other matters into account.

MR CHONG: Yes your Honour. I agree.

COURT: If this were before me, I have to say that very little of this has been surfacing in this case. You have closed your case and you have not dealt with that, and that is important.

My impression was that with the bifurcation, that actually comes as part of the remedy, and you may then go either before me or somebody else, and at that stage you can then bring those facts before the court.

If none of those facts are before the court, then it would seem rather unlikely that the court would, without any facts, say, "All right, if you succeed, yes, the shares go back to you even though they are in third party hands …"

…

COURT: If that's how you will deal with it -- because quite honestly, *I had always thought that by the bifurcation, I will only deal with liability*. Anything post-liability, the form of remedy comes later; your take is different. Your take is that I deal with everything.

MR CHONG: Other than the quantification.

…

COURT: Is that how the defendants look at it? …

MR ANG: Your Honour, we take the view that it actually covers everything except the quantification.

COURT: So whether or not there should be recovery of the shares is something to be done in these proceedings?

MR ANG: Yes.

COURT: Mr Tan?

...

MR TAN: *Your Honour only determines liability, all the rest is bifurcated*.

...

COURT: You two take the same position, but not him?

MR TAN: Yes.

COURT: We can't even decide on the order.

I have always been thinking in the way that Mr Tan has. Just give me a minute to think over this, because it has just come up.

Off-hand, I would have thought that you would have preferred to take his position *because there are a lot of questions which arise when a court decides whether to order restoration*. …

If you say that there is a bifurcation, you have another round to treat that, but if you say that you are prepared to deal with that now, you can deal with it now. …

Now we come back to this other point about whether this Coaltrade issue -- if it doesn't go into damages, the simple point is, it's not before me; *and by any of the constructions you give, damages is not before me*.

[emphasis added]

76 Mr Chong's questions to Soeryadjaya on Coaltrade were directed at eliciting evidence to show that the Adaro Shares had been sold to DSM at an undervalue with DSM's knowledge. Mr Chong wanted to prove undervalue, not actual loss, in order to show that DSM had conspired with the Bank to purchase the Adaro Shares at an undervalue and that the sale should be set aside. In this context, Mr Chong referred to the restoration of the equity of redemption, and argued that, "[b]ut, for whatever reason, if that could not be performed … then there will be an issue of damages, and that issue would have a further issue as to whether damages [are] to be assessed by reference to 2001 or 2005" (see [75] above). Clearly, Mr Chong's statement was a reference to liability being determined at the trial, and damages only later, if liability should be determined against DSM.

77 Mr Chong's understanding of the Bifurcation Order was that the quantification of damages as at 2005 valuations would follow only after the court had decided whether to set aside the sale of the Pledged Shares (assuming there was a legal basis to set it aside). Mr Ang's understanding was also the same: He said, "Your Honour, we take the view that it actually covers everything except the quantification." Similarly, Mr Tan also had the same understanding: He said, "Your Honour only determines liability, all the rest is bifurcated." Finally, even the Judge appears to have been of the same understanding since he said, "So whether or not there should be recovery of the shares is something to be done in these proceedings?", to which Mr Tan replied, "Yes" (see [75] above).

78 The Bifurcation Order was therefore "very narrow" as explained by Mr Chong. The Bifurcation Order was limited, on the issue of liability, to the remedy of setting aside the sale of the Pledged Shares; and on the issue of damages, to the extent of damages which would be necessary to compensate Beckkett for its loss should DSM not be able to restore the Pledged Shares to Beckkett, *ie*, damages at 2005 valuations. The Bifurcation Order was not concerned with liability arising from the

breach of the duty to obtain the best price, or with damages arising from this breach, *ie*, damages at 2001 valuations. That this was clearly Mr Chong's position is shown by Beckkett's written submissions that it did not have to prove actual loss at the trial but only undervalue since such damages were to be assessed, as pleaded by Beckkett.

(B) DID THE BIFURCATION ORDER REQUIRE DAMAGES TO BE PROVED AT TRIAL?

79 In our view, the Judge was wrong to have interpreted the Bifurcation Order as obliging Beckkett to adduce evidence of actual loss at the trial. This ruling is not supported by the evidence and the reasons for DSM's application for the order. DSM took out the application for its own convenience, and not for the Bank's convenience. Beckkett had never pleaded nor agreed that, if it was entitled to damages against the Bank or DSM as at 2001 valuations, it had to adduce all its evidence at the trial. All three counsel did not have such an understanding, as Beckkett's pleaded case, from inception until its final pleading, was for damages to be assessed. In its re-amended statement of claim dated 28 December 2005 (which was filed after the making of the Bifurcation Order), Beckkett proceeded on this basis:[note: 10]

> AND [BECKKETT] CLAIMS
>
> ...
>
> damages *to be assessed* against the [Bank] and [DSM] for breach of the [Bank's] duties to [Beckkett] and for the conspiracy of the [Bank] and [DSM].
>
> [emphasis added]

80 In our view, the Bifurcation Order said nothing about damages as at 2001 valuations having to be assessed at the trial. There is nothing in DSM's application or the arguments of the parties before the AR that suggested such a requirement. On the contrary, Beckkett's final pleadings suggested otherwise. Further, Beckkett had proceeded with its case on that understanding, as confirmed by its counsel's remarks during the exchanges with the Judge and counsel for the Bank and DSM, and also by its written submissions on this point.

81 Apart from the evidence, there are other reasons why, in our view, the Judge's dismissal of Beckkett's claim for damages against the Bank should not stand. The first reason is that the Bifurcation Order was only a procedural order which was not binding on the Judge. If there was any doubt as to its scope, and if it was necessary to modify or set aside the Bifurcation Order in the interest of justice, the Judge had the power to do so, and to give such directions as he thought fit. The second reason is that, and this is more important, he should have ruled on the dispute when it arose so that, if his ruling were inimical to Beckkett's claim for damages (as it was), Beckkett would have been apprised thereof and given an opportunity to decide whether to apply to re-open its case to adduce evidence of actual loss on the basis of the Judge's interpretation of the Bifurcation Order. Although both Beckkett and the Bank had closed their cases, it would have been within the power of the Judge to grant the application as it is difficult to see how the Bank could have been prejudiced by such a ruling since it had given no evidence at all. Of course, after Beckkett has adduced evidence of its actual loss, the Bank would then have another chance to elect whether or not to open its case. The third reason is that the omission by the Judge in not ruling on this disputed point and then deciding it against Beckkett in a reserved judgment might be seen to have denied Beckkett a fair trial in relation to its claim for damages.

Beckkett's claim to set aside the sale of the Pledged Shares

82 It may be recalled that Beckkett's claim to set aside the sale of the Pledged Shares to DSM is based on allegations that DSM was not a *bona fide* purchaser for value without notice as: (a) DSM had notice of the Bank's lack of good faith and/or impropriety in exercising its power of sale; and (b) DSM had conspired with the Bank to injure Beckkett through unlawful means (by buying the Pledged Shares at an undervalue). The Bank has denied such allegations and also contended that, in any event, Beckkett had no standing to set aside the Pledged Shares (other than the SME Shares) as it neither owned nor pledged those shares; and that, in any event, it would be inequitable, having regard to all the circumstances of the case, to set aside the sale. We will consider the issue of standing first, followed by the question of whether DSM was a *bona fide* purchaser.

Can Beckkett set aside the sale of the Pledged Shares?

83 The Judge agreed with the submission of the Bank that Beckkett had no *locus standi* to set aside the sale of the Pledged Shares, except for the SME Shares (at [144] of the Judgment). Before us, Beckkett has contended that it was competent to set aside the sale of the Pledged Shares as the Bank had sold them as one lot to DSM under a single agreement: there was only one transaction, and the values of the different shares could not be segregated. Beckkett argued that the whole transaction had to be unravelled for it to be even able to recover the SME Shares it had pledged. Further, given that it would be impossible for SME and Asminco to sue for their shares which they had respectively pledged since they were now controlled by DSM's nominees (see also [56] above), Beckkett was effectively the only party that could sue to recover the Pledged Shares. It was further argued that, since Beckkett had at least the standing to sue for the recovery of the SME Shares (as owner and pledgor of those shares), then following the corporate chain downstream, Beckkett *should* have an interest in the Adaro Shares and the IBT Shares through the two subsidiary companies, SME and Asminco. Beckkett's interest in SME gave it an interest in Asminco and, in turn, Adaro and IBT, because the value of the shares in SME (which itself had an interest in Asminco) was ultimately dependent on the value of the shares in Adaro and IBT. It was argued that the law recognised this as a fact, but regulated the ability of a shareholder to bring a claim for reflective loss, only because it would otherwise give rise to a problem of multiple plaintiffs or claims (see *Townsing* ([55] *supra*)). Since, in the present case, there could be no possibility of SME or Asminco suing the Bank for selling the Adaro Shares and the IBT Shares at an undervalue, the only claimant would be Beckkett and the question of double recovery would not arise. Hence, it was argued that the principle prohibiting reflective loss (which was concerned primarily with preventing double recovery) did not apply, and Beckkett should be entitled to claim an interest in the Adaro Shares and the IBT Shares for the purpose of setting aside their sale.

84 We are sympathetic to Beckkett's position. However, its predicament is one of its own making, as it could have arranged the security transaction in such a way that it was the only pledgor. It is not doubted that Beckkett has a commercial interest in 40% each of the Adaro Shares and the IBT Shares through SME and then Asminco. For practical purposes, SME and Asminco could perhaps be regarded as a single corporate entity since SME owned 99.9% of Asminco. The latter was merely a corporate vehicle used to hold the Adaro Shares and the IBT Shares. But Beckkett and SME were clearly separate entities as Beckkett owned only 74.2% of SME, and therefore the separate legal personality principle applied (see *Albacruz v Albazero (The Albazero)* [1977] AC 774 at 807, *PP v Lew Syn Pau* [2006] 4 SLR 210, *Macaura v Northern Assurance Company, Limited* [1925] AC 619, *The Maritime Trader* [1981] 2 Lloyd's Rep 153 and *The Gramophone and Typewriter, Limited v Stanley* [1908] 2 KB 89). The Judge was correct to hold that Beckkett had no standing to set aside the sale of the Pledged Shares.

85 As regards the "no reflective loss" principle, we agree with counsel for Beckkett that it had no

application here as there is no question of double recovery (see [56] above). However, this does not mean that Beckkett would then become entitled to set aside the sale of the Pledged Shares (other than the SME Shares). The principle of "no reflective loss" is concerned with claims for damages for breach of duty, not claims to set aside transactions. Beckkett cannot rely on the non-application of this principle as the basis to set aside the sale of the Pledged Shares. We agree with the Judge that "Beckkett has no claim to the shares except for the SME shares it pledged" (at [144] of the Judgment). Beckkett had an equity of redemption in the SME Shares but not in the other pledged shares. However, even this equity of redemption would be extinguished under the law upon the sale of the Pledged Shares unless the sale was in bad faith and/or improper (see *Waring v London and Manchester Assurance Company, Limited* [1935] Ch 310 ("*Waring*") at 317–318 and also *Fisher* ([37] *supra*) at para 47.2).

86 In the present case, even if Beckkett were able to prove that the sale of the Pledged Shares was in bad faith or for an improper purpose, it could only set aside the sale of the SME Shares, but not the other pledged shares. This course of action would not have served its purpose if the sale of the Adaro Shares and the IBT Shares was also not set aside. Beckkett was in no position to set aside the sale of those shares unless it was in control of SME, absent which it could not "reach" the Asminco Shares and in turn the Adaro Shares and the IBT Shares. These procedural obstacles were intractable, but might arguably be open to resolution if Beckkett had joined SME and Asminco as defendants under O 15 r 4(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). However, this was an academic argument as Beckkett did not join SME and Asminco as defendants.

87 Nevertheless, an even greater obstacle in the way of Beckkett's action to set aside the sale of the Pledged Shares on the ground of bad faith or impropriety was that it was never able to pay the Unpaid Loan at any time. It is a well-settled principle that if the sale by a mortgagee of mortgaged property is completed and the mortgagor seeks to have it set aside on the ground of bad faith or impropriety, he can only do so on terms that he pays the mortgage debt (see R P Meagher, J D Heydon & M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th Ed, 2002) at para 3-080, citing *Hotel Terrigal Pty Ltd v Latec Investments Ltd (No 3)* [1969] 1 NSWLR 687). This principle is also applicable where the mortgagor seeks to restrain the mortgagee from exercising its power of sale in the first place, and at the time when a contract for sale has been entered into, but the conveyance or transfer of the property has not been completed (see *Halsbury's Laws of Singapore*, vol 9(2) (LexisNexis, 2003) at para 110.015 and *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161 ("*Inglis*")).

88 Under the law, Beckkett, in its capacity as guarantor, had another right which it failed, or was not able, to exercise. It was entitled to pay off the Unpaid Loan and be subrogated to the rights of the Bank in the Pledged Shares (other than the SME Shares). Except where he pays the principal debt, a guarantor generally has no right to the securities held by a creditor for the debt (see *Ex parte Brett* (1871) LR 6 Ch App 838, *Challenge Bank Ltd v Mailman* [1993] NSWCA 54, *Lloyds TSB Bank plc v Shorney* [2001] EWCA Civ 1161, and see generally James O'Donovan & John Phillips, *The Modern Contract of Guarantee: English Edition* (Sweet & Maxwell, 2003) at para 11-38 and Geraldine Mary Andrews & Richard Millet, *Law of Guarantees* (Sweet & Maxwell, 5th Ed, 2008) at para 11-018). However, as mentioned, Beckkett was never in a financial position to redeem the Pledged Shares.

89 Ultimately, in our view, Beckkett's entire line of argument on setting aside the sale of the Pledged Shares was purely academic. On the evidence before the Judge, not only was Beckkett not financially capable of redeeming the Pledged Shares at any time, even up to today, but, by the time of the trial of this action, there was also no possibility whatever of either the Bank or DSM being in a position to restore the Adaro Shares and the IBT Shares to Beckkett because of the leveraged buyout by an international consortium and the subsequent changes in the equity structure of Adaro (see [15]

above). There was neither equity nor possibility in setting aside the sale of the Adaro Shares and the IBT Shares and restoring them to Beckkett even if in law the sale could be set aside and Beckkett were in a position to tender the redemption amount for them. Without the Adaro Shares and the IBT Shares, the SME Shares and the Asminco Shares were not worth recovering *per se*. What Beckkett was effectively left with was a claim for damages for the sale of the SME Shares at an undervalue (taking into account the value of its interest in the Adaro Shares and the IBT shares). It is apparent to us that Beckkett's line of argument in relation to bad faith, impropriety or conspiracy was mounted not with any confidence to set aside the sale of the Pledged Shares but to lay the foundation for a claim for damages at their 2005 value instead of their 2001 value. However, for reasons that we will elaborate in full below, we agree with the Judge's finding that the sale of the Pledged Shares to DSM was not in bad faith or for an improper purpose, and having regard to our conclusions on the breach of duty by the Bank in failing to take proper steps to obtain the best price for the Pledged Shares, Beckkett may only claim damages for any loss which it has suffered calculated at 2001 valuations and not 2005 valuations.

Was DSM a bona fide purchaser?

90 In the court below, the thrust of Beckkett's case was that DSM was not a *bona fide* purchaser because it was acting as a "front" for the Management Group. The Judge rejected this argument and found on the evidence that DSM had bought the Pledged Shares for its own commercial benefit. He said (at [130]–[134] of the Judgment):

> 130 Beckkett's case that DSM was not a *bona fide* purchaser relied mainly on the references in [the Bank's] internal documents referring to negotiations with a "key shareholder", a "vehicle", "certain existing shareholders" and "borrower-related entity" as well as Indra Aman's active involvement in the sale.
>
> 131 When I review the evidence, I find little basis for rejecting Soeryadjaya's evidence that he had wanted to acquire the shares through DSM for its own benefit. Soeryadjaya has the business background and interest in the mining industry generally and Adaro specifically to put in place arrangements to acquire the shares. *There were no persuasive reasons put up to show that Soeryadjaya allowed the Management Group to use him or DSM as a "front"*.
>
> 132 Although Beckkett alleged that DSM was buying the shares on behalf of the Management Group consisting of Graeme Robertson, Allan Buckler, Terry Smith and Indra Aman, Beckkett's case was founded on their alleged participation and assistance in DSM's purchase. However, except for Indra Aman's input in the sale process, there were no particulars given of the involvement of the other persons.
>
> 133 Indra Aman did not give evidence in the proceedings. If he had been a witness, Beckkett's counsel would no doubt have questioned him on his involvement, but counsel did not have this opportunity. On the evidence, there were unanswered questions on his involvement in the sale. However, there was no basis to infer that he was acting on behalf of the Management Group, as he could also have acted out of self-interest and he could have represented other parties.
>
> 134 *I find that Beckkett had not proved that DSM bought the shares as a "front", or that [the Bank] knew DSM was buying the shares on behalf of some party. Beckkett had therefore not proved that DSM was not a* bona fide *purchaser*.
>
> [emphasis added]

91 Before us, Beckkett abandoned its case that DSM had acted as a front for the Management Group and sought to argue that DSM was not a *bona fide* purchaser in that DSM:

(a) had notice that the Bank had exercised the power of sale in breach of its mortgagee's duties, especially the duty to act in good faith, and/or there was impropriety in the sale; and

(b) had conspired with the Bank, by unlawful means, to prevent Beckkett from:

(i) challenging the sale of the Pledged Shares; and

(ii) being able to claim damages directly from the Bank for selling the Adaro Shares and the IBT Shares at an undervalue.

It was contended that the lack of good faith could be seen in the Bank and DSM holding clandestine meetings to approve the sale of the Pledged Shares to DSM and applying *ex parte* to the Indonesian courts for approval of the sale as well as the S&E Agreement to ultimately wind up Beckkett. Furthermore, the Bank also sold the SME Shares and the Asminco Shares to DSM, even though DSM was really interested only in the Adaro Shares and the IBT Shares, in order to prevent Beckkett from using SME or Asminco to sue the Bank to set aside the sale of the Adaro Shares and the IBT Shares or for damages for selling the latter shares at an undervalue. Finally, as part of this scheme, the Bank also agreed with DSM to wind up Beckkett in order to protect the sale of the Pledged Shares to DSM.

92 In reply, both the Bank and DSM argued that this court should not allow Beckkett to depart from its case in the court below (that DSM was not a *bona fide* purchaser because it had acted as a front for the Management Group). In our view, the court should not prevent Beckkett from canvassing a new legal argument on appeal provided it can do so on the evidence before the court. It may be that in the court below, Beckkett pitched its case too "high" and now seeks to use the same evidence to support another cause of action with a lower threshold of proof. The court would only bar Beckkett from making a new legal argument on existing facts if the Bank and/or DSM were to suffer irremediable prejudice by it being raised on appeal. We do not think this is the case here. Before we go on to deal with Beckkett's case on appeal, we should first state briefly the established principles of law on which the court will set aside a sale of a mortgaged property.

(1) Principles in setting aside sale of mortgaged property

9 3 *Halsbury's Laws of England* (LexisNexis Butterworths, 4th Ed, 2005 Reissue) vol 32 at para 659 states the general principles as follows:

If the mortgagor seeks relief promptly, a sale will be set aside if there is some element of impropriety or bad faith on the part of the mortgagee in the exercise of its power of sale, but not on the ground of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale or if it would be inequitable as between the mortgagor and the purchaser for the sale to be set aside. However, if the mortgagee does not sell with proper precautions, he will be charged in taking the accounts with any loss resulting from it or liable for damages. The prima facie measure of damage is the reduction in the value of the equity of redemption. [emphasis added]

In *Corbett* ([28] *supra*), Pumfrey J said likewise (at [26]):

[A] completed sale by a mortgagee is not liable to be set aside merely because it takes place at an undervalue. Impropriety is a prerequisite … *[I]f the purchaser has no notice of the*

> *impropriety, then on the face of it he takes free*. Thus, the completed sale by a mortgagee pursuant to his statutory power is vulnerable only if the purchaser has knowledge of, or participates in, an *impropriety* in the exercise of the power. [emphasis added]

As such, the sale of a mortgaged property at an undervalue *per se* is not a sufficient reason for the court to set aside the sale (see also [28]–[29] above); there must be some element of impropriety or bad faith on the part of the mortgagee.

(2) Whether the Bank breached its duty to act in good faith and/or exercised its power of sale for an improper purpose

94 We turn now to consider whether the Bank had acted in bad faith in selling the Pledged Shares to DSM and/or had exercised the power of sale for an improper purpose. The duty of good faith is explained in *Elements of Land Law* ([29] *supra*) at paras 6.4.54 and 6.4.57 as follows:

> This subjective criterion demands that the mortgagee *should not deal 'wilfully and recklessly … with the property in such a manner that the interests of the mortgagor are sacrificed'. ...*
>
> ...
>
> The subjective requirement of good faith relates usually to the *avoidance of conflicts of interest* which may lead the court to set aside improperly transacted sales.
>
> [emphasis added]

Thus, most cases involving a breach of the duty of good faith relate to conflict of interest situations where a mortgagee tries to sell to himself or to his representative, trustee, solicitor, agent or an associated person (see, for example, *Latec Investments Limited v Hotel Terrigal Pty Limited* (1965) 113 CLR 265, and *Lukass Investments Pty Ltd v Makaroff* (1964) 82 WN (Pt 1) NSW 226 ("*Lukass*")). However, there is no reason in principle why a breach of the duty to act in good faith can only arise in a conflict of interest situation.

95 The case of *Medforth v Blake* [2000] Ch 86 ("*Medforth*"), which was followed in *Roberto Building Material* ([46] *supra*), is also instructive. In *Medforth*, Sir Richard Scott VC held at 103 that:

> *I do not think that the concept of good faith should be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith*. It is sometimes said that recklessness is equivalent to intent. Shutting one's eyes deliberately to the consequences of what one is doing may make it impossible to deny an intention to bring about those consequences. Thereapart, however, the concepts of negligence on the one hand and fraud or bad faith on the other ought, in my view, to be kept strictly apart … In my judgment, the breach of a duty of good faith should, in this area as in all others, *require some dishonesty or improper motive, some element of bad faith, to be established*. [emphasis added]

96 In the present case, Beckkett contended in the court below that the Bank had breached its duty to act in good faith in that: (a) it sold the Pledged Shares without valid court approval from the Indonesian courts; (b) it had colluded with the Management Group, in particular Indra Aman, on every aspect of the sale of the Pledged Shares; and (c) it had wilfully and actively concealed the sale of the Pledged Shares from Beckkett.

97 In regard to the first contention, the Judge was of the view that since the court approvals

(*penetapan*) obtained from the South Jakarta District Court for the sale of the Pledged Shares were set aside by the Jakarta High Court, the sale was not carried out by lawful means under Indonesian law (at [126] of the Judgment). The Judge further held that, for this reason, the Bank had failed to discharge its duties towards Beckkett (without specifying which specific mortgagee's duty was breached).

98 Before us, the Bank made the following arguments:

(a) Beckkett had obtained the setting-aside order from the Jakarta High Court more than three years after the sale of the Pledged Shares in order to prevent DSM from selling the Adaro Shares to an international consortium. Counsel for the Bank informed this court that the validity of the High Court orders were under investigation by the Judicial Commission of the Republic of Indonesia, a body set up to supervise the conduct of judges in Indonesia.

(b) The Judge's finding of unlawful conduct was wrong as the Bank and DSM were entitled to act and rely on the *penetapan*, which they had done so in good faith (Beckkett's response to this argument is that subjective belief in lawfulness is irrelevant).

(c) It has never been Beckkett's case that the Bank breached its duties as mortgagee because it had failed to apply *inter partes* under Art 1156 of the Indonesian Civil Code ("ICC") for the *penetapan*, and therefore the Judge was wrong to refashion Beckkett's case to make this finding against the Bank.

99 In our view, the Judge's finding that the sale of the Pledged Shares was not carried out by lawful means cannot be supported by the law or the facts for the following reasons. First, the sale was effected pursuant to the court approvals which were then valid. Second, since the Bank did not know that the court approvals were invalid until they were set aside long after the sale, it could not be said that the Bank and DSM had acted in bad faith in relying on them. Third, the court approvals were irrelevant to the issue whether the Bank had acted properly or in bad faith. The *penetapan* were merely a procedural irregularity (because they were obtained *ex parte*). Approval was not a substantive requirement because a sale by private treaty was permitted under Arts 1155 and 1156 of the ICC without court approval. At [43]–[47] and [52] of the Judgment, the Judge analysed the scope of these two articles and concluded that they did not compel the Bank to obtain court approval to sell the Pledged Shares by private sale. Such an application was optional under these two articles. If this finding is correct, and Beckkett has not challenged it, it would follow that the *penetapan*, being only procedurally irregular, could not have made the sale unlawful since court approval was not required in the first place. In our view, the Judge's finding that the sale was not carried out by lawful means (at [126]) is inconsistent with his finding that no court approval was necessary (at [52]). For the same reason, the Judge's consequent finding that the Bank had failed to discharge its duties as mortgagee is also incorrect. It is also not correct for another reason: a private sale may or may not breach the duty to obtain a proper price for the Pledged Shares. It depends on the price and whether the Pledged Shares would have fetched a higher price if they had been sold by private tender or public auction (see *Good Property Land* ([27] *supra*) at 234, [5] and 237–238, [10]).

100 We also note that the Judge (at [52] of the Judgment) held that, since the Bank was under a duty to sell the Pledged Shares in the open market, it should not have applied for permission to sell the Pledged Shares by private treaty. This statement does not appear to give effect to cl 5(a) of the SP Agreements which allows the Bank in an event of default "in its sole discretion [to] sell … the Pledged [Shares] at a public sale or (to the fullest extent permitted by law) *privately* at such price and upon such other terms and conditions as the Bank shall in its sole discretion determine" [emphasis added]. Article 1155 of the ICC requires a sale by public auction only if "the contracting parties do

not agree otherwise".

101 In our view, the Bank did not sell the Pledged Shares unlawfully or by unlawful means. It follows that the Bank, in selling the Pledged Shares on the strength of the *penetapan*, could not be said to have acted in bad faith or for an improper purpose.

102 As for the alleged involvement of the Management Group, and particularly the conduct of Indra Aman, in the sale of the Pledged Shares, the Judge observed at [58] of the Judgment that:

> The documents produced revealed that Indra Aman, General Legal Counsel and Director of SME and Adaro and Commissioner of Asminco, who did not hold any office in DSM, was actively engaged and took an active role in ensuring that the sale was completed.

The Judge continued at [64], noting that:

> When the foregoing facts and Beckkett's complaints are reviewed, the following questions arise:
>
> (a) Why did Indra Aman, who did not represent [the Bank], the vendors of the shares or DSM, the purchasers, have such interest and influence in the matter?
>
> (b) Why was [the Bank] prepared to work with and take instructions from him especially with regard to not notifying Beckkett on the enforcement of its pledge, when it was the [B]ank's normal practice to do that as a matter of prudence?
>
> (c) Why were DSM, Mulhendi and Akabiluru [see [12] above] left out in these matters?
>
> (d) Why was it necessary to erase and destroy the files and correspondence leading to the share sale agreement?

103 Despite asking himself these questions concerning the role of Indra Aman and of the Management Group (all of whom were not called to give evidence), the Judge did not draw any adverse inference against the Bank or DSM. He concluded (at [133]) that:

> Indra Aman did not give evidence in the proceedings. If he had been a witness, Beckkett's counsel would no doubt have questioned him on his involvement, but counsel did not have this opportunity. On the evidence, there were unanswered questions on his involvement in the sale. *However, there was no basis to infer that he was acting on behalf of the Management Group, as he could also have acted out of self-interest and he could have represented other parties*. [emphasis added]

104 There was no doubt that Indra Aman was deeply involved in the negotiations and the sale of the Pledged Shares to DSM. Beckkett relied on three e-mails dated 22 November 2001, 14 December 2001 and 15 January 2002, written by Indra Aman to the Bank's former senior legal counsel, Victor Sim Mong Seng ("Victor Sim"), on how to effect the sale to DSM without Beckkett knowing about it. In the e-mail dated 15 January 2002, Indra Aman set out in detail what was needed to be done by the Bank, SME and Asminco to ensure the smooth completion of the sale of the Pledged Shares, which included the issuance of ten carefully drafted letters for the purpose of staging purported meetings to discuss refinancing and/or restructuring of the Bridging Loan. These meetings were in fact meant to be extraordinary meetings ("EGMs"), convened for the purpose of approving the sale and transfer of the Pledged Shares.

105 As explained in the e-mail by Indra Aman dated 15 January 2002, the reason for disguising these meetings as "harmless" meetings to discuss refinancing and/or restructuring of the Bridging Loan was to prevent giving advance notice of the sale to "adverse parties" and to avoid triggering any "preemptive action" from them. Indra Aman ended the e-mail with the advice that all files or correspondence pertaining to the transaction should be erased one day prior to the completion of the sale of the Pledged Shares. Subsequently, the Bank sent out five letters using words almost identical to the sample letters drafted by Indra Aman, save for changes in the dates and the signatories.

106 In the light of the aforementioned circumstances, we share the Judge's sentiments that Indra Aman played a significant role in the entire transaction and, similarly, we have reservations about the propriety of Indra Aman's involvement in the sale of the Pledged Shares. However, the Judge found that the Bank's actions were not done in bad faith or motivated by any improper purpose. We do not disagree with the Judge on his findings of good faith and the absence of an improper purpose. The Bank was obviously concerned about recovering as much of the Bridging Loan as possible by realising its security. It may be recalled that, for nearly three years, the Bank was constantly stonewalled in its efforts to restructure the Bridging Loan and was unsuccessful in getting the Bridging Loan repaid. Beckkett simply refused to pay and, in fact, had no money to pay. The only viable option was for the Bank to realise the security, *ie*, to sell the Pledged Shares, which it was perfectly entitled to do so in law. This, however, was vehemently opposed to by Beckkett.

107 Furthermore, there was evidence that the Bank and DSM had real concerns that the sale of the Pledged Shares could be derailed by Sukanto (see [5] above) if he knew that the Bank was negotiating to sell the Pledged Shares. There was evidence that, given the existing general commercial and legal environment in Indonesia at that time, the Bank had to take steps to ensure that the sale would proceed smoothly and successfully. The Bank was concerned that Sukanto would use all means to obstruct or prevent the completion of the sale. This was why Indra Aman's e-mail dated 15 January 2002 made reference to the need to prevent giving advance notice of the sale to "adverse parties" so as to avoid triggering any "preemptive action" from them.

108 In these circumstances, we agree with the Judge's finding that Indra Aman's role in the sale of the Pledged Shares did not render the sale to be in bad faith or for an improper purpose. It follows, as a matter of course, that DSM cannot be said to have notice of such breach and/or improper purpose which is non-existent.

(3) Did DSM have notice of the Bank's breach of mortgagee's duty to obtain the best price and/or any impropriety in the sale of the Pledged Shares?

109 The next issue is whether DSM had notice that the Bank was in breach of its duty to take reasonable care to obtain a proper price for the Pledged Shares as well as of any impropriety (especially Indra Aman's involvement) in the sale. Beckkett contended that DSM had actual, imputed or constructive knowledge of the circumstances of the Bank's breach of this mortgagee's duty and/or impropriety involved in the sale such that its "conscience" was tainted.

110 With respect to actual knowledge, Beckkett's case was that "[t]he only reasonable inference that can and should have been drawn from the totality of the circumstances is that DSM knew full well that the sale was highly unusual",[note: 11] given that:

(a) DSM knew of the split between the Management Group and the Passive Shareholders (see [5] above) and was exploiting this split;

(b) DSM solicited the purchase of the Pledged Shares and approached the Management Group

to do so, knowing that the Management Group would be receptive to a proposed sale;

(c) DSM knew that the Bank had not undertaken a proper valuation of the Pledged Shares;

(d) DSM knew that the Bank had concealed the sale from Beckkett; and

(e) DSM knew that the EGMs were convened for the purpose of approving the sale and transfer of the Pledged Shares and not for the purported purpose of discussing the restructuring of the Bridging Loan.

111 With respect to imputed knowledge, Beckkett's case was that Indra Aman was, in fact, an agent of DSM as he was intimately involved in the sale of the Pledged Shares and was the person "driving the terms and the structure" of the entire transaction.[note: 12] Indra Aman clearly knew of the impropriety of the sale (as he was involved in it) and his knowledge must be imputed to DSM.

112 With respect to constructive knowledge, Beckkett's case was that, even if the combination of facts supporting the above two arguments based on actual and imputed knowledge "do not rise to the level of actual knowledge, they must … be sufficient to at least fix DSM with constructive knowledge".[note: 13]

113 In our view, the short answer to Beckkett's arguments on knowledge, whether actual, imputed or constructive, in relation to the Bank's breach of its mortgagee's duty to obtain the best price and/or impropriety on the part of the Bank in the sale of the Pledged Shares can be disposed of on a realistic consideration of the legal position of the Bank, Beckkett and DSM. The evidence shows that all the parties involved in the negotiations, *viz*, the Bank, the Management Group, Indra Aman and DSM, were working together to ensure that the sale of the Pledged Shares would go through smoothly.[note: 14] Their actions did not suggest that they wanted to deprive Beckkett or Asminco of their respective equities of redemption with respect to the SME Shares, the Adaro Shares and the IBT Shares, since Beckkett was in no financial position to redeem the Pledged Shares and did not want to refinance them. As Beckkett was in no position to redeem the Pledged Shares, it could only put obstacles in the way of any sale by the Bank to recover the Bridging Loan which had remained unpaid for more than three years since it became due.

114 As for Beckkett's further argument that DSM itself did not act in good faith in that it knew that the Bank had not obtained an independent valuation of the Pledged Shares, our view is that even if DSM knew of this omission, it would not affect its own conduct in agreeing to buy the Pledged Shares at a price which the Bank was prepared to sell and it was prepared to buy. No authority has been cited to us that the law requires the prospective purchaser to safeguard the rights of the mortgagor *vis-à-vis* the mortgagee. That is an obligation of the mortgagee. No prospective purchaser would act or be expected to act in such a commercially imprudent (or morally considerate) manner in the conduct of his own commercial affairs. If the mortgagee wants to sell a mortgaged property cheaply or below the market price, it is not up to the prospective purchaser to turn down a good offer. On the contrary, commercial reality expects the latter to drive a hard bargain to force the price down. This was what DSM did in this case as the Bank was, for whatever reason, anxious to get rid of the Bridging Loan from its balance sheet.

115 We agree with the Judge that DSM's insistence that the Bank should undertake to wind up Beckkett as one of the terms of the sale of the Pledged Shares was not evidence of a conspiracy between DSM and the Bank, nor was it evidence of a lack of good faith on the part of the Bank. Neither was DSM wrong to purchase all the Pledged Shares in order to protect the purchase of the

Adaro Shares and the IBT Shares (see [91] above) since the Bank was fully entitled to sell those shares. As stated by Lord Wilberforce in *Midland Bank Trust Co Ltd v Green* [1981] AC 513 at 530, "*taking advantage* of a situation, *which the law has provided*, and *the addition of a profit motive* [cannot] create an absence of good faith" [emphasis added]. In the present case, the Bank was legally entitled to enforce the Guarantee against Beckkett; and DSM, by requiring it to be a term of the S&E Agreement that the Bank should enforce the Guarantee against Beckkett, can be said, in Lord Wilberforce's words, to be merely taking advantage of a situation which the law has provided. In any event, as found by the Judge, these measures were motivated by genuine commercial motives, aimed at the protection of its investment in the Pledged Shares and were, in fact, mooted and advised by DSM's Indonesian lawyer, Soetopo.

116 The law, of course, will not allow the mortgagee and the prospective purchaser to conspire to cheat the mortgagor by, for example, fixing the price at a level sufficient to pay off the outstanding loan when the proper price is much higher. This is not the case here (see also [120]–[133] below where we deal with Beckkett's claim based on conspiracy). The fact is that the Bank took a loss of more than US$80m in selling the Pledged Shares at US$46m. There was no reason and no explanation for the Bank taking such a big loss on the Bridging Loan just to injure Beckkett. It defies any commercial sense. It may be that the Bank failed to sell the Pledged Shares at the best price available at the time of the sale, but that is no evidence of an intention to injure Beckkett. In the circumstances, we agree with the Judge's finding that DSM purchased the Pledged Shares in good faith and without any impropriety on the part of the Bank.

117 It may be recalled that one of Beckkett's contentions, in alleging that DSM was not a *bona fide* purchaser, was that DSM had conspired with the Bank to injure Beckkett through unlawful means. We will deal with this issue in detail in the later section on conspiracy. Suffice it to say here, we do not find that Beckkett has made out a case of unlawful means conspiracy.

Is it equitable to set aside the sale of the Pledged Shares?

118 We now consider a technical argument advanced by the Bank and DSM as to why the sale should not be set aside even if there was bad faith or impropriety. The argument is that Beckkett is not entitled to set aside the sale except upon payment of the Unpaid Loan, as otherwise Beckkett would be able to recover its interest in the Pledged Shares without having to pay the Unpaid Loan. Counsel cited *Lukass* ([94] *supra*), *Hickson v Darlow* (1883) 23 Ch D 690, *Waring* ([85] *supra*) and *Inglis* ([87] *supra*) as authorities for this argument.

119 In our view, this argument does assist the Bank and DSM, and the law on which it is based is well established, if, in law, Beckkett were entitled to set aside the sale on the facts (see [87] above where we have dealt with the law). However, there would be nothing to prevent this court, as a matter of principle, to make a conditional order giving Beckkett reasonable time to raise sufficient funds to redeem the Pledged Shares sold to DSM. That said, we should add that, in the present case, there was some evidence that Beckkett had shown no interest or inclination to redeem the Pledged Shares. It is a trite principle of law that equity demands that "he who seeks equity must do equity". The maxim applies in the context of mortgages as well, and the sale of a mortgaged property will usually be set aside on the condition that the mortgagor repays the outstanding loan and redeems the mortgaged property (see the cases cited at [118] above; as well as the authorities cited at [87] above). However, in the present case, we accept the contention of the Bank and DSM that Beckkett has not proved that it is entitled to set aside the sale of the Pledged Shares for the reasons given above.

Was there conspiracy by unlawful means?

120 In the proceedings below, Beckkett founded its case on the tort of conspiracy in both forms, *ie*, conspiracy by lawful means and conspiracy by unlawful means: see *Quah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390 where Lai Kew Chai J (delivering the judgment of this court) said at [45]:

> *The tort of conspiracy comprises two types: conspiracy by unlawful means and conspiracy by lawful means*. A conspiracy by unlawful means is constituted when two or more persons combine to commit an *unlawful act* with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved. In a conspiracy by lawful means, there *need not be an unlawful act* committed by the conspirators. *But there is the additional requirement of proving a 'predominant purpose' by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved*. [emphasis added]

This statement of the law was approved by this court in *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [2000] 1 SLR 385 at [34]. It is not disputed that in unlawful means conspiracy, the element of unlawfulness covers both a criminal act or means, as well as an intentional act that is tortious. In *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 ("*Revenue and Customs Commissioners*"), Lord Walker of Gestingthorpe said (at [93]):

> [A]ll the statements of general principle in the classic cases seem to me to be consistent with the proposition that unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it).

In that case, the House of Lords also unanimously decided that there was no requirement in unlawful means conspiracy for the unlawful means to be independently actionable.

121 The decision in Revenue and Customs Commissioners that the unlawful means need not be independently actionable was in fact anticipated by the decision of our High Court in OCM Opportunities Fund II, LP v Burhan Uray [2004] SGHC 115. In that case, the court (citing the judgment of Colman J in Bank Gesellschaft Berlin International SA v Raif Zihnali (Queen's Bench Division (Commercial Court), 16 July 2001, transcript available on LexisNexis) dismissed the defendant's application to strike out the plaintiff's action based on unlawful means conspiracy where the actionability of the unlawful means was not pleaded, on the ground that the additional requirement of actionability was "conceptionally irrelevant" (at [41]).

122 Before us, Beckkett has only appealed against the Judge's finding that there was no conspiracy by unlawful means. Beckkett has put its argument as follows:[note: 15]

> Our case is that by agreeing to, and carrying to fruition, the [S&E] Agreement executed on 21 November 2001, [the Bank] and DSM were in a conspiracy to injure Beckkett through unlawful means. The [S&E] Agreement *itself* evidences the conspiracy between [the Bank] and DSM and that the implementation of its terms involved unlawful acts. [emphasis in original]

Beckkett elaborated on these points by reference to the following actions taken by the Bank and DSM:

> (a) the sham meetings to conceal the sale of the Pledged Shares from Beckkett and the structuring of the S&E Agreement to prevent Beckkett from learning of the sale and acting to challenge it, especially the term requiring the Bank to enforce the Guarantee and wind up Beckkett;

(b) applying to the Indonesian courts *ex parte* for sanction to transfer the Pledged Shares by private sale when the law required an *inter partes* application, and consequently the sale was without the valid approval of the Indonesian courts; and

(c) the sale of the Pledged Shares at a gross undervalue of US$46m.

123 These arguments were considered and rejected by the Judge on the ground that, even if these actions constituted unlawful means (in fact, he had found that most were not), there was no common or shared intention between the Bank and DSM to injure Beckkett. Before us, Beckkett's argument was essentially that the Judge was wrong and that the proper inference to be drawn from the sale of the Pledged Shares in the way and at the price at which it was done was that the Bank and DSM had acted in concert with the intention to injure Beckkett. We will now consider Beckkett's arguments.

The sham meetings and the S&E Agreement

124 The sham meetings referred to the various so-called clandestine meetings held to obtain shareholder approval for the sale of the Pledged Shares. Reference was made, particularly by Beckkett, to an e-mail dated 15 January 2002, written by Indra Aman to Victor Sim (see [104]–[105] above). As already mentioned, in that e-mail, Indra Aman set out in detail what was to be done by the Bank and the Swabara Group to ensure the smooth completion of the sale of the Pledged Shares, which included the issuance of ten carefully drafted letters for the purpose of staging purported meetings to discuss refinancing and/or restructuring of the Bridging Loan. However, these meetings were in fact meant to be EGMs, convened for the purpose of approving the sale and transfer of the Pledged Shares. It is Beckkett's further argument that the terms of the S&E Agreement were so extraordinary that, by themselves, they constituted evidence of a concerted action by the Bank and DSM, as well as evidence of an intention, to injure Beckkett. It was pointed out that cll 2.1 and 4 of the S&E Agreement, read with cl 4 of Appendix B to the S&E Agreement, provided for the following things:

(a) the Bank to apply *ex parte* to the District Court of Jakarta to sanction the terms of the sale by private treaty together with a valuation certificate to support the agreed sale price;

(b) the Bank to commence enforcement proceedings against Beckkett as the guarantor of the Bridging Loan in Singapore to recover the Unpaid Loan with a view to winding up Beckkett; and

(c) DSM to bear the legal expenses of the enforcement proceedings (to which end it agreed to pay US$1.5m into an escrow account).

125 The Judge has dealt with the evidence and the possible implications of these actions at [119]–[124], [130]–[134] and [138]–[141] of the Judgment. He found that these meetings, although suspicious as regards their objectives, were in fact innocuous and explicable in the light of the circumstances in which the Bank was compelled to sell the Pledged Shares in the way it did. He also accepted the evidence of the Bank and DSM that they had to maintain secrecy and take appropriate action not to alert Beckkett to the sale as Beckkett had threatened, and would take whatever measures were necessary, to block, delay or stop the sale of the Pledged Shares. It may be recalled that the Bank had produced evidence that Beckkett had been intransigent in refusing to repay the secured debt and had openly challenged the Bank to sell the Pledged Shares. Evidence was also adduced that Sukanto (who owned and controlled one of the Passive Shareholders, which had control over Beckkett through its majority shareholding in ASMEC, the parent company of Beckkett) would try to use all means to prevent the completion of the sale and purchase of the Pledged Shares. It was for these reasons that DSM decided to purchase all the Pledged Shares, instead of just the Adaro Shares

and the IBT Shares. DSM also adduced evidence that these measures, *ie*, to enforce the Guarantee and to purchase all the Pledged Shares, were suggested by DSM's Indonesian lawyer, Soetopo, and DSM had merely followed its lawyer's advice. The Bank and DSM had expected serious and troublesome opposition from Beckkett and/or Sukanto if the Pledged Shares were to be sold openly or with prior notice to the latter, and thus they sought to avoid the potential opposition in a way they considered appropriate in the circumstances.

126 It was in the context of this business and legal environment as perceived by them that the Bank and DSM had no choice but to agree to take these steps to ensure that the sale was completed smoothly. The Judge accepted the evidence of the Bank and DSM that these actions were "defensive in nature" (at [140] of the Judgment) and that they were intended to protect the sale. Although the Judge had accepted that winding up Beckkett would be injurious to Beckkett, he also found that it was not the intention of the parties to injure Beckkett (at [124] and [141]). The Judge found that both the Bank and DSM had their own reasons for wanting to wind up Beckkett: to the Bank, DSM's agreement to pay the legal costs of doing so was an incentive for the deal; to DSM, it was protection for the deal (at [140]). Of course, it would be reasonable to assume that the Bank would also not want Beckkett to sue the Bank with respect to the sale, and winding Beckkett up would make it harder for Beckkett to do so. However, as the Judge rightly held, the Bank had the legal right to wind up Beckkett, an unpaid debtor to the Bank (at [140]).

127 In our view, the Judge's findings are supported fully by the evidence and we have no reason to disagree with his findings on these matters. The Bank and DSM took these extraordinary measures to protect their mutual interests in the transaction because they believed that, otherwise, extraordinary measures would be taken to prevent the transaction from being consummated. It cannot be said that these measures constituted unlawful means or evinced a clear intention between the Bank and DSM to injure Beckkett.

Sale of the Pledged Shares without valid Indonesian court approval

128 The Jakarta High Court had set aside, three years later, the approvals obtained *ex parte* by the Bank from the South Jakarta District Court. For this reason, the Judge found that this must mean that, under Indonesian law, the sale of the Pledged Shares had not been carried out by lawful means as no valid court approval had been obtained by the Bank, and therefore the Bank had failed to discharge its duties as pledgee of the shares (at [126] of the Judgment).

129 We have already shown at [99]–[101] above why the Judge's finding in this respect is not justified. The sale of the Pledged Shares was neither unlawful nor brought about by the use of unlawful means, having regard to the Judge's finding that no court approval was required for a sale by private treaty under Arts 1155 and 1156 of the ICC, which meant that the court approvals were supererogatory.

130 In any event, the Judge also found that the Bank did not intend to do anything unlawful as there was no evidence that the Bank knew that the court approvals were inappropriate, and, for this reason, this failure was not evidence of an intention to injure Beckkett (at [122] of the Judgment).

Purchase of the Pledged Shares at an undervalue

131 The Judge found that DSM did not commit any wrongful act in buying the Pledged Shares from the Bank, even if the price of US$46m was at an undervalue. The Judge further held that there was no evidence that DSM believed that the price of US$46m was an undervalue. He also held that, even if the Bank had a duty to take proper care in selling the Pledged Shares, DSM was not under such a

duty when buying them; and that it would not know, and was under no duty to know, what steps, if any, the Bank had taken to satisfy itself that US$46m was a proper price (at [120] of the Judgment). On this basis, even assuming that DSM had bought the Pledged Shares at an undervalue, such action would not go to prove any intention on its part to injure Beckkett because its primary interest was to benefit itself and not to damage Beckkett (at [121]). In our view, the finding and reasoning of the Judge on this issue cannot be faulted. As we have stated earlier, even if DSM knew that the sale price was below the market price or lower than the best price the Bank could get, DSM owed Beckkett no duty to reject the offer.

132 We should add that, given the undeniable fact that the Bank would suffer a loss of more than US$80m as a result of the sale of the Pledged Shares at the price of US$46m, it would be extremely difficult for Beckkett to be able to prove that the Bank had an intention to injure it. There would be no commercial reason for the Bank to incur such a huge loss in order to injure Beckkett. The Bank might have failed to secure a better price for the Pledged Shares, but that is no basis to infer or to argue, without any evidence, that the Bank deliberately took a huge loss in order to injure Beckkett.

133 We find, accordingly, that this part of Beckkett's appeal based on conspiracy by unlawful means fails.

Has the Bank proved its counterclaim?

134 The Bank has appealed against the Judge's decision in dismissing its counterclaim tersely (at [150] of the Judgment) on the ground that:

> As [the Bank] elected not to call its witnesses, it did not prove its counterclaim.

The Bank's contention is that the Judge's reasoning was wrong as its omission to call evidence did not mean that there was no evidence to prove its counterclaim.

135 As a matter of law, the Bank's argument is correct as Beckkett could have admitted the amount of the counterclaim in its own pleadings or in the testimony of its agents. A plaintiff who fails to call any witness will fail in his claim because there is no evidence to support the claim. But the defendant in a counterclaim is entitled to rely on such evidence that the plaintiff might have adduced in his claim in order to prove his counterclaim, without having to call any further or independent evidence.

136 But is there any such evidence in the present case? The Bank has relied on two pieces of evidence. The first piece of evidence comes from one of Beckkett's witnesses, Arthur Ling, who admitted in his affidavit of evidence in chief that:[note: 16]

> *In a letter of demand from [the Bank's] solicitors, Allen & Gledhill ("A&G") to Beckkett dated 14 March 2002, A&G demanded for payment of the sum of US$86,888,963.31*, within 14 days; failing which, [the Bank] would take legal action ... [emphasis added]

The second is that Beckkett acknowledged this claim in the auditors' report on its audited accounts for the financial year which ended 31 December 2002. The auditors reported:

> As stated in Note 5 to the financial statements, one of the group companies, [Asminco] had entered into a Bridge Loan Agreement with [the Bank] in 1997. During the financial year, [the Bank] exercised its rights to dispose off [*sic*] the shares owned by the company in its direct subsidiary, [SME], pledged to [the Bank] for the aforementioned loan, for a consideration

> amounting to US$800,000 (S$1,462,840) due to the failure of [Asminco] to repay the principal and interest on the loan to [the Bank].
>
> [The Bank] has also demanded for an immediate repayment of the outstanding loan and accrued interest due from [Asminco] amounting to US$86,888,969 (S$150,752,361) from the company as the Guarantor of the aforesaid loan.
>
> The company has officially *rejected* the demand by [the Bank] and commenced legal proceedings in Singapore … The company is reviewing whether the company has a claim against [the Bank] for selling the pledged shares in [SME] at an under-valued price.
>
> [emphasis added]

In our view, neither piece of evidence is of assistance to the Bank. A letter of demand is not an admission of the amount demanded. In fact, the note in the accounts specifically rejected the demand.

137 Nevertheless, in our view, there is *prima facie* evidence that the Bank has suffered a loss, and that evidence is in the claim for damages by Beckkett which is based on the sale of the Pledged Shares at US$46m. In our view, the evidence cannot be refuted because it is the very foundation of Beckkett's claim against the Bank, *ie*, that the Bank sold the Pledged Shares at the price of US$46m in breach of its duties as pledgee of the shares. Furthermore, nowhere in its submissions did Beckkett claim that, apart from several interest payments, it had made any payment of the principal to reduce the Bridging Loan. In fact, the calculations (of the net value of the SME Shares) advanced by Beckkett both at the trial below and on appeal specifically included a deduction of US$132m as "Loan owed to [the Bank] paid by Asminco". Deducting the US$46m obtained for the Pledged Shares, this leaves approximately US$86m, which largely corresponds to the amount counterclaimed by the Bank.

138 Further, cl 10 of the Guarantee provides that a certificate from the Bank will be conclusive evidence of the amount that is owing under the Guarantee:

> *A certificate from an officer of the Bank* as to the amount at any time due and unpaid from any of the Obligors under the Facility Agreement and/or any other Transaction Document *shall, in the absence of manifest error, be conclusive and binding on the Guarantors*. [emphasis added]

The operation of conclusive evidence clauses such as cl 10 is clear. In the first instance, the certificate from the Bank accompanied by the letter of demand would be conclusive of the amount due by the guarantor. If, however, there is a manifest error, it is then open to the guarantor to correct the error by instituting proceedings against the Bank. It is open for the guarantor to challenge the clause on the basis of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA"). In the present case, Beckkett neither disputed the quantification of liability under the Guarantee as stated in the certificate enclosed with the letter of demand, nor challenged cl 10 on the basis of UCTA. This was Beckkett's position both at trial and on appeal. Although "a conclusive evidence clause has to be interpreted strictly because the effect of such a clause is to oust the court's jurisdiction to consider all relevant facts before coming to a conclusion" (see *Bok Chee Seng Construction Pte Ltd v Development Bank of Singapore Ltd* [2002] 2 SLR 61 at [19]), it is clear that if the matters stated in the clause have been proved to exist, the court should draw the necessary inferences. On the facts of the present case, the necessary inference is that the certificate from the officer of the Bank proved the amount due under the Guarantee.

139 The Judge also gave another ground for dismissing the Bank's counterclaim to reinforce his first

ground. At [150] and [151] of the Judgment, he said:

> I should add that even if [the Bank] had proceeded with its counterclaim, it would have encountered difficulties. The difficulties arise from the fact that it did not have the Adaro, IBT and Asminco shares valued, and had sold them in a private sale without notice to other potential buyers. As I have stated earlier, [the Bank] as vendor-pledgee owes a primary duty to the pledgors, and it also owes a duty to any guarantor who may be liable for the shortfall between the outstanding loan and the proceeds from the sale of the shares.
>
> For this reason, although Beckkett has no independent right of action over the sale of the Adaro, IBT and Asminco shares, it is entitled to raise that as a defence to any claim from [the Bank] for the shortfall. The onus then is on [the Bank] to show that it had acted with due care when it sold those shares, and [the Bank]'s conduct fell short of that.

140 In our view, there is some confusion in this passage on the burden of proof in relation to the losses claimed by the parties. The fact that the Bank has not acted with due care does not necessarily mean that it has sold the Pledged Shares at an undervalue or that Beckkett has suffered a loss. Beckkett has to prove its loss by producing evidence to show that the price at which the Bank sold the Pledged Shares was not the best price available. The burden of proof is on Beckkett to produce such evidence to show that there was a shortfall against which it may rely on as a defence to the counterclaim by way of a set-off. As far as the law is concerned, if Beckkett fails to prove a shortfall, then it has suffered no loss in law. And if Beckkett has suffered no loss in law at a sale price of US$46m, then it must follow that the Bank has suffered a loss in law in the amount of the counterclaim. The Judge's holding at [149] (see [70] above) and [151] of the Judgment has led to an incongruous situation where both the claim and the counterclaim were dismissed on the ground that neither party was able to prove its case. It is true that the dismissals are based on the technical ground of lack of evidence of loss by both parties. In our view, this situation cannot be right: Either Beckkett should succeed in its claim because it has suffered a loss (after deducting the Bridging Loan and interest thereon) on the sale of the SME Shares (taking into account the shortfall in the sale price of the Adaro Shares and the IBT Shares) or the Bank has suffered a loss (after giving credit for the price at which the Pledged Shares were actually sold). Since the Judge has found that Beckkett failed to prove any loss arising from the sale of the Pledged Shares by the Bank, there should be a corresponding loss on the part of the Bank, and judgment for the amount of the counterclaim should have been entered against Beckkett without any further proof from the Bank.

141 For these reasons, the Bank was *prima facie* entitled to judgment for the amount of the counterclaim and the Bank's appeal should be allowed.

142 However, this is not the end of the matter. We have agreed with the Judge's finding that Beckkett has discharged the burden of proving that the Bank was in breach of its duty to obtain a proper price for the SME Shares, and that the sale was at an undervalue, and that Beckkett is entitled to damages (to be assessed) for any loss it has suffered. That being the case, the Bank is not entitled to enter judgment against Beckkett for the amount of the counterclaim until the damages Beckkett is entitled to claim against the Bank have been assessed. Beckkett, as guarantor of the Bridging Loan, is entitled to a *pro tanto* reduction in its liability to the Bank for the amount of the undervalue in the sale of the Pledged Shares, including the Adaro Shares and the IBT Shares (see *Smith v Wood* [1929] 1 Ch 14; *Law of Guarantees* ([88] *supra*) at para 9-041). If the damages as assessed exceed the Bank's counterclaim, nothing will be payable under the counterclaim, which will then be dismissed. If the damages as assessed are less than the Bank's counterclaim, then the Bank is entitled to enter judgment for the difference. Until then, it is not possible to determine the fate of the Bank's counterclaim. Accordingly, it will be necessary to stay the Bank's right to enter judgment

for the amount of the counterclaim until the outcome of the inquiry on damages. The costs of the parties in relation to the counterclaim can then be decided. We so order.

Summary of findings

143 In summary, our findings are as follows:

(a) The Bank, in exercising its power of sale, did not take proper steps to sell the Pledged Shares, in particular, the Adaro Shares and the IBT Shares, at the best price, and was therefore in breach of such duty as pledgee.

(b) Beckkett has adduced sufficient proof that the Adaro Shares and the IBT Shares had been sold at an undervalue.

(c) It is not possible to determine whether the sale of Beckkett's 74.2% equity share in SME at US$800,000 was at an undervalue and whether Beckkett has suffered a loss until the values of the Adaro Shares and the IBT Shares have been determined and taken into account in the valuation of the SME Shares.

(d) Contrary to the Judge's decision, the Bifurcation Order did not require Beckkett to adduce at the trial evidence of its actual loss at the 2001 valuations of the Pledged Shares. It did not abrogate Beckkett's pleaded claim that damages were to be assessed after the issue of liability was determined.

(e) Beckkett is entitled to have its loss, if any, determined at an inquiry for damages, at which it may prove the value of the SME Shares by adducing evidence of the values of the Adaro Shares and the IBT Shares.

(f) Although Beckkett, as pledgor of the SME Shares, has no direct claim for any loss arising from the sale of the Adaro Shares and the IBT Shares at an undervalue, it is entitled, as guarantor of the Bridging Loan, to prove any undervalue with respect to the Pledged Shares and to set it off against the Bank's counterclaim.

(g) The sale of the Pledged Shares by the Bank to DSM was not improper nor effected pursuant to a conspiracy between them, whether by lawful or unlawful means.

(h) Beckkett has failed to prove that DSM was not a *bona fide* purchaser of the Pledged Shares.

(i) Having regard to the subsequent developments relating to the Adaro Shares and the IBT Shares and the conduct of Beckkett, it would be wholly inequitable for the court to set aside the sale of the Pledged Shares.

Conclusion

144 For the reasons given above, we make the following orders:

(a) We dismiss, with costs, Beckkett's appeal against the Judge's decision to dismiss its claims to set aside the sale of the Pledged Shares against the Bank and/or DSM. The costs payable to DSM shall be paid forthwith, but the costs to the Bank will be stayed until the determination of Beckkett's claim for damages against the Bank as set out in the order in sub-para (b) herein.

(b) We allow Beckkett's appeal against the decision of the Judge dismissing Beckkett's claim for damages against the Bank and we order that such damages, based on the 2001 valuations of the Pledged Shares, be assessed before the Registrar, with the costs of assessment to follow the event.

(c) We order that judgment on the Bank's counterclaim against Beckkett be stayed pending the completion of the assessment of damages, the costs of the Bank's counterclaim here and below to follow the event of the assessment of damages ordered in sub-para (b) herein.

(d) The security deposits for costs paid into court will remain in court until the final determination of Beckkett's claim for damages and the Bank's counterclaim, the deposits to be paid out to whichever party succeeds on the claim and the counterclaim, respectively.

(e) There shall be liberty to apply for further orders or directions.

[note: 1]This was admitted by Arthur Ling, the director of Beckkett, during his cross-examination by the Bank's solicitors (see Joint Record of Appeal ("JRA") Vol III Part 41 at pp 12718–12720).

[note: 2]See p 173 of the Bank's Appellant's Case ("AC"); JRA Vol III (Part 42) at p 12940 (p 51).

[note: 3]See pp 178–179 of the Bank's AC; Vol III (Part 42) JRA at p 12942 (pp 59–62).

[note: 4]See p 178 of the Bank's AC; Vol III (Part 42) JRA at p 12943 (p 63).

[note: 5]See GD at [88] and the Bank's Respondent Case at p 313 and the Bank's Summary of Oral Arguments at para 6.

[note: 6]Beckkett's AC at para 237.

[note: 7]JRA Vol IV (Part 7) at p 15986.

[note: 8]JRA Vol IV (Part 7) at p 15995.

[note: 9]Transcripts of hearing on 21 to 23 August 2006 at pp 33, 40–49, JRA Vol III (Part 44) at pp 13823–13827.

[note: 10]At para 49(e).

[note: 11]Beckkett's AC at para 113.

[note: 12]Beckkett's AC at para 125.

[note: 13]Beckkett's AC at para 148.

[note: 14]Beckkett's AC at para 126.

[note: 15]Beckkett's AC at para 298

[note: 16]AEIC of Arthur Ling at para 47: Vol. III (Part 4) at p 1241