

# Receiver-managers obtain court's blessing: self-dealing and fair-dealing rules not violated

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## Introduction

### Bids

### Decision

## Introduction

In August 2016 the joint receiver-managers of the assets of the Baha Mar Companies applied to the Supreme Court of the Bahamas for a direction that the intended sale of Baha Mar's secured assets to a special purpose vehicle (SPV) would not amount to self-dealing or infringe the fair-dealing rule. The interlocutory summons was filed several months after the court permitted the joint receiver-managers to enter into a court-approved process for the marketing and sale of the secured assets comprising the Baha Mar Resort in the Bahamas (resort project).

## Bids

On September 27 2016 the court noted that following a fulsome and robust marketing process, the joint receiver-managers identified that bids received for the resort project on an 'as is' basis, compared with the offers for the resort project on a 'completed' basis, were severely depressed. In considering the facts of the case, the court held that:

*"A receiver or mortgagee is under no duty to improve the secured assets held by the Baha Mar properties prior to sale, and the Export-Import Bank of China ('CEXIM') was unwilling to invest funds, reputed to be in hundreds of millions of dollars, in the completion of the resort, whilst in receivership and carrying the stigma and legal restrictions associated with a company in receivership."*

A plan was therefore developed whereby an SPV beneficially owned by CEXIM would make a bid for the secured assets and the SPV would then complete the resort project with finance from CEXIM so that in due course the SPV could sell the completed resort project by way of a separate sales agreement to the preferred bidder, or an alternative bidder if the preferred bidder were to withdraw. The offer made by the SPV for the acquisition of the resort project was by far the highest bid tendered to the joint receiver-managers. The court therefore considered Section 145 of the Companies Act 1992, which provides that:

*"Upon an application by a receiver-manager of a company, whether appointed by the court or under an instrument, the court may make any order it thinks fit including...*

*(c) an order declaring the rights of persons before the court or otherwise...*

*(f) an order giving direction on any matter relating to the duties of the receiver-manager."*

Further, the court also considered Section 146 of the Companies Act, which provides that:

*"A receiver or receiver-manager of a company appointed under an instrument shall –*

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(a) act honestly and in good faith; and

(b) deal with any property of the company in his possession or control in a commercially feasible manner."

## Decision

In citing the *dicta* of Lord Templeman in *Downsview Nominees Ltd v First Corp* ([1993] AC 295), Judge Winder held that the duties of a receiver are akin to that of a mortgagee, and it is well settled that in exercising his or her power of sale over mortgaged property a mortgagee is under a duty to take reasonable care to obtain the best price reasonably obtainable at the time, which is synonymous with a proper price. The concerns raised by the joint receiver-managers, whereby they sought the sanction of the court, were the questions of self-dealing and fair-dealing.

The established principle governing the exercise of the power of sale by a mortgagee is that he or she may not sell to himself or herself, as noted in *Farrar v Farrar Ltd* ((1888) 40 Ch D 395). However, under Bahamian law a mortgagee is empowered to bid for and buy the mortgaged property at an auction pursuant to Section 21(1)(a) of the Conveyancing and Law of Property Act.

The court also considered the Privy Council case of *Tse Kwong Lam v Wong Chit Sen* ([1983] 1 WLR 1349), which held that:

*"a sale by a person to a corporation of which he is a member is not either in form or in substance, a sale by a person to himself... on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. A mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonable at the time. The mortgagee is not however bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss."* (Templeman delivering the board's opinion [1354].)

Further, the court noted that the Supreme Court of New South Wales also held in *Re Actwayne Pty* ([2002] NSWSC 572) that, in applying the reasoning of the Privy Council in *Tse Kwong Lam*, there is no impropriety in the sale to a company where the mortgagee was the sole director and shareholder of the purchaser company, so long as he or she acts fairly to the borrower and uses his or her best endeavours to obtain the best price reasonably obtainable for the mortgaged property. The court accepted that the self-dealing rule is concerned with substance and not technicalities and to avoid the inevitable conflict of interest that arises when the same person negotiates the sale of secured assets to himself or herself.

Winder determined that the proposed transaction would not amount to a sale by the mortgagee, given that the joint receiver-managers, not CEXIM, were in control of the sale and marketing process, as well as the bidding. The process was fair and open and designed to achieve the best price, thus it could not be said that the sale by the joint receiver-managers to the SPV was either in form or substance a sale between the mortgagee and the SPV. Further, it was held that not every sale to a corporation in which the mortgagee is interested is improper. The court was satisfied that the sale to the SPV was pursued by the joint receiver-managers in good faith and achieved after adequate precautions were taken to achieve the best price reasonably obtainable at the time, which was the SPV's bid. Finally, the joint provisional liquidators, which represented the interests of the creditors of the Baha Mar Companies' estate, did not oppose the joint receiver-managers' application.

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