W.22 *Meretz Investments NV v ACP Ltd*
[2007] Ch 197 (ChD) and [2008] 2 WLR 904 (CA)

In the text *Meretz Investments NV v ACP Ltd* is dealt with briefly. Here the same case is considered in more detail.

22.1 The facts

The case arose from some complex financial arrangements that were made in order to permit the construction of some new penthouse flats on the top of an existing block to the south of the Royal Albert Hall (a very desirable location for such flats). The transaction was very complex and is not described in full here but enough of the facts are given for you to understand the issues that arose in the case about the right to exercise the mortgagee's power of sale.

Under the arrangements Britel (the second claimant) granted a lease of the relevant part of the building to ACP. The profits were to be shared by Britel, ACP and Meretz. The arrangements were supported by several mortgage advances. Matters did not go well and eventually one of the mortgagees (First Penthouse – "FP") took possession of the lease (the mortgaged property) and sold it to the 5th Defendant (Mr Tamimi). The sale of the lease meant that ACP could no longer fulfill one of its own obligations under the original arrangements, which was to grant a sub-lease to Britel (a "lease back") of those parts of the leased property that it did not actually need for the development. By the time of the trial ACP was in voluntary liquidation.

FP was in fact the parent company of ACP and the companies both had the same managing director. FP formed ACP to carry out this particular development. The intention was to build the penthouses in stages, with subsequent stages being financed from profits on the earlier stages. This still meant that finance had to be found for the first stage of the development. ACP was granted the lease at a nominal sum. FP provided the initial development costs (after some earlier different arrangements) and took a charge on the lease to secure the sums advanced. There were a number of other charges.

The development ran into trouble and was predicted to make a considerable loss. Accordingly the directors of FP and ACP came to the view that they could use the FP charge to exercise the power of sale and thus ensure that ACP's parent company, FP, was repaid in full. It was also believed that this would avoid other losses that would otherwise be incurred by ACP.

22.2 The litigation

Meretz and ACP sought to set aside the sale of the lease by the mortgagee, alleging that the sale was made for a number of reasons and that some of them were improper (the allegations included a conspiracy allegation).

At first instance the court (Lewison J) found for the claimants in relation to the failure to grant the lease back but not on another claim in contract (to complete on time - which would have given greater damages) or for claims in tort (conspiracy and inducing breach of contract).

The matter was appealed by the claimants. The Court of Appeal consisted of Pill LJ, Arden LJ and Toulson LJ. To the extent that Lewison J had decided that substantial damages were not available for the breach of contract (which depended upon a timing issue) the CA found for the claimants. However, it should be noted that Lewison J's findings on the exercise of the power of sale under the mortgage were neither contested nor criticized in the CA, and therefore the reasoning at first instance still stands.

From the point of view of the law on mortgages and charges, the key point in the case at first instance was whether it was acceptable for a mortgagee to sell the charged property if the mortgagee had mixed motives for

the sale, only one of which was to enforce the security given by the mortgage. The court distinguished this from any case in which there was no intention at all to realise the security and thus all the purposes for sale were not properly connected with the nature of the charge. The mortgagee's power of sale was conferred upon him for his own benefit. Accordingly, he could exercise that power as long as at least **one** of the reasons for doing so was to recover the sums secured by the mortgage. There was no requirement for the mortgagee to have "purity of purpose" when selling (although the mortgagee is not entirely without responsibilities to the mortgagor, as we explain in the book).

In *Meretz* it was alleged that as well as realizing its security, the mortgagee also had the motive of selling in order to re-finance the works and thus to "build out" the development. This meant that the lease-back option had to be closed off and sale made this possible. The real aim was to avoid financial loss over the whole transaction to ACP and its parent company FP. The court held that despite these mixed motives, since **one** purpose was to realise the security, the sale was valid (see paras 327-339)

The case also confirms that a purchaser from a mortgagee cannot rely on section 104(2) of the Law of Property Act 1925, if he or she had knowledge of an impropriety in the exercise of a power of sale.

Also, what was described in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 at para 112 as "shut-eye" or "blind-eye" knowledge, is the equivalent of actual knowledge for this purpose (see paras 318-322 in *Meretz*). "Shut-eye" knowledge exists where the purchaser has a suspicion that relevant facts exist and takes a deliberate decision to avoid confirming that they exist. In other words, the purchaser acts like Nelson when he placed his telescope to his blind eye and announced "I see no ships".

Because section 104(2) operates by absolving a purchaser from having to inquire whether a case has arisen to authorise the sale, the purchaser **can** rely on the section even if the purchaser had constructive knowledge of an impropriety (see para 323).

However, imputed knowledge is not the same as constructive knowledge in a conveyancing transaction, and therefore a solicitor's actual or "shut-eye" knowledge can and should be imputed to the client purchaser (paras 317, 322-325); thus if the solicitor has actual or "shut-eye" notice, so does the client for whom the solicitor acts.