Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City
Office of the General Counsel

CHINA BANKING CORPORATION,
Petitioner,

- versus-

SEC *En Banc* Case No. 04-14-325

HON. DANIEL P. GABUYO and HON. MYRLA B. BARRIBAL, in their respective capacities as Head and Member of the Special Hearing Panel 2, and ST. FRANCIS SQUARE REALTY CORPORATION, AND ST. FRANCIS SQUARE DEVELOPMENT CORPORATION,
Respondents.

x--x

27 April 2016

TO:

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ATTY. MYRLA B. BARRIBAL
Special Hearing Panel 2
Securities and Exchange Commission, SEC Bldg., EDSA, Greenhills Mandaluyong City

G R E E T I N G S:

Please take notice that on 27 April 2016 a **DECISION** was issued in the above-entitled case, the original of which is now on file with this office.

Mandaluyong City, Philippines

By Authority of the Commission *En Banc:*

ARMANDO A. PAN, JR.
Officer-in-charge
Office of the Commission Secretary

tlt/avf

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DECISION

This resolves the pending *Petition for Review on Certiorari with prayer for issuance of Stay/Status Quo Order*[1] filed, on 02 April 2014, by China Banking Corporation (**Chinabank**) against Hon. Daniel P. Gabuyo and Hon. Myrla B. Barribal, in their respective capacities as Head and Member of the Special Hearing Panel 2 (**SHP2**), St. Francis Square Realty Corporation (**SFSRC**), and St. Francis Square Development Corporation (**SFSDC**).

The Petitioner seeks the cancellation of the *Order* of the SHP2 of the Commission dated 25 March 2014 (**Assailed Order**) issued in relation to SEC Case No. 05-00-6609 entitled "*In the Matter of: Petition for Rehabilitation with Prayer for Suspension of Actions and Proceedings against Petitioners, ASB Holdings, Inc., ASB Realty Corp., ASB Development Corp. (formerly Tiffany Tower Realty Corp.), ASB Land, Inc., ASB Finance, Inc., Makati Hope Christian School, Inc., Bel-Air Holdings Corp., Winchester Trading, Inc., VYL Development Corp., Genrick Holdings Corp., and Neighborhood Holdings, Inc.*" (ASB Group). The dispositive portion of which reads as follows:

> "WHEREFORE, premises considered, the hearing panel hereby resolves as follows:
>
> 1. Declaring the petitioners' loans with Chinabank to be over-collateralized. Hence, Chinabank is hereby directed to release to petitioners the titles over the mortgaged Bel-Air and Caloocan properties and to cancel/release the corresponding mortgage on said properties. Petitioners are hereby authorized to sell the same via public bidding within 180 days from date hereof. Accordingly, the Rehabilitation Receiver is directed to promulgate appropriate bidding rules and procedure, seeing to it that the value of the properties are maximized and the sale awarded to the highest bidder.

[1] Dated 31 March 2014.

2. Directing Chinabank to accept the proceeds of such sale, net of taxes and expenses, and to credit the same as partial payment for the Php300,000,000.00 Million loan (with no interest and charges whatsoever) of the Petitioners.
3. Chinabank is further directed to cancel/release the mortgage on The Legaspi Place, as well as to release the title/s thereon to petitioners. Petitioners are directed to resume construction thereat within one (1) year from release of mortgage and turn-over of said title/s to Petitioners.Thereafter, Petitioners shall allocate for Chinabank as a security, such number of units at the The Legaspi Place as are sufficient to pay-off such loan balance based on current market value of the units. Furthermore, Petitioners are directed to pay the remaining unpaid balance to Chinabank on cash basis, (with no interest or charges whatsoever) from the proceeds of the sale of units at The Legaspi Place within one (1) year from completion of the said project.

Facts of the Case

On 02 May 2000, SFSRC (formerly known as ASB Realty Corporation) and SFSDC (formerly known as ASB Development Corporation), along with several other affiliate companies, initiated rehabilitation proceedings with the Hearing Panel of the Commission's Securities Investigation and Clearing Department (SEC Hearing Panel, presently SHP2) after suffering financially from the Asian currency crisis in the late 90's.

At the time of filing of the petition for corporate rehabilitation, SFSRC is indebted to Chinabank for the total principal amount of Two Hundred Sixty Five Million Pesos (Php265,000,000.00) which is secured by two (2) real estate mortgages over 1.) two (2) parcels of land located in Salcedo Street, Legaspi Village, Makati City (Legaspi Property) and 2.) a parcel of land located in Bel-Air 2, Makati City (Bel-Air Property).While, SFSDC was indebted to Chinabank in the sum of Thirty Five Million (Php35,000,000.00) secured by a real estate mortgage over two (2) contiguous lots in Caloocan City (Caloocan Property).

To preserve the ASB Group's assets while the rehabilitation proceedings are on-going, a *Stay Order* was issued by the SEC Hearing Panel on 04 May 2000.

After due proceedings, the ASB Rehabilitation Plan was approved by the SEC Hearing Panel on 26 April 2001 and, eventually, upheld by the Supreme Court in several cases[2] filed by the various Creditor-Banks of the ASB Group namely, Metropolitan Bank & Trust Company (Metrobank), Bank of the Philippine Islands (BPI) and Chinabank.

On 13 September 2013, SFSRC and SFSDC filed an *Omnibus Motion*[3]with the SHP2 alleging that the mortgaged properties' market value increase based on the appraisal report of Cuervo Appraisers, Inc. (**CAI**), to wit: Legaspi Property – Php 1,086,102,000.00[4]; Bel-Air Property – Php 46,462,000.00[5]; and Caloocan Property – Php 82,031,000.00[6].

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[2] 2nd paragraph of the Petition for Review on Certiorari citing Metropolitan Bank & Trust Company v. ASB Holdings, Inc., G.R. No. 166197, dated 27 February 2007; Bank of the Philippine Islands v. Securities and Exchange Commission, G.R. No. 164641, dated 20 December 2007; and China Banking Corporation v. ASB Holdings, Inc. et al., G.R. No. 172192, dated 23 December 2008.
[3] Dated 13 September 2013.
[4] Annex "A" of the Omnibus Motion, CAI's Appraisal Report dated 26 July 2012.
[5] Annex "B" of the Omnibus Motion, CAI's Appraisal Report dated 22 July 2013.
[6] Annex "C" of the Omnibus Motion, CAI's Appraisal Report dated 29 July 2013.

In their *Omnibus Motion*, SFSRC and SFSDC sought that an order be issued: 1.) confirming that the SFSRC and SFSDC's loans to Chinabank are "over-collateralized"; 2.) directing the immediate release of the Bel-Air and Caloocan Properties; 3.) authorizing the sale of the Bel-Air and Caloocan Properties and the proceeds to be used to pay SFSRC and SFSDC's loans to Chinabank; 4.) directing Chinabank to release the mortgage on the Legaspi Property and ASB Group will complete the construction of the same; 5.) upon completion of the Legaspi Property, directing SFSRC to set aside units to fully settle the remaining balance of its loan with Chinabank based on their prevailing market value.

On 03 October 2013, the Rehabilitation Receiver filed his comment recommending that the secured status of Chinabank will not be diminished considering that the cash generated from the sale of the Bel-Air and Caloocan properties with a combined value of Php 128,491,000.00 will be applied to the loan of the ASB Group. He also noted that the completion of the unfinished Legaspi Place will finally settle ASB Group's debt to Chinabank, allocating such number of units in said project after completion, sufficient to pay-off the remaining loan balance and to pay unsecured creditors[7].

On 25 March 2014, SHP2 issued the Assailed Order granting SFSRC and SFSDC's *Omnibus Motion.*

Aggrieved by the said Assailed Order, Chinabank filed the instant Petition contending that the SHP2 acted with grave abuse of discretion amounting to lack or excess of jurisdiction:

I

WHEN THEY ARBITRARILY EXCLUDING INTEREST AND OTHER CHARGES ON PRIVATE RESPONDENTS' LOAN, THEREBY PREEMPTING A RULING ON THE SAID ISSUE BY THIS HONORABLE COMMISSION *EN BANC;*

II

WHEN THEY ARBITRARILY ORDERED THE SALE OF THE BEL-AIR AND CALOOCAN PROPERTIES IN VIOLATION OF THE CONSTITUTION AND APPLICABLE LAW;

III

WHEN THEY WHIMSICALLY ORDERED THE RELEASE OF THE MORTGAGES ON THE LEGASPI PLACE, THE BEL-AIR PROPERTY AND THE CALOOCAN PROPERTY IN VIOLATION OF THE CONSTITUTION, APPLICABLE LAW, AND THE CONTRACTS VALIDLY ENTERED INTO BETWEEN THE PARTIES;

IV

WHEN THEY ORDERED CHINABANK TO ACCEPT CONDOMINIUM UNITS IN THE LEGASPI PLACE AS REPLACEMENT SECURITY FOR PRIVATE RESPONDENTS' LOANS;

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[7] Page 2 of the Assailed Order.

V

BY EFFECTING AMENDMENTS TO THE ASB REHABILITATION PLAN IN VIOLATION OF THE FR RULES;

VI

BY ACCORDING UNTO THEMSELVES THE EXERCISE OF POLICE POWER IN VIOLATION OF THE CONSTITUTION.

SFSRC and SFSDC filed their Answer, on 02 May 2014, alleging that no grave abuse of discretion can be attributed to the public respondents, as the Assailed Order was anchored on substantial and undisputed evidence on record and established jurisprudence. Particularly, SFSRC and SFSDC aver that:

1. The statements made by the SHP2 relative to the issue of 'interest' was merely a reiteration of its previous ruling on the matter;
2. The instant Rehabilitation proceeding is primarily governed by the Rules of Procedure on Corporate Recovery;
3. A Rehabilitation Court has the power to order the sale of the property of the debtor in partial payment of the debts owing to a creditor;
4. The Rehabilitation Plan may be modified or altered by the rehabilitation tribunal upon motion by the debtor;
5. The findings of fact made by the SHP2 that the SFSRC and SFSDC's loans with Chinabank are 'over-collateralized' is duly supported by evidence on record;
6. The Rehabilitation Tribunal, as agent of the State in the exercise of its police power, is authorized to modify the contracts between the parties pursuant to the purpose of rehabilitation;
7. The Non-Impairment Clause is not applicable with respect to the exercise by the State of its quasi-judicial power;
8. Any preference in favor of a particular creditor, by virtue of a mortgage in its favor, is deemed suspended during the pendency of the rehabilitation proceedings;
9. It is settled that the power of a rehabilitation tribunal to amend or alter the existing contract between the parties constitutes as a valid exercise of delegated police power.

Issues

Summarizing the parties arguments, the relevant issues left for this Commission to resolve are the following:

1.) Whether or not the "*Financial Rehabilitation and Insolvency Act of 2010*" (FRIA) and "*Financial Rehabilitation Rules of Procedure (2013)*" (FR Rules) are applicable in ASB's rehabilitation;

2.) Whether or not SHP2 effectively amended ASB's Rehabilitation Plan when it issued the Assailed Order;

3.) Whether or not the SHP2 was correct in declaring the mortgaged properties (Legaspi Property, Bel-Air Property and Caloocan Properties) to be "over-collateralized" based on the appraisal of Cuervo Appraisers, Inc.;

4.) Whether or not the SHP2 was correct in ordering the release of the mortgaged properties, and sale of the Bel-Air Property and Caloocan Properties.

Ruling

We find the *Petition* partially meritorious.

Restoration is the central idea behind the remedy of corporate rehabilitation. In common parlance, to "restore" means "to bring back to or put back into a former or original state". Case law explains that corporate rehabilitation contemplates a continuance of corporate life and activities in an effort **to restore and reinstate the corporation to its former position of successful operation and solvency,** the purpose being to enable the company a new lease on life and allow its creditors to be paid their claims out of its earnings. In other words, rehabilitation assumes that the corporation has been operational but for some reasons like economic crisis or mismanagement had become distressed or insolvent, *i.e.*, that it is generally unable to pay its debts as they fall due in the ordinary course of business or has liability that are greater than its assets. Thus, **the basic issues in rehabilitation proceedings concern the viability and desirability of continuing the business operations of the distressed corporation**, all with a view of effectively restoring it to a state of solvency or to its former healthy financial condition through the adoption of a rehabilitation plan.[8]

In *San Jose Timber Corporation, et al. vs. SEC*[9], et al., the Supreme Court likewise ruled that:

> "Under the Rules of Procedure on Corporate Rehabilitation, "rehabilitation" is defined as the restoration of the debtor to a position of successful operation and solvency, if it is shown that its continuance of operation is economically feasible and its creditors can recover by way of the present value of payments projected in the plan, more if the corporation continues as a going concern than if it is immediately liquidated.
>
> An indispensable requirement in the rehabilitation of a distressed corporation is the rehabilitation plan. Section 5 of the Interim Rules of Procedure on Corporate Rehabilitation provides the requisites thereof:
>
> **SEC. 5. Rehabilitation Plan**. -- The **rehabilitation plan shall include** (a) the desired business targets or goals and the duration and coverage of the rehabilitation**;** (b) the terms and conditions of such rehabilitation which shall include **the manner of its implementation, giving due regard to the interests of secured creditors**; (c) the material financial commitments to support the rehabilitation plan; (d) **the means for the execution of the rehabilitation plan**, which may include conversion of the debts or any portion thereof to equity, restructuring of the debts, *dacion en pago*, **or <u>sale of assets or of the controlling interest</u>**; (e) a liquidation analysis that estimates the proportion of the claims that the creditors and shareholders would receive if the debtor's properties were

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[8] BPI Family Savings Bank, Inc. vs. St. Michael Medical Center, Inc., G.R. No. 205469, March 25, 2015.
[9] G.R. No. 162196, February 27, 2012.

liquidated; and (f) such other relevant information to enable a reasonable investor to make an informed decision on the feasibility of the rehabilitation plan.

"A successful rehabilitation usually depends on two factors: (1) a positive change in the business fortunes of the debtor, and (2) **the willingness of the creditors and shareholders to arrive at a compromise agreement on repayment burdens, extent of dilution, etc. The debtor must demonstrate by convincing and compelling evidence that these circumstances exist or are likely to exist by the time the debtor submits his 'revised or substitute rehabilitation plan for the final approval of the court.'"**

In connection with the above legal principles, we see the need to discuss the design of the ASB Rehabilitation Plan to serve as guidance to the SHP2 and the parties.

ASB Rehabilitation Plan

The ASB Rehabilitation Plan, which was approved by the Commission and upheld by the Supreme Court[10], provides a Total Approach on how ASB, now SFSRC and SFSDC, would reduce its debt, to wit:

1. Complete or sell on-going projects;
2. Invite secured creditors to complete *Dacion en Pago* transactions, waiving all penalties; and
3. Invite unsecured creditors to purchase real estate parcels and other assets and set-off the amount of their outstanding claim against the purchase price.

Based on the above-mentioned program, the secured creditors are given two (2) options for the settlement of its claims, thus:

1) To enter into a *Dacion en Pago* Agreement as presented in the Rehabilitation Plan;
2) To settle the obligations (without interest penalties, and other related charges accruing after 04 May 2000, the date of the Stay Order) to secured creditors with mortgaged properties at ASB selling prices[11].

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[10] Note 2, Supra.

[11] pp. 17-18, ASB Rehabilitation Plan - IV. THE REVISED REHABILITATION PLAN

A. The Total Approach

It is apparent that ASB's corporate indebtedness needs to be reduced as quickly as possible in order to prevent rapid deterioration in equity. Based on calculations of the net realizable value of real estate assets and other assets determined on a combined basis, **there appears to be sufficient assets to meet liabilities provided a significant portion of assets are quickly converted to a reduction of debt**. Based on the current status of the Philippine real estate sector, assets will not be converted quickly enough through normal sales methods. If assets are sold in the normal course through present sales methods, interest accumulating over the period of sales will cause unsecured creditors to incur substantial losses. In order to reduce debt quickly, we must do the following:

1. **Complete or sell on-going projects;**
2. **Invite secured creditors to complete dacion en pago transactions, waiving all penalties**; and
3. **Invite unsecured creditors to purchase real estate parcels and other assets and set-off the amount of their outstanding claim against the purchase price.**

The assets included in the above program include all real estate assets.

In order to determine the feasibility of the above, representatives of our financial advisors met with or had discussions with most of the secured creditors. Preliminary discussions indicate support from the secured creditors towards the concepts of the program associated with them. The majority of these secured creditors appear to want to complete dacion en pago transactions based on mutually agreed upon terms. We attach as Appendix A, a listing of properties expected to be subject to dacion en pago transactions. We also attach as Appendices B to O, term sheets setting out ASB's expectations of the outcome of the dacion en pago transactions with the secured creditors. We continue to pursue discussions with secured creditors. Based on the program, secured creditors claims amounting to PhP5.192 billion will be paid in full including interest up to April 30, 2000. Secured creditors have been asked

The 1st option contemplates settlement of ASB Group's obligation through a *Dacion en Pago,* albeit, the amount of the obligation shall be comprised of only the principal plus any interest due and unpaid as of 30 April 2000 without any penalties and charges. The 2nd option provides that, in case the *Dacion en Pago* transaction fails, the ASB Group can settle its obligations (without interest, penalties, and other related charges accruing after the date of the initial suspension order) to secured creditors with mortgaged properties at ASB selling prices.

After the completion of above transactions (1st option and 2nd option), the remaining real estate assets will be transferred into an Asset Pool for the benefit and protection of the remaining creditors of ASB[12]. **Among the properties included in the Asset Pool are the two (2) unfinished developments, namely the BSA Twin Towers and the Legaspi Place (TLP or Legaspi property), which shall likewise be released from their current encumbrance** [13].

An Asset Pool is an unincorporated entity administered by a Trustee Bank and the asset development managed by a Project Governing Board ('PGB') into which assets of ASB released from the secured creditors or otherwise unencumbered, whether developed or unfinished, will be contributed[14]. The Asset Pool is an important component for the settlement of the obligations of ASB to the unsecured creditors and the rehabilitation of ASB Group of Companies. With the Asset Pool, funds could be generated to complete the unfinished developments; new projects could be started and the assets properly managed for the benefit and interest of the creditors.

A reputable bank acceptable to the creditors and ASB shall be chosen as trustee and it shall administer the Asset Pool. The Trustee Bank once appointed shall issue certificates, known as Creditor's Participation Certificate (CPC), as evidence of indebtedness of the ASB Group of Companies that are outstanding as of the date of filing of petition. The assets in the Asset Pool may be utilized to generate cash or income to settle the obligation in favor of the unsecured secured. One of the CPCs to be issued is Series B which is specifically designed for secured creditors.

The holders of the CPC shall have the option to convert their certificate into lots or units in completed buildings which have been contributed to the Asset Pool or in units of yet to be completed, such as the Legaspi Place (Legaspi property). The conversion value shall be at ASB selling process at the time of conversion.

Prescinding from the foregoing legal principles and ASB Rehabilitation Plan, we now rule on the relevant issues raised.

Applicable law or rules in ASB's rehabilitation

Chinabank argues that its consent is necessary before the SHP2 could order the release of the mortgaged properties and sale of the Bel-Air and Caloocan properties. In

to waive all penalties and other charges. This Dacion en pago program is essential to eventually pay all creditors and rehabilitate the ASB Group of Companies. If the dacion en pago herein contemplated does not materialize for failure of the secured creditor to agree thereto, **the rehabilitation plan contemplates to settle the obligations (without interest, penalties and other related charges accruing after the date of initial suspension order) to secured creditors with mortgaged properties at ASB selling price**for the general interest of the employees, creditors, unit buyers, government, general public and the economy.

[12] Paragraph 2, Page 18 of the ASB Rehabilitation Plan, Annex "B" of the Petition.

[13] Paragraph 2, Page 20 of the ASB Rehabilitation Plan, Note 12, Supra.

[14] Paragraph 2, Page 21 of the ASB Rehabilitation Plan, Note 12, Supra.

support of its contention, it cited Section 50[15] of FRIA and Section 49[16] FR Rules which provides that prior consent of an affected creditor is needed before any sale or disposal of an encumbered asset may be effected. We disagree with Chinabank.

It should be emphasized that before any provisions of the FRIA and FR Rules can be applied, it must comply with the FRIA's transitory provision as provided for in Section 146 of thereof, to wit:

> **Section 146.** *Application to Pending Insolvency, Suspension of Payments and Rehabilitation Cases.* - This Act shall govern all petitions filed after it has taken effect. **All further proceedings in** insolvency, suspension of payments and **rehabilitation cases then pending, except to the extent that in opinion of the court their application would not be feasible or would work injustice, in which event the procedures set forth in prior laws and regulations shall apply**.

In the instant case, the release of the mortgaged properties and sale of the Bel-Air and Caloocan properties would benefit the ASB Group in its rehabilitation as the proceeds from the sale will not only reduce its debt to Chinabank, but, most importantly, will help SFSRC and SFSDC finance the completion of the TLP. This is consistent with the intent of the Total Approach in the Rehabilitation Plan. On the other hand, Chinabank would also benefit from the release of the mortgaged properties and sale of the Bel-Air and Caloocan properties as it will receive partial payment of the SFSRC and SFSDC's outstanding loans.

Thus, provisions of the FRIA cannot be applied in the instant case for it is not advantageous, feasible nor would it facilitate ASB Group's rehabilitation. Otherwise stated, the provisions of the Rules of Procedure on Corporate Recovery (Rules on Corporate Recovery)[17] should apply. Besides, ASB Group's rehabilitation was filed way back in 2000 and during that time the FRIA and FR were not yet in effect. The applicable law at that time is the Rules on Corporate Recovery.

Amendment to ASB's Rehabilitation Plan

Chinabank argues that SHP2 effectively amended ASB's Rehabilitation Plan when it issued the Assailed Order which is in violation of Sections 63[18] and 72[19], Rule 2 of the FR rules. Such argument is without merit.

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[15]Section 50. *Sale or Disposal of Encumbered Property of the Debtor and Assets of Third Parties Held by Debtor.***The court may authorize the sale, transfer, conveyance or disposal of encumbered property of the debtor**, or property of others held by the debtor where there is a security interest pertaining to third parties under a financial, credit or other similar transactions if, **upon application of the rehabilitation receiver and with the consent of** the affected owners of the property, or **secured creditor/s in the case of encumbered property of the debtor** and, after notice and hearing, the court determines that:
(a) such sale, transfer, conveyance or disposal is necessary for the continued operation of the debtor's business; and(b) the debtor has made arrangements to provide a substitute lien or ownership right that provides an equal level of security for the counter-party's claim or right.

[16]Section 49. *Sale or Disposal of Encumbered Property of the Debtor and Assets of Third Parties Held by Debtor.* — In cases of:
(1) encumbered property belonging to the debtor, or (2) property of third persons held by the debtor where there is a security interest pertaining to third parties under a financial, credit or other similar transactions, the court may, upon the rehabilitation receiver's application, after due notice and hearing, authorize **the sale, transfer, conveyance or disposition of the property, upon a showing that**:
A. the affected owner or **secured creditor/s have given their consent**; B. the sale, transfer, conveyance or disposal is necessary for the continued operation of the debtor's business; and C. the debtor has made arrangements to provide a substitute lien or ownership right that provides an equal level of security for the counter-party's claim or right.

[17] Sections 4-18, 20, 21 of the Rules on Corporate Recovery.

[18] Sec. 63, FR Rules – Submission of Rehabilitation Plan to the Court – If the Rehabilitation Plan is approved, the rehabilitation receiver shall submit the Plan to the court for confirmation. Within five (5) days from receipt of the Rehabilitation Plan, the court

First, as above-discussed the FR Rules finds no application in ASB's rehabilitation. Second, SFSRC and SFSDC simply followed the ASB's Rehabilitation Plan when they filed with the SHP2 their motion for the release of the mortgaged properties. This is because the ASB Rehabilitation Plan provides that if the 1st option (*Dacion en Pago* offer) is rejected by a secured creditor, the next alternative for said creditor is the 2nd option (settlement of obligation/claims). In the 2nd option, "ASB Group can propose to settle its debts at such amount as is equivalent to the selling price of the mortgaged properties[20]".

In the case at bar, Chinabank rejected the 1st option (*dacion en pago* offer) when it filed with the SHP2 a *Manifestation* dated 13 November 2009 which was the subject of SEC En Banc Case No. 03-13-286. Hence, SFSRC and SFSDC resorted to the 2nd option for secured creditors (settlement of claims/obligations) to settle its obligation to Chinabank with mortgage properties at ASB's selling prices. Therefore, there is no amendment to the ASB Rehabilitation Plan.

<u>Declaration of "Over-collateralized" Mortgaged Properties</u>

Chinabank argues that SHP2 erroneously declared the mortgaged properties to be "over-collateralized" by accepting "hook, line and sinker" CAI's appraisal reports[21]. Chinabank also claims that SHP2 should have sought an independent appraiser and not simply rely on SFSRC and SFSDC's real property valuation[22]. Such argument is untenable.

Cuervo Appraisers, Inc. is an SEC-accredited Asset Valuer. It has complied with all the Commission's requirements to be an accredited appraiser, pursuant to SEC Memorandum Circular No. 4, series of 2010[23]. Hence, its evaluation and findings may be relied on by the SHP or the Commission, absent any contrary evidence.

In the instant case, SHP2 declared that SFSRC and SFSDC's loans with Chinabank are "over-collateralized", based on CAI's appraisal report as well as the recommendation of the Rehabilitation Receiver. Meanwhile, Chinabank did not present any evidence to rebut CAI's evaluation and Rehabilitation Receiver's recommendation, such as a counter-appraisal or other evidence, to support its contention. It is basic that mere allegation is not evidence, the basic evidentiary rule is to the effect that the burden of evidence lies with the party who

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shall notify the creditors that the Rehabilitation Plan has been submitted for confirmation; that any creditor may obtain copies of the Rehabilitation Plan; and that any creditor may file an objection thereto.

[19] Sec. 72. Amendments to the Approved Rehabilitation Plan – After the confirmation of the Rehabilitation Plan, the debtor, rehabilitation receiver or any creditor may file a verified motion for the leave to amend the Plan. The motion shall state the reasons warranting the amendment if the Rehabilitation Plan and the proposed amendments, with a copy given to the rehabilitation receiver. Within five days from filing of the motion, the court *motu proprio* shall grant or deny the motion. If the court grants the motion, it shall set the proposed amendments for hearing not later than fifteen (15) days from the date of the order. The order, which shall include the proposed amendments, shall be published once in a newspaper of general circulation in the Philippines not later than five (5) days from the date of the order. The proposed amendments shall be subject to the same requirements set forth in Section 63 of this Rule. The court shall act on the proposed amendments not later than forty-five (45) days from the date of the filing of the motion for leave to amend the Rehabilitation Plan.

[20] Bank of the Philippine Islands v. Securities and Exchange Commission, et al., G.R. No. 164641, 20 December 2007 - Thus, if BPI does not find the *dacion en pago* modality acceptable, the ASB Group can propose to settle its debts at such amount as is equivalent to the selling price of the mortgaged properties. If BPI still refuses this option, it can assert its rights in the liquidation and distribution of the ASB Group's assets. It will not lose its status as a secured creditor, retaining its preference over unsecured creditors when the assets of the corporation are finally liquidated.

[21] Note 4,5,6, Supra.

[22] Ibid.

[23] Guidelines on Property Valuation.

asserts the affirmative of an issue and has the burden of proving the same, with such quantum of evidence required by law[24] which in this case, Chinabank failed to do.

As a rule, bare and unsubstantiated allegations do not constitute substantial evidence and have no probative value[25]. Thus, between Chinabank's unsupported argument and SHP2's declaration, we find credence in SHP2's argument and evidence that the mortgaged properties are "over-collateralized".

Release of the Mortgaged Properties and Sale of Bel-Air and Caloocan properties

a) Caloocan Properties

The SHP2 did not abuse its discretion when it ordered the release of the mortgage on the Caloocan properties. The Caloocan properties are valued at Php 82,031,000.00 but it secures SFSDC's debt which amounts only to Php 35,000,000.00. SFSDC's loan to Chinabank is obviously "over-collateralized" by Php 47,031,000.00. Assuming that said property is released and sold within 180 days and the best price obtained through public bidding, it can fully pay off SFSDC's obligation to Chinabank, plus an excess to settle other obligations. Undoubtedly, this would be beneficial to both parties. In fact, this falls within the 2nd option ASB Rehabilitation Plan, which is the settlement of obligations to secured creditors with mortgage properties at ASB selling prices.

As above-discussed, the 2nd option is designed for the extinguishment of the SFSRC and SFSDC's obligation to Chinabank. Unfortunately, the ASB Rehabilitation Plan provides a general assertion on how the settlement of claims is effected. Thus, we need to interpret the same for the guidance of the parties. Article 1231 of the New Civil Code provides various ways of extinguishing obligations, viz:

> "Art. 1231. Obligations are extinguished:
> (1) By payment or performance;
> (2) By the loss of the thing due;
> (3) By the condonation or remission of the debt;
> (4) By the confusion or merger of the rights of creditor and debtor;
> (5) By compensation;
> (6) By novation."

In ASB's Rehabilitation Plan, there are two (2) possible ways that is applicable to extinguish SFSRC and SFSDC's obligation, to wit: 1.) payment or performance[26]; or 2.) novation[27]. In the instant case, it obvious that the 2nd option is contemplates payment or performance of SFSDC's obligation. Thus, release and sale of the Caloocan properties is considered as payment or settlement of SFSDC's obligation.

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[24] General Milling Corporation-Independent Labor Union vs. General Milling Corporation, G.R. Nos. 183122 and 183889, June 15, 2011.

[25] LNS International Manpower Services vs. Armando C. Padua Jr., G.R. No. 179792, March 5, 2010.

[26] Payment as it is understood in the Civil Code, means not only the delivery of money but also the performance, in any other manner, of an obligation - Comments and Jurisprudence on Obligations and Contracts, Desiderio P. Jurado, 2002, page 227.

[27] Novation is the substitution or change of an obligation by another, resulting in its extinguishment or modification, either by changing its object or principal conditions, or by substituting another in place of the debtor, or by subrogating a third person in the rights of the creditor. It is one of the modes of extinguishing obligations through the creation of a new one effected by the change or substitution of an obligatory relation by another with the intention of substantially extinguishing or modifying the same - Ibid, page 323.

b) Bel-Air Property

The Bel-Air property is valued at Php 46,462,000.00 and it is one of the properties that secures SFSRC's loan of Php 265,000,000.00. Similarly as above, assuming the property is released and sold within 180 days and the best price is obtained through public bidding, it will partially settle the obligation which likewise would work for the benefit of Chinabank and SFSRC. In the same way as the Caloocan properties, this also falls within the 2nd option for secured creditors on settlement of claims/obligations in the ASB Rehabilitation Plan. The sale of Bel-Air property, however, does not fully extinguish SFSRC's obligation to Chinabank. Nonetheless, the Legaspi property can still secure the remaining balance of SFSRC's loan.

c) Legaspi Property

The Legaspi property is valued at Php 1,086,102,000.00 and secures SFSRC's loan of Php 265,000,000.00. Clearly, SFSRC's loan is still "over-collateralized" by 821,102,000.00, despite the release and sale of the Bel-Air property. However, we do not agree with SHP2 ruling on how the release of the Legaspi property should be implemented.

As above-discussed, the ASB Rehabilitation Plan provides the secured creditors two (2) options for ASB Group to pay its obligations. The rehabilitation plan further provide that the remaining ASB properties will be transferred to an Asset Pool to be managed by a Trustee Bank for the payment of the remaining creditors. Among the properties to be included in the Asset Pool is the Legaspi property, to wit:

> "**1. List of Properties**
>
> After the *Dacion En Pago*, the following properties are expected to be released by the secured creditors:
>
> x x x
>
> In addition to the foregoing properties, two other unfinished developments namely the BSA Twin Towers and **the Legaspi Place, currently mortgaged to Metro Bank and China Bank respectively, <u>shall likewise be released</u> from their current encumbrance**. x x x"[28]

Furthermore, the ASB Rehabilitation Plan provides that:

> *"Assets in the Asset Pool*
>
> The Asset Pool shall be composed of the following assets:
> 1. **<u>Real estate assets released by the secured creditors</u>**
> 2. Unencumbered real estate assets
> 3. Internally, generated cash from the sale of certain assets identified in this plan, namely, DBS shares and ASB Malayan Tower Project

[28] Note 13, Supra.

4. Outstanding receivables of ASB on uncompleted projects
5. Future receivables from project completion and future development
6. Units released as a result of units swapped with fully paid buyers
7. Other assets
8. Proceeds from the sale of any of the above

x x x

3. *Creditor's Participation Certificates*

The Trustee Bank, once appointed, shall issue certificates to the unsecured creditors. These certificates shall be employed to serve as evidence of indebtedness of the ASB Group of Companies that are outstanding as of the date of filing of the petition. These certificates shall be known as Creditors' Participation Certificates (CPC), which shall have the backing of the assets in the pool. The assets in the pool may be utilized to generate cash or income to settle the obligations in favor of the unsecured creditors.

The following certificates shall be issued:
Series A: to be issued to the unsecured creditors of ASB holdings, Inc.
Series B: to be issued to secured creditors, if any
Series C: to be issued to contractors and other unsecured creditors
Series D: to be issued as a subordinate tranche for interest payments

x x x

The holders of the CPCs shall have the **option to convert their certificates into lots or units** in completed buildings which have been contributed to the Asset Pool or in **units of yet to be completed buildings** such as BSA Twin Towers **and Legaspi Place**. The conversion value shall be at ASB selling price at the time of conversion. x x x"[29]

Applying the foregoing, releasing the mortgage over the Legaspi property is allowed under the ASB Rehabilitation Plan provided that the said property will be included in the Asset Pool for the payment of the remaining creditors. In the Assailed Order, SHP2 directed the release of mortgage on the Legaspi property on the sole purpose to complete the construction of the Legaspi Place. Thereafter, it directed SFSRC to allocate such number of units, as replacement security, for Chinabank after the completion of the said project. Clearly, the Assailed Order is not in accordance with the ASB's Rehabilitation Plan.

Considering that the Assailed Order is silent on the issuance of the Series B CPC, the release of the mortgage over the Legaspi property will reduce Chinabank's status from a secured creditor to an unsecured one during the time when SFSRC is completing construction on the said property. While SFSRC commits to resume construction within one (1) year, there is no clear commitment from SFSRC and SFSDC on when the project will be completed, and which would take some time and with no clear certainty.

It should be emphasized that in *Metropolitan Bank & Trust Company vs. ASB Holdings*[30], et al., the Supreme Court ruled that:

"As we stressed in Rizal Commercial Banking Corporation v. Intermediate Appellate Court, such suspension "**shall not prejudice or render ineffective the**

[29] Page 20 of the ASB Rehabilitation Plan.
[30] G.R. No. 166197, February 27, 2007.

> **<u>status of a secured creditor as compared to a totally unsecured creditor</u>**," for what P.D. No. 902-A merely provides is that all actions for claims against the distressed corporation, partnership or association shall be suspended. This arrangement provided by law is intended to give the receiver a chance to rehabilitate the corporation if there should still be a possibility for doing so, without being unnecessarily disturbed by the creditors' actions against the distressed corporation. However, in the event that rehabilitation is no longer feasible and the claims against the distressed corporation would eventually have to be settled, the secured creditors, like petitioner bank, shall enjoy preference over the unsecured creditors."

Even though, the SHP2, as the rehabilitation tribunal, has the primary duty to restore SFSRC and SFSDC, together with its allied entities, to its former position of successful operation and solvency, the manner of implementing the approved Rehabilitation Plan should still give due regard to the interests of the ASB Group's creditors. Stated otherwise, while it is correct to release the mortgage over the Legaspi property, the SHP2 should still comply will the provisions of the ASB Rehabilitation Plan in the disposition of the same. <u>In releasing the Legaspi property, SHP2 failed to conform with the provisions of the ASB Rehabilitation Plan when they ordered Chinabank to release the Legaspi property and to accept condominium units in the said property as replacement security.</u>

Finally, in view of our holding in SEC En Banc Case No. 03-13-286, declaring that China Bank is enjoined from charging, accruing and/or collecting interests, penalties and other charges on the loans of SFSRC after the issuance of the Stay Order on 04 May 2000, it is unnecessary to resolve Chinabank's first assigned error.

WHEREFORE, premises considered, the instant petition is **PARTIALLY GRANTED**. The paragraphs 1 and 2 of Special Hearing Panel 2's *Order* dated 25 March 2014:

> "1. Declaring the petitioners' loans with Chinabank to be over-collateralized. Hence, Chinabank is hereby directed to release to petitioners the titles over the mortgaged Bel-Air and Caloocan properties and to cancel/release the corresponding mortgage on said properties. Petitioners are hereby authorized to sell the same via public bidding within 180 days from date hereof. Accordingly, the Rehabilitation Receiver is directed to promulgate appropriate bidding rules and procedure, seeing to it that the value of the properties are maximized and the sale awarded to the highest bidder.
>
> 2. Directing Chinabank to accept the proceeds of such sale, net of taxes and expenses, and to credit the same as partial payment for the Php300,000,000.00 Million loan (with no interest and charges whatsoever) of the Petitioners."

are hereby AFFIRMED with MODIFICATIONS, to wit:

1. That the Chinabank is directed to release the titles of the Bel-Air and Caloocan properties to the Rehabilitation Receiver;
2. That the public bidding shall be conducted by the Rehabilitation Receiver;
3. That the cancellation of the mortgage over the Bel-Air and Caloocan properties shall only be done after a successful sale and payment by a buyer of the said properties;
4. That SFSRC and SFSDC shall execute an undertaking that in case the 180-day period expires with no successful public bidding, that the Rehabilitation Receiver shall

return/turnover the titles of the mortgage properties to Chinabank, without need of demand.

Pargraph 3 wherein -

"3. Chinabank is further directed to cancel/release the mortgage on The Legaspi Place, as well as to release the title/s thereon to petitioners. Petitioners are directed to resume construction thereat within one (1) year from release of mortgage and turn-over of said title/s to Petitioners. Thereafter, Petitioners shall allocate for Chinabank as a security, such number of units at the The Legaspi Place as are sufficient to pay-off such loan balance based on current market value of the units. Furthermore, Petitioners are directed to pay the remaining unpaid balance to Chinabank on cash basis, (with no interest or charges whatsoever) from the proceeds of the sale of units at The Legaspi Place within one (1) year from completion of the said project."

is hereby REVERSED and SET ASIDE.

The settlement of SFSRC's outstanding obligation with Chinabank is hereby REMANDED to the SHP2. The SHP2 and the parties are further directed to adhere to the provisions of the ASB Rehabilitation Plan in the disposition of the Legaspi property.

SO ORDERED.

City of Mandaluyong, 27 April 2016.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

Antonieta Fortuna Ibe

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG*
Commissioner

BLAS JAMES G.VITERBO**
Commissioner

*On Leave
**On Official Business