Chua Choon Cheng and Others v Allgreen Properties Ltd and Another Appeal [2009] SGCA 21

Case Number : CA 72/2008, 73/2008

Decision Date : 28 May 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Molly Lim SC, Philip Ling and June Hong (Wong Tan & Molly Lim LLC) for the appellants; Davinder Singh SC, Darius Bragassam and Alecia Quah (Drew & Napier LLC) for the respondent

Parties : Chua Choon Cheng; Janet Loh Mee Hoon; LSTC Realty Pte Ltd; Goh Siang Chua; Goh Siew Hiang; Ho Kok Keong; Wong Lai Keen; Wong Chiu-Hon John; Wong Kan Lai-Chung @ Wong Aline; Veeraraghavalu Ranganathan; Kamalasarasu W/O V. Ranganathan; Ang Teck Hai; Tan Wee Liang; Toh Lay Har Ellen; Lim Yoke Eng; Tai Lee Pin; Fong See Weng; Kong En Lin; Zhan Jun Shun Francis; Chan Gek Noi; Yue Teck Ying; Ee Ah Choo; Wong Yoon Wah; Lew Poo Chan; Chua Eng Kee Christina; Lee Huay Eng; Ong Teck Hong; Hsu Loke Soo; Hsu nee Lim Bee Eng; Alias Bin MD Sharif; Alias Bin MD Sharif nee Mas Siti Aisah Binte Mas Kosman Tasban; Lim Soo How; Monica Wong Heng Wan; Shum Hon Fai Stephen; Fong Wai Kim; Chew Lip Ping; Patricia Siow Yun (Patricia Xiao Yun); Tan Hee Luan; Tan Ann Kiong; Tay Suan Cheok; Tan Eng Luan — Allgreen Properties Ltd

Civil Procedure – Appeals – New point raised on appeal – New point on implied term in law – No prejudice caused to other party – Whether new point could be raised on appeal

Civil Procedure – Judgments and orders – Minority owner not party to action – Minority owner had no opportunity to appear before court to make arguments – Whether appellant could proceed against minority owner on appeal

Contract – Contractual terms – Implied terms – Implied duty of disclosure in law – Nothing in contract required purchaser to disclose making of additional payments to minority owners – Whether purchaser owed implied duty to disclose in law the making of additional payments to minority owners

Contract – Contractual terms – Implied terms – Implied duty of good faith in law – No duty of care or good faith owed by purchaser to vendor in relation to price of property – Whether purchaser owed implied duty of good faith in law to owners in collective sale contract

Contract – Contractual terms – Implied terms – Majority owners might be keen to incentivise minority owners or for purchaser to offer more money to minority owners to complete deal – Whether there was implied term in law prohibiting making of additional payments to minority owners

Contract – Contractual terms – Implied terms – Purchaser offering additional payments to minority owners to induce consent – Contract provided possibility of obtaining unanimous consent within 12 months from date of contract – Whether there was implied term in fact prohibiting making of additional payments to minority owners

Land – Strata Titles – Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) – Minority owners initially objected to collective sale but later withdrew objections – Collective sale became unanimous – Whether Strata Titles Board had jurisdiction over application for collective sale order

Land – Strata Titles – Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) – Minority owners paid additional sum by purchaser to procure consent to collective sale – Whether such fact relevant to position of majority owners

Land – Strata Titles – Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) – Sale committee objected as sale price too low – Sale committee did not subject collective sale to development baseline inquiry to save costs and achieve certainty of sale – Whether Strata Titles Board should take sale

committee's objections into account in determining whether transaction was in good faith

Land – Strata Titles – Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) – Strata Titles Board hearing application for collective sale order – Related proceedings before High Court – Whether Strata Titles Board should continue its hearing or decision

28 May 2009 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

1 This appeal arises from the collective sale of the condominium development known as Regent Garden Condominium (the "Property"). It raises an interesting legal issue about the propriety of the purchaser's direct payment of incentive monies to the minority owners to secure the latter's consent to the collective sale. Is there an implied term or an obligation of good faith that requires a purchaser to obtain the prior consent of the consenting majority owners or, at the very least, to inform the latter before making such incentive payments? We should add that an unusual feature about this collective sale is that it is only *the minority owners* who now support the collective sale. The majority owners, ironically, are in the rather awkward position of opposing the very sale they initiated and agreed to with the purchaser. This *volte face* has arisen because the majority owners now strongly feel that they had mistakenly short-changed themselves when they agreed to a sale price "below" the market value of the Property. How did this peculiar situation arise? To provide the background to the dispute, we first set out the material facts before addressing the legal issues.

Facts of the case

2 There are 31 units in the Property. Between 26 August 2006 and 25 February 2007, the owners of 25 units (the "Majority Owners") agreed, pursuant to a Collective Sale Agreement dated 26 August 2006 (the "CSA"), to a collective sale of the Property.[note: 1] Clause 10.1 of the CSA states that "[t]he Sale Price shall be applied by the Solicitors in accordance with the terms of this Agreement and apportioned as set out in Schedule F".[note: 2] Schedule F of the CSA sets out the prescribed method of apportionment that seeks to ensure that each subsidiary proprietor receives a share of the sale proceeds in proportion to his unit's share value and floor area.[note: 3] In accordance with the CSA, a Sale Committee ("SC") was constituted to represent the Majority Owners. Colliers International ("Colliers"), the SC's marketing agent,[note: 4] recommended a minimum reserve price of $30m for the Property, taking into account an anticipated development charge estimated at $7.6m. This worked out to be about $336 on a per-square-foot ("psf"), per-plot-ratio ("ppr") basis.

3 After accepting this recommendation, the SC instructed Colliers to prepare an Invitation to Submit Offer ("ISO") to invite developers to bid for the Property. The ISO was sent out on 16 January 2007 and the bidding process closed on 13 February 2007. At this point of time, the SC was still four units short of the 80% threshold required by the CSA (see [47] below) and the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("the Act") to be able to submit an application to the Strata Titles Board (the "STB") for a collective sale.[note: 5] The ISO indicated an estimated development charge of $7.2m. Allgreen Properties Limited, the respondent, ("Allgreen") offered the highest bid of $34m, which was $4m higher than the reserve price. On 14 February 2007, Colliers wrote to all the subsidiary proprietors of the Property to notify them of Allgreen's bid, describing it as amongst the highest achieved on a psf-ppr basis for a property in the vicinity[note: 6]. Based on the $34m offer, Colliers managed to persuade four other subsidiary proprietors to sign the CSA at a reserve price of $34m, on

21 February 2007.[note: 7]

4 We pause here to provide some context about the development charge regime. This will facilitate a better understanding of the background to this dispute. Development charges are charges levied on the enhancement in land value resulting from the State approving a higher value development proposal: see *A Quick Guide on Development Charge* (Source: <http://www.ura.gov.sg/dc/brochure-devtcharge.pdf> (accessed on 14 May 2009). Generally, a development charge is payable where the 'development ceiling' exceeds the existing 'development baseline'.[note: 8] Therefore, the higher the existing development baseline of a project is, the lower the development charge will be. A lower development charge would, in turn, ordinarily translate into a higher realisable sale price for the land.

5 After the bid was received (but before the sale and purchase agreement was entered into), the SC held extensive discussions with both Allgreen and Colliers about the potential impact of the potential development charge. This was partly documented by the handwritten minutes of a meeting held between the SC and Colliers on 2 April 2007, which stated:[note: 9]

1. The Sales Committee enquired about the need for a base-line measurement of the estate for the enbloc sale.

   Colliers noted that they had clarified this previously.

2. ~~They~~ Colliers assured the committee that the current practice is for the buyer who are developers to be concerned about the size of the estate ~~for~~ as it affects the development charges. If the buyer does not demand the base line, it has adopted the risk.

   The sales committee's duty is to obtain the best price. The price can be obtained from a EOI [Expression of Interest] or a tender. The profession currently relies on the URA approved gross floor area as a measure of the estate's size.

[emphasis added]

6 It is also helpful for additional context to reproduce an email sent by Colliers to the SC on 9 April 2007. This summarised, with clarity, the nature and extent of the SC's and Collier's discussions on the potential impact of the development charge on the sale price:[note: 10]

> Following the meeting on 2 April 2007… we note that the subject of the development baseline for Regent Garden was brought up again by Ms Wong Lai Keen [chairperson of the SC].
>
> If you all can recall, the subject of the development baseline was brought to attention soon after our appointment by the sale committee as the marketing agent sometime in July 2006. For buildings approved prior to 1 September 1989, there is a requirement for an architect to recompute the Gross Floor Area (GFA) of the building according to the new definition of GFA when a Development Baseline enquiry is made. We obtained a verbal quotation of $11,000/- from M/s Cyril K H Seah Architects to recompute the GFA, and this was conveyed to the sale committee then. *The sale committee felt that the owners were unlikely to pay for the extra cost, considering that the MC funds could not be used for this purpose. Hence, the development baseline enquiry was not made*.
>
> However, for our marketing purposes, we applied at our own cost to URA for the planning records

to obtain the approved GFA for Regent Garden based on the submission plans back in 1980. The approved GFA in 1980 was indicated as 5880.44 sq m, which translates to a plot ratio of 0.8355. *This was of course subject to the usual disclaimer that it shall not be construed as the development baseline*, but it will at least provide the developers with a guide as to the estimated development baseline, in lieu of an official baseline enquiry reply. The estimated baseline plot ratio based on the approved GFA is higher than the plot ratio of only 0.7 in the 1980 Master Plan, and so an estimated base plot ratio of 0.8355 was indicated to developers during our marketing of your site.

Allgreen initially wanted to subject their purchase of Regent Garden to a baseline plot ratio of at least 0.8355, but we negotiated with them and managed to get them to agree to remove the clause from the Sale & Purchase Agreement. What this means is that Allgreen will assume the risk of having to pay more development charge should the baseline plot ratio fall below 0.8355.

During the meeting of 2 April 2007, Ms Wong brought to our attention a recent press article regarding a developer having to pay less development charge for a collective sale site because the development baseline was higher than earlier estimated. She then posed the question whether owners of Regent Garden can seek legal recourse if the development baseline is found to be higher than 0.8355?

If the sale committee still has concerns or issues with the development baseline, please let us know now. *We will then perhaps suggest to Allgreen that they subject the sale to a baseline of 0.8355*. Should the baseline be higher, Allgreen will pay to owners the savings in the development charge; if it is lower, then Allgreen has the option to either proceed with or walk away from the deal.

We have already come this far in the collective sale, and we hope that the sale committee, lawyers and consultants can all work together as an undivided team to see the collective sale till fruition.

[emphasis added]

7 In Ms Wong's reply to Colliers, she confirmed that the SC had "*[a]fter much deliberation… decided not to subject the [sale and purchase agreement] to any development baseline. We need to have more certainty of sale*". Ms Wong, we should add, was the Chairperson of the SC. This email is important as it underscores a crucial fact. The SC had made a *considered decision* in preferring the *certainty of a sale* to the uncertainty of renegotiating the sale. The latter alternative, while allowing the subsidiary proprietors to receive any savings in the development charge (if the actual development charge turned out to be lower than originally estimated), would give Allgreen the option of walking away from the deal if the actual development charge payable was greater than estimated. As far as the SC was concerned, the "certainty" of a bird in hand was certainly preferable to the "uncertainty" of there possibly being two birds in the bush (but see [17] below). We also note that between 14 March 2007 and 15 March 2007, there was a further exchange of letters between Tan & Au LLP (solicitors for the Majority Owners and the SC) ("T&A") and Yeo-Leong & Peh LLC (solicitors for Allgreen) ("YLP").[note: 11] This correspondence unequivocally confirmed that both the SC and Allgreen had agreed not to subject the collective sale to any development baseline.

8 On 26 April 2007, the SC entered into the sale and purchase agreement (the "SPA") with Allgreen. It agreed to sell the Property to Allgreen for $34m (the "Sale Price") subject to the terms and conditions contained therein. We will refer to the CSA and the SPA from time to time collectively as the "Agreements". The sale was made subject to approval by the STB. Clauses 3(5) and 3(8) of

the SPA are material in this respect:[note: 12]

> (5) *Notwithstanding anything herein provided, the sale and purchase of the Property is conditional and subject to the approval of the Strata Title[s] Board ("the Board") to the sale herein*. For the avoidance of doubt, if the Board dismisses the Vendors' application for causes which can be rectified by the Vendor, then any reference herein to the order of the Board shall include such order of the Board upon subsequent applications by the Vendor after rectification has been done by the Vendor. In the event the Board does not approve the sale due to causes which the Vendor are [*sic*] unwilling to rectify or otherwise, all monies paid by the Purchaser towards the purchase of the Property shall be refunded to the Purchaser without any interest, compensation or deduction whatsoever and the Purchaser shall have no claim whatsoever against the Vendor but without prejudice to any other rights or remedies available to the Vendor at law or in equity against the Purchaser. Each party shall bear their or his own solicitors' costs in the matter.
>
> (6) The Vendor shall apply to the Board for the Board's Order within 3 months from the date of this Agreement. The Vendor undertakes to expeditiously procure such application to the Board using their [*sic*] best endeavours.
>
> …
>
> (8) If at any time on or before the expiry of 12 months from the date of this Agreement, all the owners *shall unanimously consent* to the Collective Sale and the sale herein, then the condition set out in *Clause 3(5) hereof shall be deemed to be satisfied*.
>
> [emphasis added]

9 On the same day (26 April 2007), Allgreen, which is a company listed on the Stock Exchange of Singapore, announced the acquisition of the Property "for a cash consideration of $34 million" and stated that the "the estimated development charge payable [was] $7.6 million".[note: 13] The announcement further stated that the Property could be redeveloped into a condominium development of 85 residential units of 110 sq m each. Allgreen must then have instructed its architects to initiate the planning approval process for the proposed development, as on 28 June 2007, its architects wrote to the Urban Redevelopment Authority ("URA") to enquire about the indicative development charge for the Property.[note: 14]

10 On 26 May 2007, an extraordinary general meeting of the subsidiary proprietors of the Property was convened by the SC.[note: 15] The meeting was attended by 22 subsidiary proprietors. A special resolution to approve a budget for the *en bloc* sale expenses was approved. During the meeting, the SC stated that further efforts would be made to persuade those who had not consented to the collective sale (the "Minority Owners") to join in the sale. If these efforts were successful, the collective sale process could be expedited by averting the need for the STB's approval. Unfortunately, these efforts came to naught. The SC could not move the Minority Owners. For a variety of reasons, centring on the inadequacy of the sale proceeds they would each receive, the Minority Owners adamantly objected to the collective sale at the Sale Price.

The STB proceedings

11 On 23 July 2007, an application to the STB was made by three members of the SC on behalf of the Majority Owners, to seek its approval for the collective sale of the Property pursuant to s 84A of

the Act.[note: 16] The STB application was supported by a valuation report prepared by DTZ Debenham Tie Leung ("DTZ") dated 19 June 2007 (the "June Valuation Report"). The June Valuation Report valued the Property at $33.1m as of 26 April 2007 (which was the date of the SPA), taking into account an estimated development charge payable of $7.6m.[note: 17]

12 Co-incidentally, and in a wholly unanticipated turn of events, on that very day (23 July 2007), the URA responded to Allgreen's architect's earlier enquiry (see above at [9]). Based on the information provided by the URA's letter, the actual development charge payable was now a mere $950,894. [note: 18] This meant that the development charge factored into the Sale Price had been grossly over-estimated by some $6.6m. In percentage terms, this worked out to be a startling 87% difference from the original estimate of $7.6m.

13 The Minority Owners filed their objections with the STB on 27 July 2007. Not surprisingly, armed with the new information on the actual development baseline, they alleged that the sale was at a gross undervalue.[note: 19] The STB, in accordance with s 92(1) of the Building Maintenance and Strata Management Act (Cap 30C, 2004 Ed) read with s 84G of the Act, directed the Majority Owners and Minority Owners to resolve their differences through mediation.

14 At the first mediation session held on 4 September 2007, the STB was informed of the manifest discrepancy between the anticipated and actual development charges. The STB directed that fresh valuation reports be obtained. The STB Panel also indicated, at the mediation, that an incorrect valuation could be a ground for dismissing the Majority Owners' application for the sale order. The brief summary prepared by T&A in respect of this mediation session states:[note: 20]

> 5) The Chairman commented that it is a serious issue if the valuation is incorrect which would be a ground for dismissal of the application. He ordered a final mediation to be held on 15 October 2007.

15 The SC obtained two further valuation reports in due course. In these new valuation reports, DTZ and HBA Group Property Consultants Pte Ltd ("HBA") valued the Property at $39.7m[note: 21] and $42m[note: 22] respectively as of 26 April 2007 (the date of the SPA), after taking the revised development charge into account. This worked out to be approximately $374 psf ppr and $400 psf ppr[note: 23] respectively. Because of these very substantial differences in valuation, the parties could not resolve the matter during the final mediation session on 15 October 2007. We should add, for accuracy, that only DTZ's revised report was available on the date of the final mediation session as the HBA report was obtained only on 2 November 2007. The STB then fixed a hearing on the merits of the application for 30 January 2008. On the basis of the STB's preliminary observations made during the mediation sessions, which the SC's solicitors had made known to Allgreen, it appeared that the collective sale was unlikely to be approved as the Sale Price was substantially below the updated market valuation. The Majority Owners then attempted to use these observations to prevail upon Allgreen to substantially increase the Sale Price. It appears to us that T&A intimated to YLP that the SC would no longer support the collective sale if the Sale Price was not appreciably increased to compensate for the savings in the development charge accruing to Allgreen.[note: 24] Not surprisingly, the parties' relations soured during these discussions. It is not necessary for the purposes of this appeal for us to reprise precisely what transpired.

16 Without the consent or knowledge of the Majority Owners and the SC, sometime between 26 November 2007 and 28 November 2007, Allgreen secured the agreement of all the Minority Owners to the collective sale by offering them additional incentive payments (the "Additional

Payments").[note: 25] The precise quantum of the Additional Payments made to each of the Minority Owners has not been revealed but the SC has intimated in these proceedings that a total of approximately $2m had been paid.[note: 26] Allgreen has not in these proceedings taken issue with this estimate. Upon receiving these Additional Payments, each of the Minority Owners immediately assented to the collective sale by executing a deed of consent and signing on a photocopy of the CSA. At the same time, the Minority Owners also wrote to the STB to withdraw their objections to the collective sale. Allgreen's solicitors, on 30 November 2007, wrote to T&A (enclosing a cheque representing the 5% deposit prescribed by the SPA) asserting that unanimity for the sale process had been obtained. Allgreen also requested the Majority Owners to withdraw the pending STB application.[note: 27] Taken aback by these wholly unanticipated developments, the Majority Owners then dug in their heels and resolutely refused to withdraw the STB application. T&A, in a letter dated 19 December 2007, bitterly complained that Allgreen had wrongfully repudiated the SPA by breaching its terms in making the Additional Payments, and that the SC accepted this repudiation.[note: 28] Allgreen's solicitors, in their reply dated 8 January 2008, disputed this and forcefully joined issue insisting that the SPA "continues to subsist and remains enforceable".[note: 29]

17 The proceedings before the STB resumed on 30 January 2008. The SC was now opposed to the collective sale. Despite the fact that the Minority Owners had withdrawn their earlier objections and now insisted that the collective sale process had achieved unanimity, the STB dismissed the application. It gave the following brief reasons to explain its decision (the "STB Decision"):[note: 30]

> [STB]: The Board shall not approve an application unless it is satisfied that section 84A (9)(a) has been complied.
>
> Six respondents have filed objection to the sale on the ground that the transaction was not in good faith after taking into account the sale price. The six respondents have now withdrawn their objections. However, under section 84A(6) and (10), the Board is required to determine the method even though no objections has been filed. The determination should be made on the facts available to the Board.
>
> Based on the facts available to the Board, the value of the estate depends on the development potential of the site, which in turn is reflected in the development baseline. The correct baseline information was not obtained before the sale was approved. This gave rise to an incorrect market value of the site which was sold for $34 million.
>
> Two separate valuation reports were made after the sale and purchase agreement was concluded. These subsequent valuation reports were based on the correct development baseline. These reports indicated that the market value was at 39.7 million and 41 million. The sale price of 34 million was well below the market value.
>
> *The basis of arriving at a sale price was wrong. The Board is satisfied that the transaction is "not in good faith, taking into account the sale price"*. The Board therefore dismisses the application.

[emphasis added]

We pause here to make some brief observations with respect to the STB Decision. First, the STB should have deferred its hearing or its decision until the High Court had determined the issue of "unanimity" which was, to the knowledge of the STB, *sub judice* before the High Court (see [18] below). Not only would this have saved time and costs, it would have avoided the STB's decision being inconsistent with that by the High Court, as happened here. Secondly, although the Minority Owners had initially objected to the sale on the grounds of lack of good faith, they withdrew their objections and accordingly withdrew, with their objections, their allegations of lack of good faith. In those circumstances, the position would substantially be the same as the situation envisaged under s 84A(6) of the Act, which provides that the STB shall, *subject to s 84A(9)*, approve the application if no objections are filed by any minority owner to an application that is made by the consenting subsidiary proprietors. Therefore, we agree with the STB that it had jurisdiction over the application for approval. There is no reason why the STB's jurisdiction should cease simply because the Minority Owners had withdrawn their objections and signed the SPA, thus making the sale unanimous. Thirdly, the STB decision was certainly questionable in law. The STB should not have entertained the SC's objections that the Sale Price was too low. The present factual matrix is remarkable. In substance, the SC was effectively saying that it lacked good faith when it settled the Sale Price with the consent of the Majority Owners; and that an opportunity ought to be accorded to it to correct this. This is an unpalatable proposition in the context of the collective sale regime, which was *not* been designed to "protect" an SC from its own errors when they are no other *legitimate* complaints. The present case was not one whereby the SC had displayed a lack of conscientiousness in arriving at the Sale Price: see *Ng Eng Ghee v Mamata Kapildev Dave* [2009] SGCA 14 ("*Horizon Towers*") at [134] and [153]. The only incorrect decision made by the SC was to not subject the collective sale to a development baseline enquiry, and this decision had been made to save costs and (more pertinently) to achieve certainty of sale. However, the SC's decision to not subject the collective sale to a development baseline enquiry was made consciously and deliberately after it received input from its professional advisers. It was not as if the SC had neglected to consider the issue of the development charge in its objective to achieve certainty. The fact that an SC had made a genuine error on hindsight did not necessarily mean that it had acted in the absence of good faith. Not all errors made by an SC evidence a lack of good faith. Fourthly, although the STB did not purport to rely on the fact that the Minority Owners had been paid an additional sum in order to buy their consent to the sale in arriving at its decision, we should add for completeness that such a fact is irrelevant to the position of the Majority Owners unless the purchaser owed a duty to them not to pay any additional sums to the Minority Owners. In our view, there was no such duty in law: see below at [81].

The High Court proceedings

18 On 10 January 2008 (even before the STB made its determination), the members of the SC commenced Originating Summons No 54 of 2008 ("OS 54"), suing in their personal capacities, as well as on behalf of the other Majority Owners. They sought various remedies including, *inter alia*:

(a) a declaration that the Majority Owners were no longer bound by and were discharged from further performance of the SPA since no approval had been given by STB for the sale of the Property;

(b) an order for rescission of the SPA by reason of the parties' mistake as to the development charge payable;

(c) a declaration that the parties had entered into an agreement for Allgreen to pay the subsidiary proprietors no less than an additional payment of $5.7m, so that the transaction would

not be at an undervalue (the "Further Agreement"); and

(d) a declaration that Allgreen breached the SPA and/or the Further Agreement by making additional payments to the Minority Owners;

(e) a declaration that Allgreen had wrongfully repudiated the SPA or the Further Agreement by failing/refusing to make the payments required under the Further Agreement, and that the Majority Owners were therefore released from their obligations under the SPA and/or Further Agreement.

19 The Further Agreement was an alleged agreement made by Allgreen sometime in November or December 2007 to pay a further sum of money to all the subsidiary proprietors of the Property. Since the appellants have abandoned this ground of appeal, we do not dwell on this issue here.

20 Allgreen, on its part, filed Originating Summons No 90 of 2008 ("OS 90") on 18 January 2008, naming all 25 of the Majority Owners as defendants, and sought, *inter alia*:

(a) a declaration that the SPA was valid and subsisting;

(b) an order that the Majority Owners withdraw their application before the STB; and

(c) an order for specific performance of the SPA.

At this juncture, we should point out that the present appeal against the Judge's decision under OS 90 is being brought by only 23 of the Majority Owners out of the original 25 (for reasons stated at [36] below).

21 Apart from OS 54 and OS 90, three other applications were made by the parties. On 5 February 2008, the Majority Owners filed Summons No 547 of 2008 ("SUM 547") seeking leave to issue third-party notice against the Minority Owners to determine (*inter alia*) the following issues:

(a) whether Allgreen had entered into a separate agreement or arrangement to make additional payments to the Minority Owners;

(b) if (a) is answered in the positive,

(i) whether the Minority Owners had wrongfully procured or induced Allgreen to breach the CSA or SPA; and/or

(ii) whether Allgreen and the Minority Owners had unlawfully conspired with each other to injure and/or to cause loss to the Majority Owners by unlawful means;

(c) whether the Minority Owners were considered and/or deemed parties to the CSA and/or SPA by executing the deeds of consent;

(d) whether the Minority Owners had unanimously consented to the collective sale at the price of $34m and on terms set out in the CSA and SPA;

(e) whether the Minority Owners, if they were considered and/or deemed parties to the CSA and/or SPA, were in breach of the CSA, in particular cl 9.1.16; and

(f) whether the Minority Owners were required to account to the Majority Owners for the

additional payments in accordance with the sharing arrangement under the SPA and CSA.

22 For completeness, since cl 9.1.16 of the CSA is referred to at [21(e)] above, we will reproduce the clause in full. It reads :

> **9. Warranties and Undertakings**
>
> 9.1 Each of the Consenting Owners hereby warrants, undertakes and/or agrees (as the case may be) as follows:-
>
> …
>
> 9.1.16 Not to do anything whether by an act or omission that may prevent or otherwise be detrimental to the fulfilment of any of the purposes of this Agreement.

23 Dissatisfied with being sidelined while this legal sparring about their conduct was taking place, on 26 February 2008, the Minority Owners filed Originating Summons No 254 of 2008 ("OS 254") appealing against the STB Decision. The main grounds of appeal were that the STB did not have the jurisdiction to hear the application and/or give the STB Decision, and that the Majority Owners had, in law, no *locus standi* to continue with the application. SUM 547 was heard together with OS 54 and OS 90. OS 254 was scheduled to be heard together with OS 54 and OS 90 but was eventually not heard due to time constraints. OS 254 has since been stayed, pending the outcome of this appeal.

The decision below

24 The Judge rejected the application to grant leave to issue a third party notice against the Minority Owners under SUM 547. The Judge held that the issues in [21(a)], [21(e)] and [21(f)] were unnecessary to the determination of OS 90. With respect to the issue stated in [21(b)] above, the Judge took the view that since he had found there was no breach of the SPA, CSA or the Act, there was no question of wrongful conduct on the part of Allgreen and the Minority Owners. With respect to the issues stated in [21(c)] and [21(d)] above, the Judge held that he had answered these issues in the affirmative in determining OS 90: see *Wong Lai Keen v Allgreen Properties Ltd* [2009] 1 SLR 148 (the "GD") at [33].

25 The Judge rejected the Majority Owners' argument that Allgreen could not seek specific performance of the SPA as it was contrary to the STB Order. The Judge reasoned that as the applications were based on private contract (*viz*, the CSA and SPA), it was within the Court's ordinary civil jurisdiction to hear the case: see GD at [28].

26 The Judge determined that the SPA was valid and binding on the Majority Owners on three primary grounds. First, there was no common mistake which affected the validity of the SPA since the Majority Owners knew that the development charge initially used was just an estimate and they had decided against subjecting the collective sale to any development baseline so as to obtain certainty of sale. Furthermore, the bargain was not one-sided since the SPA would have been equally enforceable had the development charge been higher than estimated: see GD at [40]–[41].

27 Second, the Judge held that there was no express term in the SPA or the CSA which prohibited Allgreen from making additional payments to the Minority Owners. The Judge further found that there was no term implying the same. The business efficacy test was not satisfied because the SPA would have been perfectly capable of performance without implying such a term. Furthermore, since unanimous consent had been obtained, there was no need for an order by the STB for the SPA to be

binding on all the subsidiary proprietors: see GD at [45], [48], [50] and [57].

28 Third, the Judge found that cl 3(8) of the SPA had been satisfied. Unanimous consent had been obtained since the Minority Owners had executed a copy of the CSA within 12 months from the date of the SPA. There was also nothing in the CSA, or SPA, requiring the Minority Owners to obtain approval from the SC before they could become a party to the CSA: see GD at [60].

29 The Judge also concluded that there was no Further Agreement on the facts. He held that there was no direct documentary evidence supporting the alleged Further Agreement, and that it was difficult to believe that such an important agreement would not have been reduced into writing. Even if an oral agreement had been reached between Allgreen and the Majority Owners, pursuant to s 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed), no action could be brought on it as it related to a contract for the sale of immovable property and the agreement was not made in writing: see GD at [72] and [74].

30 Finally, the Judge unhesitatingly rejected the Majority Owner's belated argument that the additional payments amounted to a fraud on the Inland Revenue Authority of Singapore ("IRAS"), to the extent that the additional payments were not declared for stamp duty assessment. He accepted that it was for Allgreen to persuade IRAS that the sale price was $34m and that the additional payments were irrelevant. Ultimately, it was for IRAS to determine what amount of stamp duty was due from Allgreen: see GD at [77]. This improbable complaint was not seriously pursued before us, and we need say no more.

31 In the circumstances, the Judge ordered specific performance of the SPA. The Majority Owners duly completed the sale of their respective units to Allgreen on 16 May 2008 as ordered. It bears mention that a minority owner, Liu Shuang Liang ("Liu"), has since made a claim for $124,416.21 as compensation for financial loss, as he purchased his unit for $1,279,200.00 but claimed to receive only $1,154,783.00 from the collective sale.[note: 31] As cl 9.1.25 of the CSA required 3% of the sale proceeds to be set aside to compensate any owner who might suffer financial loss, the solicitors holding on to sale proceeds as stakeholders took out an interpleader proceeding in the Subordinate Courts by way of Originating Summons No 302 of 2008 ("OS 302") to determine whether Liu was entitled to any compensation for financial loss. OS 302 has likewise been stayed pending the outcome of this appeal.

The Appeal

The parties' arguments

32 The appellants have not appealed against the Judge's refusal to grant leave to issue a third-party notice (in SUM 547). Neither have the appellants appealed against the Judge's finding that there was no common mistake and no Further Agreement.[note: 32] Briefly, the case which the appellants now pursue falls into three broad areas, namely that:[note: 33]

(a) the making of the Additional Payments was prohibited and/or was a breach of the CSA, SPA or the Act (the "first argument");

(b) there was no 'unanimous consent' to the collective sale under cl 3(8) of the SPA, and therefore cl 3(5) of the CSA (which required STB's approval as a condition of the sale) was not satisfied (the "second argument"); and

(c) the Minority Owners were not entitled to retain the Additional Payments received and had

to share these Additional Payments with the Majority Owners. In addition, the appellants argued that these Additional Payments should be taken into account in ascertaining the Majority Owners' 'financial loss' (together, the "third argument").

33 Counsel for Allgreen, Mr Davinder Singh SC ("Mr Singh") raised a number of procedural objections to the appellants' grounds of appeal, vigorously contending that the only live issue was the first argument (in part). We will first consider Mr Singh's procedural objections before addressing the merits of the appeal.

34 With respect to the appellants' first argument, Mr Singh objected to the appellants arguing that there was an implied term *in law* prohibiting the making of the Additional Payments, as this was not raised below.[note: 34] However, we pointed out that this court could, in appropriate matters, entertain a new point on appeal if (a) no new evidence was required in relation to the new point, and (b) no explanation could be usefully offered in response: see *Riduan bin Yusof v Khng Thian Huat (No 2)* [2005] 4 SLR 234 at [35] and *Susilawati v American Express Bank Ltd* [2009] SGCA 8 at [53].

35 Similarly, in the present case, given that whether or not a term should be implied in law is based largely on policy considerations (see [68] below), there is little standing in the way of allowing this new point to be argued on appeal. There would be no prejudice, save the incurring of additional costs, caused to Allgreen by allowing this issue to be raised on appeal. Therefore, we do not accept Mr Singh's position on this point.

36 With respect to the second argument, Mr Singh emphasised that an appeal could only lie against *the order* made by the court and not against *the reasons* given by the court for its decision, citing the decision of this court in *Lee Kuan Yew v Tang Liang Hong* [1997] 3 SLR 489. As the sale had been completed, Mr. Singh argued that the appeal was now both moot and futile. It is true that the appellants had completed the sale and purchase of the Property, albeit on the Judge's orders. While OS 90 was originally initiated against all 25 Majority Owners of the Property, the appellants' counsel, Ms Molly Lim SC ("Ms Lim") informed us during the hearing that two Majority Owners wanted finality and were not participating in this appeal against the Judge's decision. Therefore, there are only 23 of the Majority Owners appealing under Civil Appeal No 72 of 2008 (the appeal against the Judge's decision in OS 90). This was one of the main reasons why the remaining Majority Owners had completed the sale and purchase of the Property with Allgreen.

37 In the present appeal, the issue of unanimous consent is relevant in determining whether cl 3(8) of the SPA had been satisfied. If cl 3(8) is not satisfied, cl 3(5) will govern and the SPA would remain conditional upon the STB's approval. In short, the issue of unanimous consent related to whether the condition precedent for the sale and purchase had been satisfied. As the appellants had completed the sale and purchase of the Property without seeking to unwind the transaction, Mr Singh argued that the issue of whether unanimous consent was obtained in the circumstances was moot. In our view, Mr Singh's objections here were not well founded. They ignored the fact that the Majority Owners had completed the sale and purchase of the Property *without prejudice* to their rights to obtain remedies. Allgreen itself had agreed to complete the sale on this basis. There therefore remains an outstanding issue as to whether the condition precedent had been satisfied, which in turn, could possibly lead to a claim for the difference in value between the agreed price and the market price or damages if this issue was decided in the appellants' favour.

38 With respect to the third argument, Mr Singh emphasised that neither the Minority Owners nor Liu were parties to the appeal. A party has to be given a proper opportunity to present its case before an adverse order can be granted against that party. Since the appellants here were seeking, in substance, a share of the Additional Payments which was the Minority Owner's legal property, the

court could not make an order against the Minority Owners without having heard them. Further, the appellants had not appealed the outcome in SUM 547 below and were therefore now precluded from seeking relief against the Minority Owners. The issue of whether the Minority Owners were obliged to share the Additional Payments with the Majority Owners was only raised in SUM 547, and had not been raised in either OS 54 or OS 90 (since the latter proceedings did not involve the Minority Owners).[note: 35] Therefore, this issue was a new point in the context of the appeals in relation to OS 54 or OS 90. The issue of Liu's financial loss was similarly a new point not raised below, especially since Liu's claim only crystallised after the Judge delivered his decision below. The appellants had not sought leave to introduce these new points on appeal. Even if the appellants belatedly sought leave, Mr Singh submitted that leave ought not to be granted as new evidence was required on these points (as to the quantum of Additional Payments and/or financial loss). With respect to Liu's claim, Allgreen also pointed out that the claim was not included in the appellants' notice of appeal.

39 We accept Allgreen's objections with respect to the third argument. The appellants are effectively seeking orders against the Minority Owners, including Liu, even though they are not parties to the present proceedings. It is a trite principle that an order of Court will, generally, only bind the parties to an action and even then only after they have been properly served and heard. This principle is in substance no more than another facet of the bedrock doctrine of natural justice, or more pertinently, the *audi alteram partem* principle. A good illustration of this principle is found in the case of *In Re Shephard Atkins v Shephard* (1890) LR 43 Ch D 131 (UKCA). In that case, C had taken out a summons against S to have a receiver appointed over a property owned by S, who had passed away before the summons was heard. Even though his estate was not represented, an interim receiver was eventually appointed. When the executors of S's estate sought to set aside the appointment, the issue before the Court was framed in the following manner (at p 135):

> Was there any jurisdiction to make an order affecting the estate formerly belonging to [S], when in consequence of his death the estate no longer belonged to him, and when no person interested in it was before the Court?

40 The English Court of Appeal ruled against C. The action was not automatically kept alive as against the heir-at-law, who was not a party to the proceedings. The right to make an order against what was now the property of the heir-at-law could not arise until the heir-at-law was properly before the Court. Cotton LJ observed (at p 137):

> It is quite new to me to hear it alleged that there is anything in the rules to enable the Court to make an order against a person who is not a party to the action. *It is against all principle to proceed against him until he has been brought before the Court, or all proper steps to bring him before the Court have been taken ineffectually*. I think, therefore, that this receivership order was made, *per incurium*, the Court having no jurisdiction to make an order against the heir in his absence … [emphasis added]

41 The underlying basis for this principle has since been more amply explicated in *In Re Wykeham Terrace* [1971] 1 Ch 204. In that case, the applicants initiated an action to recover possession of their land, but were unable to ascertain the trespasser's names. The court held that it could not make an order against the trespassers, who were not parties to the proceedings. Stamp J explained (at 208):

> There are in my judgement two fatal objections to the procedure invoked. In the first place, it is axiomatic that a person claiming an order of this court against another, except where a statute provides otherwise… cannot obtain that relief except in proceedings to which that other person is a party and after that other person—the person against whom the relief is sought—has had the

opportunity of appearing before this court and putting forward his answer to the claim. The accusatorial process by which the person against whom relief is sought is summoned to appear to answer the plaintiff's claim is the process by which justice has been done in England and Wales between man and man over the centuries. …

…

The second objection … is that an order made upon an ex parte application in ex parte proceedings will bind nobody. It is a truism that an *order or judgment of this court binds only those who are parties to or attending the proceedings* in which the order or judgment is given or made.

[emphasis added]

42 On the present facts, it would be plainly wrong to make an order against the Minority Owners and/or Liu when they have not had the *opportunity* to appear before the court to make their arguments. This had resulted from the appellants' election to not appeal against the Judge's refusal to grant an order to join the Minority Owners as third parties in SUM 547. As a result, the Minority Owners have not been able to respond to the appellants' contentions even though relief is sought against them under the third argument.

43 Furthermore, with respect to Liu's claim, we note that the appellants have assumed that the quantum of Additional Payments received by Liu exceeded his financial losses. However, there was no evidence as to the exact amount(s) of Additional Payments received by Liu or any other Minority Owner claiming for financial losses. Since resolution of this issue would require new evidence, we do not think that the appellants are entitled to raise this point in this appeal: see above at [34]. We note, in any event, that interpleader proceedings have already been taken out with respect to Liu's entitlement to his claim for financial loss. In light of all these circumstances, we are of the view that the appellants cannot now proceed with their third argument in the present appeal and we rule accordingly.

44 This therefore means that there are effectively four main substantive legal issues for us to resolve in this appeal, and we now turn to consider them. In summary, the substantive legal issues which arise for determination are:

(a) whether there was unanimous consent within the meaning of cl 3(8) of the SPA;

(b) whether there was an express term in the CSA or SPA prohibiting the making of Additional Payments to the Minority Owners;

(c) whether there was an implied term in fact in the CSA or SPA prohibiting the making of Additional Payments to the Minority Owners; and

(d) whether a term should be implied in law into the CSA and/or SPA prohibiting the making of Additional Payments to the Minority Owners.

We will deal with these issues *seriatim*.

Resolution of the issues on appeal

Unanimous consent

45 The appellants' argument on this ground was two-fold. First, they argued that the Minority Owners could not become parties to the CSA without the SC's prior approval. This argument ran as follows. Under cl 3.1.4.1 of the CSA (see below at [47]), the CSA would expire if less than 80% of the subsidiary proprietors signed the CSA "within the permitted time". 'Permitted time' was defined as the six-month period commencing the day after the first subsidiary proprietor signed the CSA (see below at [48]).The Minority Owners could only become parties to the CSA without the SC's approval within the permitted time. Thereafter, the SC's approval was necessary because under cl 4.2.8 of the CSA, the SC had been empowered "[t]o agree to or to amend any terms and conditions or … to negotiate on behalf of the Consenting Owners any matter … necessary and/or incidental to any of the purposes in this Agreement".

46 Further or alternatively, the Minority Owners did not 'unanimously consent' to the "same" collective sale because they accepted the Additional Payments. The appellants argued that the meaning of "unanimous" was "being in complete accord", citing *Black's Law Dictionary* (Bryan A Garner ed-in-chief) (West Group, 7th Ed, 1999). Therefore, since the Minority Owners had not agreed to a sale price of $34m, but to a sale price of $34m plus the Additional Payments, they were not of the same mind as the Majority Owners. In other words, there was no *consensus ad idem* between the Majority Owners and the Minority Owners. Furthermore, under cl 3(8) of the SPA, the requirement was for all the owners to "unanimously consent to the Collective Sale and *the sale herein*", which referred to the sale price of $34m and required distribution in accordance with the distribution method provided in Schedule F of the CSA and cl 24 of the SPA. The receipt of the Additional Payments subverted the agreed manner of apportionment under the CSA and SPA as the Minority Owners would then have received more than what they were entitled to under the Agreements.

47 Clause 3.1.4 of the CSA reads:

> 3.1.4 This Agreement shall expire and be of no further effect upon any of the following events arising (whichever is earlier):-
>
> 3.1.4.1 if only subsidiary proprietors holding less than eighty percent (80%) of the share values in [the Property] sign this Agreement within the permitted time; or
>
> 3.1.4.2 if within twelve (12) months from the date the subsidiary proprietors of the Units having not less than eighty per cent (80%) of the share values as shown in the schedule of strata units for [the Property] have signed this Agreement:-
>
> 3.1.4.2.1 There is no Contract of Sale; and
>
> 3.1.4.2.2 Where applicable, an application to the STB has not been made pursuant to the terms of the Contract of Sale and/or this Agreement.
>
> 3.1.4.3 The completion of the Collective Sale to the Purchaser and the delivery of vacant possession in accordance with the terms of the Contract of Sale.

48 'Permitted Time' is defined in cl 1.1 of the CSA as referring to the period:

> (a) starting from the date the first subsidiary proprietor … signs the collective sale agreement; and
>
> (b) ending not more than six months after the date the first subsidiary proprietor … signs the collective sale agreement.

49 We do not accept the appellants' arguments on this point. Clause 3.1.4 of the CSA, when read together with the definition of permitted time in the CSA, only meant that the CSA would expire if less than 80% of the subsidiary proprietors had agreed to the CSA within six months. It did not mean that the remaining subsidiary proprietors who had not agreed to the CSA within the six-month period were thereafter precluded from agreeing to the same, or that any such assent would be subject to the SC's approval. Neither did such an implication arise from the clause. Indeed, cl 3.4 allows for the CSA to be "executed on separate copies" and "at different times" without placing any time constraints. In addition, there is nothing in the CSA which supported the appellants' argument that the Minority Owners could, after the 'permitted time', only become parties to the CSA *with* the SC's approval. While cl 4.2.8 granted the SC wide powers to agree or to amend any terms and conditions and to negotiate on the Majority Owner's behalf, it did not assist the appellants' case. Quite simply, cl 4.2.8 did not come into play as there was no provision in the CSA preventing the Minority Owners from becoming parties to the CSA after the 'permitted time'. We therefore do not accept that the Minority Owners could become parties to the CSA after the 'permitted time' only with the SC's approval.

50 With respect to the appellants' argument on 'unanimous consent' in cl 3(8) of the SPA, it is clear that the contracting parties' intention was to allow for negotiations to continue even after the SPA was entered into for a period of 12 months: see [64] below. '[U]nanimously consent' in cl 3(8) of the SPA meant only common agreement on the terms therein and, in particular, the essential features, *viz*, the Sale Price and the apportionment or distribution of *that* amount. As aspects of this argument overlap with the "express term argument", which we will consider next, we shall expand on this further in the next section.

The express term argument

51 The appellants argued that the apportionment of the sale price had to strictly comply with the distribution method provided in Schedule F of the CSA and cl 24 of the SPA (the "Distribution Method"). The SC had an obligation to ensure that the Distribution Method adopted was fair and equitable to *all* the owners pursuant to s 84A(9)(*a*)(i)(B) of the Act. Allgreen, in making the Additional Payments to the Minority Owners, had flouted the Distribution Method provided for in the Agreements by giving the Minority Owners a disproportionately larger sum for their respective units (and share values) as compared to the Majority Owners. In short, the appellants contended that the Additional Payments constituted a part of the sale price of the collective sale, resulting in the Minority Owners receiving more than the Majority Owners in breach of the Distribution Method.

52 Allgreen, on its part, responded that the Agreements did not stipulate that any payments made over and above the sale price of $34m was to be apportioned according to the Distribution Method, or that no payments over and above the Sale Price should be made to any of the subsidiary proprietors.

53 It is necessary to consider the terms of the CSA and the SPA to see if the stipulated 'Sale Price' proscribed the Additional Payments. We now set out the relevant clauses of the CSA and the SPA. Clauses 10.1 and 10.2 of the CSA state:

> 10.1 The Sale Price *shall be applied by the Solicitors* in accordance with the terms of this Agreement and apportioned as set out in Schedule F.
>
> 10.2 The Sellers hereby confirm that the Solicitors are *authorised to collect the Sale Price or any part thereof and/or any other monies due under the Contract of Sale …*
>
> [emphasis added]

54 'Sale Price' is defined in cl 1.1 of the CSA as:[note: 36]

> 1.1 ….
>
> "Sale Price" shall mean the total Sale Price of All Units in accordance with this Agreement.

55 Further, cl 24 of the SPA states:[note: 37]

> The Purchase Price shall be distributed according to the terms of the collective sale agreement made between the Vendors and according to the Method specified thereunder and as stipulated in **Schedule C**. [emphasis in original]

56 As we have observed earlier, Schedule F of the CSA and Schedule C of the SPA are in all material aspects similar. Interestingly, both Schedule F of the CSA and Schedule C of the SPA use the term 'Sale Price' to describe how the monies received from the collective sale will be distributed. The term 'Purchase Price' is not defined in the Agreements.

57 In our view, these terms in themselves cannot be construed as prohibiting the making of additional payments to the Minority Owners. Pursuant to cl 7.1.3 of the CSA, the Majority Owners agreed to sell "at a Sale Price of not less than the Reserve Price". Clause 7.1.11.1 of the CSA further provided that the Contract was to be granted to the tenderer submitting an offer "containing the *highest Sale Price* that is equal to or more than the Reserve Price" [emphasis added]. Taking both clauses together, it is clear that 'Sale Price' merely refers to the highest bid received, which in the present case is clearly $34m and no more.

58 We now turn to consider the Distribution Method envisaged in the CSA. Pursuant to cll 10.1 and 10.2 of the CSA (see [53] above), the solicitors were to collect and distribute the "Sale Price… and/or any other monies due under the Contract of Sale", with the 'Contract of Sale' referring to the SPA. Clause 24 of the SPA uses the term 'Purchase Price' (without defining it) to describe how monies received will be distributed. Clause 1 of the SPA strongly suggests that the 'Purchase Price' similarly refers to Allgreen's bid of $34m and no more, and it reads as follows:

> WHEREAS:
>
> …
>
> C) The Purchaser is agreeable to purchase… at the total price of Singapore Dollars Thirty Four Million … *upon the terms and conditions hereinafter appearing*.
>
> **WHEREBY IT IS AGREED** between the parties hereto:-
>
> 1. The Vendor *shall sell* and the Purchaser *shall purchase* all 31 units … *at the price of Dollars Thirty Four Million (S$34,000,000.00)* whereof a sum of Dollars Three Million and Four Hundred Thousand (S$3,400,000.00) being 10% of the sale price (the Deposit) shall be paid by the Purchaser to the Vendor's solicitors …
>
> [emphasis in bold in original; emphasis in italics and underline added]

59 The Additional Payments were undoubtedly not part of the Purchase Price under the SPA. In any case, while cl 24 of the SPA states that the 'Purchase Price' was to be distributed according to the terms of the CSA as stated in Schedule C of the SPA, Schedule C, in setting out the Distribution

Method, did not refer to the 'Purchase Price'. Instead, Schedule C sets out the Distribution Method with reference to the 'Sale Price'. This is made clear in para B of Schedule C of the SPA, which states:

> The following formula shall be adopted in apportioning the Sale Proceeds of the Collective Sale:
>
> (1) The *Sale Price* shall be divided by two to obtain half the Sale Price known as "the Divided Sale Price".
>
> [emphasis added]

60 In addition, Schedule C of the SPA included a table which set out, *inter alia*, each unit's entitlement "[b]ased on *Sale Price of $34 million"*. In our view, it is clear that the parties had intended that the term 'Sale Price' was to refer to the $34m bid only. In other words, the Distribution Method, as contemplated under the Agreements, only relates to the distribution of the $34m and no more. There is nothing in the CSA or the SPA which supports the appellants' contention that there was an express term that the Additional Payments were to be distributed in accordance with the Agreements or that the term 'Sale Price' included the Additional Payments.

Implied Term in Fact

61 The appellants argued that Allgreen's Additional Payments effectively transformed the collective sale into a two-stage transaction. In the first stage, the Majority Owners would receive their proportionate share of the Sale Price. In the second stage, the Minority Owners would receive their proportionate share of the Sale Price *coupled* with the Additional Payments. Therefore, to give effect to the legislative intent that the distribution of the sale proceeds should be made fairly and equitably pursuant to s 84A(9)(*a*)(i)(B) of the Act, a term should be implied to prohibit the making of such additional payments. The appellants accept that the implied term does not satisfy the business efficacy test,[note: 38] but argued instead that it satisfies the officious bystander test; that is to say that the Majority Owners, if asked at the outset, would not have agreed to allow the Minority Owners to receive more than they did, and that neither would Allgreen be prepared to make additional payments surreptitiously without first consulting the Majority Owners. Ms Lim contended that it would defy commonsense to allow Allgreen to negotiate with the Minority Owners directly as this would disregard cl 24 of the SPA and s 84A(9)(*a*)(i)(B) of the Act.

62 Allgreen argued that no such term could be implied. First, they highlighted that cl 3(8) of the SPA was included to reflect the position that any party could continue to negotiate with the Minority Owners to obtain their consent to the collective sale. Clause 3(8), it suggested, would be rendered superfluous if additional payments were not allowed since there would be no other commercially realistic way of procuring the consent of minority owners. Allgreen further argued that by securing the Minority Owners' agreement to the collective sale through the use of monetary incentives, it was acting to uphold the contract and, indeed, had acted *bona fide* in saving the Majority Owners the additional expense of having to pay the Minority Owners out of their pocket. In addition, Allgreen highlighted that any implied term prohibiting the making of Additional Payments would fly against the face of established industry practice. In support, Allgreen relied on the affidavit of Tan Tiong Cheng, Managing Director of Knight Frank Pte Ltd, which stated that "[i]t is also my experience that it is not uncommon for the developer (and not the Majority Owners) to contribute to the payment of the premium to the Minority Owners to procure their consent to the collective sale".[note: 39]

63 It is settled law that "a court will *not lightly* imply a term into a contract" [emphasis original]: *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 at [107]. The rule of thumb

is that the more detailed or complex a contract is, the less likely it is that the court will imply a term into that contract. The touchstone for implying a term into a contract is always "necessity and not merely reasonableness": *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458 at [19]. The learned authors of *Chitty on Contracts*, vol 1 (Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty on Contracts*") at para 13-004 note that both the officious bystander and business efficacy test "[depended] on the presumed *common intention* of the parties", which has to be objectively ascertained. In *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 ("*Forefront*") at [36], Phang J (as he then was), after a detailed analysis of the historical origins of these tests, concluded that the two tests are but different facets of the same coin; "the 'officious bystander' test is the *practical mode by which* the 'business efficacy' test is implemented" [emphasis in original]. We agree.

64 It is far from clear or obvious to us that Allgreen would have agreed, without prior negotiations, *not* to make any additional payments directly to the Minority Owners if it was necessary to complete the sale. A purchaser will usually do whatever it sensibly takes to finalise a sale transaction after an agreement has been entered into. The appellants could not give any reasons why Allgreen would be inclined to agree to this term without any trade off. We also note that cl 3(8) of the SPA (see above at [8]) provided for the possibility of obtaining unanimous consent within 12 months from the date of the SPA. We therefore agree with Mr Singh that the parties must have contemplated that continuing efforts could be made to obtain the Minority Owners' consent. In cases such as these where the main objection is centred on the inadequacy of the financial consideration being received, it is difficult to see how the Minority Owners' consent can be secured without providing additional inducements in exchange for consent to the collective sale. Indeed, the acceptance by Ms Lim (above at [61]) that the "business efficacy" test is not satisfied says it all: see Phang J's comments in *Forefront* at [63] above. Essentially, what the appellants are seeking to do under the guise of invoking an implied term is to persuade this Court to rewrite the SPA to rescue them from an improvident bargain. This we cannot and will not do.

Implied term in law

65 The appellants argued that a critical term, *ie*, that no additional payments can be made without the Majority Owners' prior consent, should be implied in law because it was consistent and necessary to give effect to legislative intent and the objective behind the collective sale regime.[note: 40] Otherwise, it would lead to an "abuse of the collective sale process" whereby a purchaser could opt to pay off the minority owners to prevent the STB from scrutinising the transaction, depriving the majority owners of protection under the Act and circumventing the safeguards under the Act to ensure that the collective sale was carried out in good faith. Stretching the appellants' argument, even the minority owners could be prejudiced if they were not treated equally by the purchaser.

66 Allgreen, on its part, stressed that there were no provisions in the Act prohibiting the making of such additional payments to the Minority Owners. Indeed, such an implied term in law would undermine the objectives and intent of the Act. First, Allgreen argued that the Act was designed for the protection of minority owners, and not majority owners. Furthermore, the Act only applied where there was no unanimity to ensure that the minority owners were not done in by the majority owners. Therefore, the law of contract immediately applied once unanimous consent was obtained, and the Act had no further application. The sale process became a matter for private contract and was no longer subject to the statutory scheme.

67 We preface our discussion on this issue with an observation. It may be said to be ironical that the Majority Owners, while purportedly championing the cause of *inter alia* conferring protection on minority owners, in general, are attempting to, in one and the same breath, deny the Minority Owners

of the benefits they secured directly from Allgreen.

68 We now turn to consider the law on this issue. The 'implied term in law' is a peculiar feature of contract law, in that the law is concerned with considerations of *fairness and policy* rather than the intentions of the parties *per se*: see *Halsbury's Laws of England*, vol 9(1) (Butterworths, 4th Ed Reissue, 1998) ("*Halsbury's Laws of England*") at para 778; *Chitty on Contracts* at para 13-003. In *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, Lord Bridge drew the distinction between an implied term in fact and in law in the following manner (at 307):

> A clear distinction is drawn…between the search for an implied term necessary to give business efficacy to a particular contract and the search, *based on wider considerations*, for a term which the law will imply as a necessary incident of a definable category of contractual relationship. [emphasis added]

69 By implying a term in law, the court is laying down a general rule in law that certain terms will be implied in all contracts of a defined type, unless it is contrary to the express words of the agreement: *Chitty on Contracts* at para 13-003. Indeed, some of the rules which the courts had previously implied have later become codified in statutory form: see for example, ss 10–15A of the Sales of Goods Act (Cap 393, 1999 Rev Ed). In short, the court is really "deciding what should be the content of a paradigm contract … [and] is in effect imposing on the parties a term which is most reasonable in the circumstances": Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Ed, 2001) at pp 263–264. However, this does not mean that any reasonable term will be implied in a contract: see *Liverpool City Council v Irwin* [1977] AC 239 at 262 (*per* Lord Salmon). Indeed, a court should ordinarily exercise considerable restraint in implying a term in law, given that such a term extends and applies to all future like cases, rather than to the particular contract at hand and the immediate parties only as in the case of terms implied in fact: see *Forefront* at [44].

70 For the present purposes, it is clear that the category of contracts for which such an implied term is to apply, is that of all collective sale agreements as a class. The appellants did not argue that the implied term ought to apply more narrowly to specific types of contracts and, in any event, we do not think that it is possible to draw any meaningful distinction between any different varieties of collective sale agreements. However, during the appeal, there was some discussion as to the exact scope of the term sought to be implied. In essence, the appellants now contend that there ought to be, in fact, three interlinked core features to be incorporated in their proposed general implied term. The first is a term prohibiting the purchaser from making additional payments to the Minority Owners. The second is a term requiring the purchaser to conduct his negotiations in good faith. The third is a term requiring the purchaser to disclose to the Majority Owners that it intended to make such Additional Payments to the Minority Owners. We will discuss each of these purported features in turn.

Implied term prohibiting the making of Additional Payments to the Minority Owners

71 The appellants have passionately argued that the "practice" of condoning additional payments, if left unchecked, will encourage some subsidiary proprietors to hold out in hope of receiving a premium for their units later. This could frustrate the intent of the collective sale regime which is primarily meant to facilitate urban renewal. Such payments, it was contended, would lead to heightened tensions and in turn increase the prospects of conflict between both camps (as in this case), an unwelcome consequence which should, as far as possible, be prevented. Even after considering these wider, and not altogether improbable concerns, we are of the view that such a term cannot be implied in law. These are our reasons.

72 First, such a term would mean that even if some of the majority owners, who might for personal, or even noble, reasons be keen to ensure that the sale is carried through, they would be unable to incentivise any or all of the minority owners to alter their stances for the wider common good. Second, it cannot be gainsaid that there will be instances where even the majority owners will welcome the purchaser's offer of more money to the minority owners to ensure that the deal can be completed. One such illustration can be found in the recent case of *Mohamed Amin bin Mohamed Taib v Lim Choon Thye* [2009] SGHC 48 ("*Mohamed Amin*"), which involved a property named Regent Court (which is not to be confused with the project in the present case, Regent Garden Condominium). In *Mohamed Amin*, the collective sale would have resulted in financial losses for two of the minority owners. This, in turn, would have resulted in the dismissal of the collective sale application by the STB. The sale committee there managed to persuade the purchaser to provide an undertaking to pay the two minority owners for their financial losses as well as such additional sums which the STB might have allowed as deductions. However, the STB refused to take into account the reality of such an undertaking. As a result, the STB held that the two minority owners would suffer financial loss, and dismissed the application. The authorised representatives of the consenting owners appealed against the STB's failure to consider the evidence of such an undertaking. Prakash J allowed the appeal, taking the view that the STB ought to have taken into consideration the undertaking and the supplementary agreements in assessing whether or not the two minority owners had suffered 'financial loss' within the meaning of the Act.

73 On the facts of *Mohamed Amin*, there was nothing objectionable about the purchaser providing additional payments to the two minority owners, who would have suffered financial losses, to ensure that the sale could proceed. Indeed, Prakash J accepted the plaintiff's submission that taking a strict view of what constituted 'proceeds of sale' could unreasonably hinder *en bloc* sales and thereby undermine the legislative intent behind the collective sale regime. This case vividly illustrates the point that the making of additional payments to minority owners, in certain circumstances, can be beneficial and consistent with the legislature's intent of achieving urban renewal. Of course, the present matter is quite different because the "incentive payment" in that case was *made with the consent, one might even say the behest*, of the majority owners.

74 Further, we cannot agree with the appellants' contentions that such a term should be implied as it would otherwise deprive the Majority Owners of the STB's protection, from a sale at an undervalue. The appellants now say that the legislative intent of the Act is to protect *all* subsidiary proprietors and not just the minority owners. In *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 (at [7]), this court elaborated on the policy on collective sales as follows:

> The 1999 Amendment Act also introduced a large number of procedural steps and substantive safeguards *to protect the interests of minority owners*, such as ensuring that they are kept fully informed by the subject property's collective sale committee of the progress of the sale and any developments in relation thereto. We will consider the adequacy of these safeguards later in this judgment. *The basic idea of the collective sale scheme is to enable majority owners to sell the subject property to a purchaser without the consent of the minority owners, subject to the approval of the Board*. Once the Board has approved the collective sale application, the Board's order binds all the minority owners and they, together with the majority owners, are under an obligation to transfer their respective lots and the common property to the purchaser in accordance with the terms of the sale and purchase agreement (see s 84B(1)(*b*) of the Act). The sale takes effect by virtue of the Board's order, and not by virtue of the sale and purchase agreement. In short, the collective sale is not a contractual sale, but a new form of statutory sale. [emphasis added]

75 We also note that the report of the Select Committee (see *Report of the Select Committee on*

the Land Titles (Strata) (Amendment) Bill (Bill No 28/98) (Parl 2 of 1999, 19 April 1999) ("Select Committee Report") suggests that the safeguards provided in s 84A(9) were for the protection of minority owners. The following passage from the Select Committee Report is instructive:

> 17 …
>
> (**5**) **Whether objections to en-bloc proposals should be heard by the High Court or the Board and whether the approach and guidelines for en-bloc sale should be made clearer and stated in the Bill**
>
> 18 Under the Bill, the Board's primary role is to determine if the required majority consent and other procedures have been met. The Board would not itself review or intervene to set the terms of sale. *If the minority do not object, the sale would proceed*. *If the minority object, the Board would consider the objection essentially in the light of whether the proposed sale is in good faith and at arm's length. Once the Board is so satisfied, the sale would proceed*.
>
> 19 The Bill also provided that in hearing a case, *the Board would consider* the scheme and intent of the section, *the interests of all subsidiary proprietors* and *all the circumstances of the case*. To avoid limiting the flexibility of the Board, the factors which the Board would consider important in evaluating if the sale is just and fair were not included in the Bill but outlined in the Second Reading Speech, ie the sale price, method of distributing the sale proceeds, relationship of the purchaser to the unit owners (to ensure that there is no collusion) and that the minority will not suffer a financial loss, eg whether the sale proceeds for a minority owner are sufficient to redeem outstanding encumbrances (eg a mortgage or charge) on his unit and is more than the price he had paid for the unit.
>
> …
>
> 22 The Committee, however, agrees that it is desirable that the provisions should spell out in greater detail the factors which the Board can take into account and recommends the following approach for the Board:
>
> (a) the Board will review a case (regardless of whether there is an objection) to see whether on the face of the application it is satisfied that the transaction is in good faith and at arm's length, after taking into account the sale proceeds, method of distributing the sale proceeds and the relationship of the purchaser to any of the unit owners. It will also ensure that the sale and purchase agreement does not require a minority owner to be part of a joint venture agreement with the developer of the land. *This will go some way towards addressing concerns that the Board is not sufficiently pro-active in safeguarding minority interests*;
>
> (b) when objections are raised, the Board will, where relevant, mediate. Where mediation on objections of a personal or non-pecuniary nature fails, the Board must order that the sale proceed as long as the Board is satisfied that none of the factors in (c) applies; and
>
> (c) the Board will have power to refuse an order for sale only on the grounds that the purchase price which a minority owner will receive is less than the price he paid for his unit, including all allowable deductions; the purchase, price a minority owner receives is not sufficient for him to discharge the encumbrances (ie mortgages and charges) on his unit; the minority owner is forced to be part of a joint venture agreement with the developer; or the sale is not in good faith and at arm's length considering the factors at para (a). The Board, however, will not impose its own terms and conditions on the parties. If the Board feels that

the price is too low or the method of distribution of the sale proceeds is not equitable, it will order that the sale not proceed. *The majority owners must then address this issue*.

[emphasis in bold in original; emphasis in italics and underline added]

76 The recommendations set out in para 22(a) were eventually incorporated in s 84A(9) of the Act. The last sentence of para 22(a) clearly shows that the s 84A(9) safeguards were included to *specially protect the minority's interests* and not the interest of all owners. Furthermore, we note that the responsibility of addressing the issue of the sale price being too low or the distribution method being inequitable falls squarely on the majority owners. In *Horizon Towers* at [154], this court explained that the duty to obtain the best price arose out of the SC's duty to act conscientiously as well as to act even-handedly in the collective interest of all the subsidiary proprietors. The reason for imposing such a duty was because (at [154]):

> *[t]he duty to obtain the best sale price is particularly crucial for the objecting subsidiary proprietors*. As alluded to at [114] above, such subsidiary proprietors may be compelled by virtue of an STB order to sell their units either at a price which they were not prepared to accept or where they were in fact not prepared to sell their units at any price for personal reasons. In such circumstances, their only consolation or compensation for losing their units is the sale price they will receive. The SC must therefore strive to achieve the best premium available for the subsidiary proprietors by obtaining the best price for the development as a whole. [Emphasis added]

77 In our view, the STB's primary roles are to ensure that both the letter and spirit of the *en bloc* processes are observed, and in particular, to ensure that the minority owners are not prejudiced. Ms Lim could not persuade us that the majority owners needed protection from the minority owners and/or the purchaser when the Act itself makes no express provision for this. Incongruously, it seems to us that what in essence Ms Lim was really arguing was that the majority owners needed *protection from themselves*, in case they made errors. This is an unacceptable argument. It should not be forgotten that it is invariably the majority owners who both initiate and implement the sale process. The majority owners have both the means and wherewithal to protect their interests in a typical collective sale when, in consultation with their advisors, they settle the terms of the CSA among themselves, and the terms of the SPA with the potential purchaser. We shall return to this point more fully later in this judgment in our concluding observations.

78 The appellants also relied on the following statements by Assoc Prof Ho Peng Kee ("Minister Ho") at the second reading of the Land Titles (Strata) (Amendment) Bill in 1999 (*Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at col 604 (Assoc Prof Ho Peng Kee, Minister of State for Law)) to fortify their contention that the legislative intent of the Act was for the protection of all owners:

> Let me now elaborate on the role of the Board, in particular, how it acts as a safeguard. The Board will first satisfy itself that the required consent has been obtained and that prescribed procedures have been complied with. It will not review or intervene to determine the terms of sale. Essentially, its role is to determine that the proposed sale is bona fide and an arm's length transaction so that the proposed sale can proceed. *It will do this by considering the minority's objections*, *the interests of all the owners, all the circumstances of the case and the scheme and intent of the en-bloc provisions in the Bill*. The Board will look at the sale price, method of distributing the sale proceeds to ensure that the minority owners are treated no less favourably than the majority, and the relationship of the purchaser to the owners, to ensure that there is no collusion. If the Board decides that the transaction is bona fide and an arm's length transaction, the sale will proceed. Otherwise, the sale cannot proceed and the majority owners would have to

rework their proposal if they still wish to sell en-bloc. The Board will not rewrite the agreement for the parties. [emphasis added]

79 The appellants placed particular emphasis on the underlined portion above. Further, Minister Ho also made the following remarks in the same speech (at coll 635–636):

> [W]e should not characterise majority owners, which has been done in this House by several speakers, that they are greedy, they are avaricious, all they want is to make money. I think it is not fair on majority owners, if it is what they are waiting for. But it does happen that Government's actions result in certain people getting richer, getting a windfall. So shall we begrudge that? I would say no. Shall we facilitate it? Well, if it results in a public interest being met, which is the creation of more homes for Singaporeans, a lot of them in prime freehold areas, then I will say yes, provided, of course, *there are sufficient safeguards, and the interests of all parties are taken into account*. And this indeed is the approach we take in the Bill, if you look at the specific criteria in the Bill taking into account *all the objections of the minority, all the circumstances of the case, all the interests of the parties*. [emphasis added]

80 However, viewed in its proper context, the Minister's overriding concern is plainly the protection of the interests of the minority owners. This must be so, given that in every successful collective sale, it is the minority owners who lose their homes, despite their objections, as a result of the majority's decision to enter into a collective sale. If, indeed, the interests of all parties were an overriding consideration in every collective sale, Parliament would have provided that an application to the STB would be necessary even if unanimous consent was obtained. The following excerpts of the same speech by Minister Ho vividly illustrates this point (at coll 601–603, 634):

> I had informed this House on 19th November last year that Government would be amending the law to make it easier for en-bloc sales to take place …
>
> I said that the law would be amended to remove the need for unanimous consent…. In February this year, also in this House, I outlined the main features of the new scheme. In particular, *I highlighted the fact that safeguards would be put in place to protect the interests of the minority owners*.
>
> Let me now highlight the *key features of the proposed new scheme*.
>
> Firstly, Government will not decide which developments are ready or ripe for en-bloc redevelopment. The owners will decide that for themselves. …
>
> …
>
> *Secondly, there will be adequate safeguards to protect the interests of minority owners*. These safeguards are found in the procedures as well as in the substantive powers of the Strata Titles Board. …
>
> These procedures will ensure that all relevant parties will have adequate notice of the sale and its terms, in order to decide whether or not to lodge objections with the Strata Titles Board. I should add that no application needs to be made to the Strata Titles Board if all the owners agree to the sale. In other words, *application to the Board is not a pre-requisite to all en-bloc sales but only when there is no unanimous consent*.
>
> …

The other big area that we looked at was the role of the Strata Titles Board. I think, like I have said in my speech, it is an important safeguard. The Strata Titles Board will be enhanced. There will be more members. And as Mr Rai has rightly pointed out, based on personal experience, the Board comprises senior professionals in the various fields *which are relevant to what the Strata Titles Board will have to do*, not decide on the law, but decide on whether the sale price is one where there is no collusion, decide on the method of distribution, *whether it is unfair to the minority owners*. The composition of the panel will ensure that this task is better done, rather than a judge sitting in court fettered by the rules of evidence.

[emphasis added]

81 We further observe that in *Horizon Towers*, this court held:

The relationship between an SC and subsidiary proprietors

104 In our view, the SC is the agent of the subsidiary proprietors collectively in relation to the collective sale of their strata units. At the point when an SC is appointed to carry out the collective sale (*inter alia*, obtaining consent to the collective sale agreement; advertising, negotiating and finalising the terms of the collective sale with potential purchasers; and completing the sale), there is no question of it being appointed to represent the consenting subsidiary proprietors only, since at that point the process of signing up to the collective sale agreement has not yet begun. The SC therefore carries out the collective sale process on behalf of all the subsidiary proprietors collectively and has the power to affect the legal relations of all the subsidiary proprietors with third parties…

105 Section 84(1A) of the LTSA constitutes statutory confirmation of an SC's status as agent for all subsidiary proprietors collectively, although we are mindful that s 84A(1A) as well as the present incarnations of the Second and Third Schedules to the LTSA were introduced only in 2007 as part of the amendments to the LTSA ("the 2007 amendments")…Section 84A(1A) provides:

> For the purposes of a collective sale under this section and before the signing of the collective sale agreement by any subsidiary proprietor —
>
> (*a*) there shall be constituted a collective sale committee *to act jointly on behalf of the subsidiary proprietors* of the lots whose members shall be elected by the subsidiary proprietors of the lots at a general meeting of the management corporation convened in accordance with the Second Schedule; and
>
> (*b*) the Third Schedule shall have effect as respects the collective sale committee, its composition, constitution, members and proceedings.
>
> [emphasis added]

An SC is now constituted by an ordinary resolution passed by the subsidiary proprietors at an EGM convened by the strata development's MC, which represents the interests of all the subsidiary proprietors (see paras 1 and 3(4) of the Second Schedule and para 1(2) of the Third Schedule to the LTSA).

106 The Minister explained the rationale for the 2007 amendments at the second reading of the Land Titles (Strata) (Amendment) Bill 2007 (Bill 32 of 2007) ("the 2007 Second Reading") (see

Singapore Parliamentary Debates, Official Report (20 September 2007) vol 83 at cols 1994–1995 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law)):

> [T]he main purpose of this Bill, which amends the Land Titles (Strata) Act, is to provide additional safeguards and greater transparency for all owners involved in en bloc sales, ie, both majority and minority owners. The proposed amendments address the concerns of owners over the lack of clarity, transparency and safeguards in the current process of en bloc sales. They also ensure that the interests of all owners are taken into consideration more adequately. While the amendments are intended to achieve those objectives, we have also borne in mind that the amended law does not make it unduly onerous to bring about an en bloc sale.

The rationale for the enactment of s 84A(1A) in particular was as follows (at col 1997):

> Currently, the law does not contain rules to govern the function and proceedings of an en bloc sale committee. In the light of experience and complaints which we have received, we believe there is clearly a need *to enhance procedural clarity in this regard*. [emphasis added]

107 As the SC is the agent of the subsidiary proprietors collectively, there is no point at which the SC may act solely in the interests of any group of subsidiary proprietors, whether they are consenting or objecting proprietors. When an SC is first appointed, it is with a view to achieving a collective sale for *the benefit of* all the subsidiary proprietors. At this stage, the interests of the subsidiary proprietors are not yet clearly differentiated. Thus, the SC's initial paramount responsibility is simply to obtain the requisite consent for the collective sale as well as appoint competent professional advisers. The SC's members and advisers also have the duty to avoid any possible conflict of interest (see [137]–[145] below). However, once the requisite consent is obtained and the interests of the objecting subsidiary proprietors become distinguishable from those of the consenting subsidiary proprietors, the SC's role becomes that of an impartial agent acting for both camps. In other words, the SC must hold an even hand between these interests. We shall elaborate on this below at [136].

[Emphasis in italics original; emphasis in underline added]

Our finding that the collective sale regime was promulgated with the aim of protecting the interests of the minority owners is not inconsistent with our decision in *Horizon Towers*, as cited above. The SC, as agent of all subsidiary proprietors, must act in the interests of *all* the subsidiary proprietors, as opposed to any particular group thereof. This is a rule grounded in fairness and logic, since the SC has the power to affect the legal relationship of all subsidiary proprietors with third parties. It should not come as a surprise that the rule is therefore reflected within the statutory scheme, insofar as the SC is to be constituted to 'act jointly on behalf of the subsidiary proprietors' within the Act. While the Act was amended in 2007 to provide 'additional safeguards and greater transparency for *all* owners [emphasis added]', we do not think that the amendments passed detract from the original purpose of the collective sale regime.

82 There is one final point we should address for completeness. Pursuant to s 84A(7A) of the Act (after the 2007 amendments), any order to increase the sale proceeds of an objecting minority owner, *must be made with the consent of the SC*. This provision, however, only applies where the additional payments are to be made from the sale proceeds due to all the owners from the agreed sale price. As the STB's order will affect the interests of the majority owners, the SC (who represents the majority owners at the hearing of the application) has to agree to it. The statutory scheme does not address the case of a purchaser paying the additional monies directly without the intervention of

either the STB or the majority owners. Indeed, it can be said with force that given the express provisions of s 84A(7A) of the amended Act, Parliament has required the SC's consent for the making of additional payments *only in this particular instance provided for there*. In light of the above, we do not think that a term can be implied in law to prevent the purchaser from making additional payments to the minority owners on the basis of the purported legislative intent.

Implied term that the purchasers will act in good faith

83 The appellants next contend that it is necessary to imply a continuing duty of good faith on the part of the purchaser. Allgreen procured the Minority Owner's consent only after realising that the STB was likely to dismiss the application, and had therefore breached such an implied term (though, given our decision below, it is not necessary for us to make such a finding). Such duties of good faith (defined loosely) have been held to be applicable to certain classes of contracts, for example, contracts of insurance (see for example, *The Star Sea* [2003] 1 AC 469 at [50] (HL); and generally, Poh Chu Chai, *Principles of Insurance Law* (LexisNexis, 6th Ed, 2005) at p 165) and employment contracts (*Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] AC 20 (HL)). However, the common law does not recognize a principle of good faith, in the sense of fair dealing, to be of general application: see *Chitty on Contracts* at para 1-22; *Halsbury's Laws of England* at para 612.

84 The issue of implying a term of good faith has been extensively discussed by this court in the recent decision of *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] SGCA 19. It is unnecessary for us to reprise our views on the doctrine generally here.

85 We can find no authority to support the appellant's proposition. A purchaser does not owe any duty of care, much less a duty of good faith, to a vendor of property in relation to the price of the property. The general principle is *caveat emptor*. In our view, it would not be possible to imply any new duty of good faith in law into collective sale contracts outside that stipulated in the statutory scheme. Within the scheme, the purchaser owes no duty of good faith to the owners. Indeed it might be persuasively said that since Parliament has expressly considered the concept of good faith and carefully limited its application in this collective sale scheme, there can be no further room for any implication of an overarching duty of good faith imposed on any other parties involved in a collective sale: see *Horizon Towers* at [128]–[133]. To recapitulate, the duty of good faith *requires the SC* to discharge its duties in good faith in five specific areas, including (but not limited to): (a) the duty of loyalty or fidelity; (b) the duty of even-handedness; (c) the duty to avoid any conflict of interest; (d) the duty to make full disclosure of relevant information; and (e) the duty to act with conscientiousness. This duty of good faith is confined to the conduct of the SC (and the majority owners) in relation to the collective sale process. We can see no pressing policy considerations that warrant the implication of a term that the purchaser has to deal with the majority owners in good faith. Their relationship is governed by the terms of the SPA, which would only have been settled in consultation with the SC's professional consultants. If such a term were important to the subsidiary proprietors it can, and should be expressly provided for in the SPA.

Implied term that the purchaser would disclose the making of Additional Payments to the Majority Owners

86 Ms Lim also argued that Allgreen had an implied duty to disclose that it was intending to make additional payments to the Minority Owners. In response, Mr Singh, maintained that: (a) that there was no common law duty of disclosure; and (b) Allgreen was under no duty to disclose in the absence of any express provisions in the Agreements stipulating such a duty.

87 We agree with Mr Singh. There is no general duty of disclosure in the performance of an already concluded contract under the common law: see Edwin Peel, *Treitel, The Law of Contracts* (Sweet & Maxwell, 12th Ed, 2007) at para 9-148; see further Hugh Collins, "Implied Duty to Give Information During Performance of Contracts" (1995) 55 Modern LR 556. The position, however, becomes more nuanced when it comes to disclosing the *terms* of the contract: see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433. The law has carved out several exceptions to the rule that there is no general ongoing duty of disclosure. An illustration of such an exception can be found in the case of *Sybron Corporation v Rochem Ltd* [1984] 1 Ch 112 ("*Sybron*"). In *Sybron*, the fourth defendant was an employee of the plaintiff-company and, upon retirement, received a lump sum payout and annual payments under a life assurance policy. However, under this scheme, a member who was dismissed for fraud or serious misconduct was only entitled to the benefit secured by virtue of his own contributions, with the balance being at the company's discretion. The company later discovered that the fourth defendant had, during the period of his employment, engaged with other employees to set up rival businesses in competition with the company.

88 The English Court of Appeal held that there was no general duty to report a fellow servant's misconduct or breach of contract, and that whether such a duty existed would depend on the terms of the contract. However, on the facts of the case, the court found that fourth defendant owed the duty to report his fellow-employee's misconduct. The court placed heavy reliance on the fact that there was a hierarchical system, and that the fourth defendant was near the top of the hierarchy and was responsible to his employers for the operation of a complete sector of the employer's business in Europe. Indeed, the court took the commonsensical view that a person in a managerial position could not silently stand by and observe his fellow servants pilfer the company's assets. As a result, the company's claim was allowed, and the fourth defendant was required to return the balance of the payments.

89 In the present case, we do not think that a duty of disclosure should exceptionally be implied in the context of collective sales. First, it was not the appellants' case that the purchaser had special obligations *vis-à-vis* all the subsidiary proprietors which warranted the imposition of a duty of disclosure. Indeed, the contract was made on an arm's length basis, as illustrated by how the SC successfully negotiated with Allgreen for the removal of the requirement of a minimum development baseline (see above at [5]). Secondly, we have already found that there is no duty of good faith imposed by law on these types of contractual arrangements. As between the majority owners and the purchaser, there is nothing peculiar about their relationship, even in a collective sale setting, which warrants the implication of a continuing duty to disclose from the latter to the former. We cannot agree that such a term should be implied in law.

Concluding Observations

90 Allgreen has not breached any express or implied terms in the CSA or SPA by giving the Additional Payments to the Minority Owners. The SC sowed the seeds of their present unhappy predicament when, to save a mere sum of $11,000, it made a deliberate decision not to accurately ascertain the development baseline of the Property. While one should be slow to take issue with their decision by coldly equating hindsight with foresight, the stubborn facts that cannot be lightly erased are that, acting in the interests of the Majority Owners, the SC, firstly, inappropriately opted to save costs and then, secondly, preferred the comfort of having the *certainty* of a binding contract with Allgreen to the *uncertainty* of re-negotiating the Sale Price upon the ascertainment of the actual development baseline. Since they opted to seize and keep the proverbial bird in the hand, it is only just that they cannot now be allowed to complain that the bird is not what they thought it was. While we can understand the appellants' dismay in relation to how events have unhappily conspired against them, that is not in itself a basis for implying novel new terms in fact or in law into the

Agreements. The present circumstances have without doubt been precipitated largely by their own deliberate conduct.

91 We acknowledge that the practice of some developers in making direct payments to minority owners to secure their consent can be potentially divisive and may even sometimes be ethically challenging. This, nevertheless, does not mean that the law, as it now stands, *prohibits* such incentive payments. The Act itself, while comprehensively dealing with a host of contractual issues, plainly does not proscribe such payments. It is also probable, that not infrequently, the majority owners will have no real complaints about such payments, as their overriding interest will be in ensuring that the collective sale is successful (and to collect the sale proceeds early) rather than to quibble about incentive payments made on the sidelines.

92 SCs that do not want to find themselves in a similar predicament *vis-à-vis* incentive payments made by purchasers to minority owners are far from helpless. Any SC can easily make provision for similar contingencies by expressly providing for them in the SPA, in particular, by including all those terms which have been argued before us in this appeal as being implied in law and or in fact. In the final analysis, it seems to us that the appellants have attempted to belatedly rectify their mistake in agreeing to the Sale Price without taking into account the true amount of the development charge. They have attempted to mask this by passing it off as the consequence of legal defects in the SPA and the Act that the law must remedy by reference to the collective sale regime, and by the imposition of additional obligations on a purchaser. We reject this attempt.

Conclusion

93 The appeal is dismissed. Costs of the appeal are awarded to the respondent and the usual consequential orders are to follow.

[note: 1]Appellant's Core Bundle vol 2 ("ACB") at p 58

[note: 2]ACB at p 68

[note: 3]ACB at p 103

[note: 4]ACB at p 94

[note: 5]Appellant's Case ("AC") at para 34

[note: 6]Respondent's Core Bundle ("RCB") at pp 86–87

[note: 7]ACB at p 113

[note: 8]The formula is: Development Charge payable = Development Ceiling – Development Baseline – Development Charge Exemption.

[note: 9]ACB at p 114

[note: 10]ACB at pp 115–116

[note: 11]RCB at pp 88–89

[note: 12]ACB at p 120

[note: 13]ACB at p 150

[note: 14]ACB at p 155

[note: 15]RCB at p 90

[note: 16]RCB at p 95

[note: 17]ACB at p 153

[note: 18]ACB at p 155

[note: 19]ACB at pp 158–159

[note: 20]RCB at p 107

[note: 21]ACB at p 160

[note: 22]Record of Appeal ("RA") at p 403

[note: 23]ACB at p 161 and RA at p 405

[note: 24]RCB at p 108

[note: 25]ACB at p 163

[note: 26]AC at para 65

[note: 27]RCB at p 116

[note: 28]RCB at p 47

[note: 29]RCB at p 57

[note: 30]ACB at p 164

[note: 31]AC at paras [15] and 17

[note: 32]AC at para 64

[note: 33]AC at para 86

[note: 34]RC at para 162

[note: 35]RC at [163]

[note: 36]ACB at p 60

[note: 37]ACB at p 126

[note: 38]AC at para 120

[note: 39]RCB at p 145

[note: 40]AC at [125]