N K Rajarh and others *v* Tan Eng Chuan and others
[2013] SGCA 62

Case Number	: Civil Appeal No 42 of 2013
Decision Date	: 08 November 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; V K Rajah JA
Counsel Name(s)	: Hri Kumar Nair SC, Benedict Teo and Constance Zhao (Drew & Napier LLC) (instructed) and David De Souza and Kevin De Souza (De Souza Lim & Goh LLP) for the appellants; Lim Seng Siew, Ong Ying Ping and Susan Tay (OTP Law Corporation) for the first and second respondents; Lai Swee Fung (UniLegal LLC) for the third respondent.
Parties	: N K Rajarh and others — Tan Eng Chuan and others

LAND – Strata titles – collective sales

EQUITY – Fiduciary relationships

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 3 SLR 103.]

8 November 2013

V K Rajah JA (delivering the grounds of decision of the court):

1 This appeal arises from an application for the collective sale of the units in Harbour View Gardens comprised in Land Lot No 1789M of Mukim 3 ("the Development"), which was dismissed by a High Court judge ("the Judge") on 8 April 2013. The Judge's grounds of decision is reported as *N K Rajarh and others v Tan Eng Chuan and others* [2013] 3 SLR 103 ("the GD"). This appeal raised some interesting legal questions in relation to a sale committee's duties arising from the making of an offer of an incentive payment to a minority proprietor to secure the requisite consent level under the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) ("LTSA"). In this case, the incentive payment was effectively offered to only one of three minority proprietors. It is also noteworthy that this minority proprietor was a member of the sale committee for the proposed collective sale. Another peculiar feature in this appeal was the marketing agent's intimate involvement in the arrangements to facilitate the incentive payment. This raised further questions as to whether the marketing agent's conduct (and the sale committee's knowledge and involvement in it) tainted the procedural fairness of the transaction and made it unsafe for the collective sale to proceed.

2 After hearing the parties' submissions, we dismissed the appeal. These are the grounds of our decision.

The background facts

Parties to the dispute

3 The Development is a 27-year-old small residential development of 14 residential units of different sizes and share values. [note: 1] The appellants were members of the collective sale committee who were authorised to make the application for the collective sale of the Development.

[note: 2] (In these grounds, we will refer to the collective sale committee that was constituted as "the CSC", and collective sale committees in general as "SCs").

4 The first respondent ("Mr Tan") and the second respondent ("Madam Kee") (collectively, "the Tans") are husband and wife and they jointly own two units, *viz*, units 223 and 223A. The third respondent ("Ms Chow") owns unit 217A. Unit 217A was purchased by Ms Chow's former husband, Richard Toh ("Mr Toh"), in his sole name before their marriage and used as their matrimonial home. In 2009, Ms Chow and Mr Toh underwent divorce proceedings. On 10 January 2011, the High Court, in dividing the matrimonial assets, ordered that unit 217A be transferred to Ms Chow by 10 January 2012. [note: 3] We will refer to the Tans and Ms Chow collectively as "the respondents".

Events leading to the application for the collective sale

5 On 10 September 2011, an extraordinary general meeting ("EGM") of the proprietors was convened, [note: 4] and a resolution for the CSC to be constituted was passed. The following proprietors were appointed to the CSC: [note: 5]

S/N	Subsidiary proprietor's name	Unit No
(a)	Arthur Lim Kean Chuan (the second appellant)	213A
(b)	He Jianpeng	221A
(c)	Tan Haw Kiong Jimmy	219
(d)	Pang Kok Wah	221
(e)	Chua Ang Fatt (the third appellant) who was nominated by his wife, Tan Puay Hong, the subsidiary proprietor of unit 215A	215A
(f)	N K Rajarh (the first appellant)	213
(g)	Han Min Juan ("Mr Han")	217

6 On 14 September 2011 at a meeting of the CSC, Colliers International (Singapore) Pte Ltd ("Colliers") was appointed as the marketing agent and De Souza Lim & Goh LLP as the solicitors ("the solicitors") for the collective sale. [note: 6] The CSC also discussed the reserve price and the method of apportionment for the sale. All the members of the CSC, except Mr Han, agreed with the method of apportionment proposed at this meeting. [note: 7]

7 An EGM of the subsidiary proprietors was convened on 8 October 2011 for them to consider a reserve price of $34m for the Development. Mr Tan attended this meeting. The subsidiary proprietors in attendance, including Mr Han, did not object to the proposed reserve price, the method of distribution of the sale proceeds and the terms of the Collective Sale Agreement ("the CSA"). [note: 8] The CSA provided that if a collective sale was ordered, the "Collective Sale Price" and "the Disbursements" were to be apportioned amongst all the subsidiary proprietors, 60% by strata area and 40% by share value, and each subsidiary proprietor was entitled to receive the gross sum payable in accordance with the method of apportionment less "the apportioned Disbursements" for that unit (cl 41 read with Scheds 1 and 6 of the CSA). [note: 9]

8 Consent from subsidiary proprietors representing not less than 80% of the share values and

total area of all lots in the Development ("the 80% threshold") was required for an application for a collective sale to be made (s 84A(1)(*b*) of the LTSA). By the end of October 2011, ten subsidiary proprietors representing 77.41% of the strata area and 80.33% of the share value of the Development had signed the CSA ("the Consenting Proprietors"). [note: 10] Mr Toh was one of the Consenting Proprietors – his signature on the CSA was accepted at that time because he was the registered subsidiary proprietor of unit 217A. However, when Ms Chow became the registered subsidiary proprietor of unit 217A in March 2012, she opposed the collective sale and Mr Toh's acceptance was not taken into account for the purposes of the 80% threshold. [note: 11] With this development, the Consenting Proprietors together held 72.14% of the strata area and 73.77% of the share value of the Development. [note: 12] The subsidiary proprietors who objected to the collective sale ("the Dissenting Proprietors") were:

(a) Mr Han and Jee Meng Tu ("the Hans");

(b) Ms Chow; and

(c) the Tans.

It was undisputed that the 80% threshold would be met if the Hans consented, or if the Tans consented with respect to unit 223. [note: 13] Ms Chow's consent was not critical for the purposes of meeting the 80% threshold because her unit represented only 5.27% of the total strata area of the Development. [note: 14]

9 A meeting of the proprietors was convened on 13 April 2012. Madam Kee and Ms Chow attended this meeting. [note: 15] The appellants claimed that the proprietors were informed at that meeting that the CSC had decided to put the Development up for sale by public tender between 18 April 2012 and 16 May 2012, even though the 80% threshold was not met. [note: 16] This fact was not explicitly captured in the minutes of the meeting. The minutes merely stated that Colliers had explained that the mode of sale would be by public tender, the advantages of this process and the timeline going forward. Ms Chow said that she did not object to the public tender because, in any event, the 80% threshold had not been obtained and she was "not optimistic that a buyer would be found". [note: 17] As for the Tans, Mr Tan, in an affidavit filed on 21 January 2013, claimed that Madam Kee did not understand the proceedings because they were conducted in English. [note: 18] At the close of the tender, no offers were received for the Development.

10 The solicitors subsequently received an offer on 19 July 2012 from Roxy-Pacific Holdings Limited ("Roxy-Pacific") to purchase the Development for $33m. [note: 19] The party named as purchaser under the sale and purchase agreement ("SPA") was RH West Coast Pte Ltd ("RH West Coast"), a subsidiary of Roxy-Pacific. The offer price was above the market valuation of $32.1m by DTZ Debenham Tie Leung (SEA) Pte Ltd in their report dated 16 May 2012. [note: 20] Under para 11(3) of the Third Schedule to the LTSA, the CSC had ten weeks from the close of tender to enter into a sale by private treaty. Thus, the SPA had to be executed by 25 July 2012. [note: 21] The solicitors confirmed that except for the reserve price, the offer was in accordance with the terms of the CSA. The offer from RH West Coast would be deemed to be accepted if subsidiary proprietors representing not less than 80% of the share values and total area of all lots in the Development signed the SPA (see cll 27–29 of the CSA) [note: 22] and a supplemental agreement ("the SA") to the CSA to reduce the reserve price to $33m. [note: 23]

11 As a consequence of this arrangement, there was a rush to complete the transaction by 25 July 2012. On 23 July 2012, a meeting of the subsidiary proprietors was convened to consider the offer from RH West Coast. Madam Kee and her son and Ms Chow were at the meeting, but the Hans were not present. According to the minutes of the meeting, none of the subsidiary proprietors present at the meeting of 23 July 2012 dissented to the terms and conditions of the SPA and the SA. During the meeting, some of the subsidiary proprietors also discussed whether to contribute a portion of the sale proceeds due to them to make an incentive payment to one or more of the Dissenting Proprietors so that they would sign the CSA and the SA and the 80% threshold would be crossed. According to the minutes of the meeting (see below at [51]), Colliers emphasised that this contribution was voluntary and would be a private matter between the subsidiary proprietors that had agreed to contribute and the recipients. [note: 24] The sale proceeds for the Development would not be set aside for this purpose. The subsidiary proprietors who were prepared to contribute ("the Contributing Proprietors") decided that the contributions should be based on the same formula as the method of apportionment for the sale proceeds. On the evening of 23 July 2012, eight of the ten Consenting Proprietors agreed to contribute monies to make an incentive payment to the minority subsidiary proprietor who accepted the offer ("the Additional Payment"). [note: 25] This offer was not extended to Ms Chow, see [12]. A ninth subsidiary proprietor who consented to the collective sale, Mr Miao Miao ("Mr Miao") had agreed to contribute as well but he was away in Shanghai on 23 July 2012 and could not sign the agreement to contribute to the Additional Payment ("the Contribution Agreement") on that day. He only signed the Contribution Agreement subsequently. Of particular significance was the fact that the nine Contributing Proprietors consisted of all the members of the CSC (except for Mr Han) and three non-members. The Hans accepted the Additional Payment of $200,000 and signed the CSA and SA on 24 July 2012.

12 However, it appeared that the Additional Payment was effectively open to only the Hans to accept. The Additional Payment was not offered to Ms Chow because her consent was not critical for the purposes of meeting the 80% threshold. As for the Tans, while the Additional Payment was ostensibly open to them to accept, they said that a $200,000 offer would not make commercial sense to them. According to the Tans, Mr Andy Gan ("Mr Gan"), the representative from Colliers, and the second appellant had approached them some time before 23 July 2012 and asked how much they wanted for their units. The Tans said that they wanted $4.5m for their units. [note: 26] The Tans owned a maisonette unit and the unit above it and had exclusive use of the staircase leading to the units, and thus wanted a higher price. [note: 27] (Based on a reserve price of $34m, the Tans were to receive about $3.986m. [note: 28]) Colliers and the second appellant subsequently informed the Tans that the other subsidiary proprietors did not agree to the request for $4.5m and asked the Tans to consider accepting an additional sum of $200,000 and to sign the CSA and SA for one of the Tans' two units. The Tans rejected the offer as "this did not make sense" to [them]. [note: 29] In short, the offer of $200,000 was not extended to Ms Chow and discriminated against the Tans who would effectively be compensated for only one of their units.

13 On 20 July 2012 at about 12.00 noon, Mr Gan sent an e-mail titled "Collective Sale of Harbour View Gardens – Proposed Compensation to Han": [note: 30]

> Dear Majority Owners
>
> Please take some time to look through the table below.
>
> Below is the same proposal we have simulated earlier for compensation to Mr Han at $34 million. Now the table is based on current offer of $33 million.

We have engaged him on various occasions and unfortunately, he is still insistent on his figure of $1,300 psf.

The compensation figures are based on the method of apportionment schedule as highlighted earlier.

We look forward to more in-depth discussion on Monday evening to take matters forward.

…

Mr Gan set out a table in that e-mail stating how much each subsidiary proprietor (except for the Tans) had to contribute, if the incentive payment was made according to Mr Han's terms. On the same day, Mr Miao replied Mr Gan by e-mail to state that he was "agreeable to the table below".

14 Unbeknownst to the Tans and Ms Chow, Colliers interposed itself in the agreements for the Additional Payment. The Contribution Agreement was *in fact* between Colliers and the Contributing Proprietors, and stated: [note: 31]

This Agreement is made between [Colliers] and the subsidiary proprietors of each of the Units in [the Development] listed in Schedule 1 hereto who sign this Agreement … [*ie*, the Contributing Proprietors].

Whereas:-

…

(d) The subsidiary proprietors of Unit 217 have agreed to sign the CSA and [the SA] on the condition that they will receive the sum of S$ 200,000.00 in addition to the gross sale price of their Unit under [the SA] on legal completion of the sale of the Development pursuant to the terms of the CSA and [the SA] (the "Additional Payment").

Now this Agreement witnesseth as follows:-

1. The [Contributing Proprietors] hereby agree and undertake with each other and Colliers that each of them will contribute the sum set out against their respective Units in the 3rd column of Schedule 1 hereto (the "Contributing Sum") towards making up the Additional Payment.

2. In consideration of the Contributors agreeing to make payment of the Contributing Sum, Colliers agrees that it will enter into an agreement with [the Hans] to pay the Additional Payment to them without delay after the legal completion of the sale of the Development.

3. The [Contributing Proprietors] shall give instructions, or shall be deemed to have given instructions, to the solicitor acting for the subsidiary proprietors in the collective sale of the Development to deduct their respective Contributing Sum from the purchase price of their Unit on legal completion of the collective sale and to utilize the Contributing Sum to pay the Additional Payment to [the Hans] and/or reimburse Colliers for such payment.

…

In the schedule to the Contribution Agreement, it appeared that the total amount the Contributing Proprietors agreed to pay was $200,475, but this discrepancy was not explained.

15 Colliers also entered into an agreement ("the Colliers Agreement") with the Hans for the Additional Payment to be made in exchange for their consent to the collective sale of the Development. The recital of the Colliers Agreement stated that: [note: 32]

> **Whereas**:-
>
> …
>
> (b) Colliers is the marketing agent for the collective sale of the Development and Colliers has arranged for some of the other Subsidiary Proprietors of the Development to contribute towards the sum of **S$200,000.00** mentioned below.
>
> …
>
> (d) Colliers is assisting [the CSC] to obtain the signatures of not less than 80% (by share value and by strata area) of the subsidiary proprietors of the Development to the Supplemental Agreement. …
>
> …
>
> **Now this Agreement witnesseth** as follows:-
>
> 1. [The Hans] agree and undertake to forthwith sign the CSA (if they have not already done so) and the [SA] on the basis of the terms set out below.
>
> ...
>
> 3. Accordingly, Colliers undertakes to [the Hans] that Colliers will upon the successful sale of the Development and its legal completion, pay to [the Hans] the sum of **S$200,000** (the "Sum").
>
> 4. The Sum will only be payable upon the successful completion of the collective sale of the Development under the CSA and [the SA] and, if for any reason, the collective sale of the Development is unsuccessful and legal completion does not take place, Colliers shall not be under any obligation whatsoever to pay the Sum or any part thereof to [the Hans] ... .
>
> 5. [The Hans] understand ... that 25th July 2012 is the last day for the Sale Committee to sign the [SPA]. Accordingly, [the Hans] agree and represent to Colliers (who receive such agreement and representation on their own behalf as well as on behalf of the other subsidiary proprietors of the Development) that [the Hans] will not exercise their statutory right to rescind their signatures to the SA within 5 days from signing the same.
>
> …

16 The Hans signed the Colliers Agreement on 24 July 2012, although the time at which the agreement was signed was not clear. On the same day, Mr Gan sent an e-mail to Mr Miao stating that the meeting of 23 July 2012 went well and the Contributing Proprietors agreed to make the Additional Payment. He sent Mr Miao a copy of the Contribution Agreement and stated [note: 33] :

> Your proportion for compensation is also proportionately reduced to only $15,881.00.

> Please sign both copies against your name in the table & get it witnessed before a notary public or in Singapore consular in Shanghai as suggested by you.
>
> Please scan a copy & email back first.
>
> Would it also be possible for your [*sic*] to send it back to our address via express courier?
>
> We need to wrap up this deal by tomorrow, as our deadline for a private treaty sale expires 25th July 2012.

17 Mr Miao replied on the same day to say that an appointment had been made with "the Singapore consular in Shanghai at 1530pm tomorrow (25 July 2012)". Mr Miao sent the signed and notarised copy of the Contribution Agreement to Colliers by e-mail on 25 July 2012, 4.25pm. [note: 34] During a meeting of the CSC on 25 July 2012 at 4.30pm, the CSC resolved to sell the Development to RH West Coast at $33m. [note: 35] The SPA was signed on the same day. [note: 36]

18 Up to 8 March 2013, which was the first day of the hearing before the Judge, the respondents were only aware that the Contributing Proprietors had made an incentive payment of $200,000 to the Hans. The CSC had refused to provide the Contribution Agreement to the respondents contending that it was a private arrangement between the Contributing Proprietors and the Hans. The Contribution Agreement, the Colliers Agreement and the e-mail correspondence involving Mr Gan were only disclosed on the Judge's orders.

19 On 17 September 2012, the appellants applied to the Strata Titles Board ("the Board") in STB No 79 of 2012 for the collective sale to be approved. [note: 37] The respondents filed their objections to the application on 26 September 2012 and 1 October 2012. The Board held mediation sessions on 15 and 26 November 2012 but the dispute was not resolved. On 26 November 2012, the Board issued a Notice of Stop Order under s 84A(6B) of the LTSA. A stop order was issued on 6 December 2012.

Summary of pleadings

20 On 19 December 2012, the appellants filed Originating Summons No 1199 of 2012 ("the OS") [note: 38] in the High Court for an order that:

(a) the Development be sold collectively to RH West Coast under the terms and conditions of the SPA;

(b) all subsidiary proprietors of the Development, including the respondents, be bound by the terms of the CSA and the SPA as if they had been parties thereto;

(c) all costs and disbursements in connection with this application be borne by the respondents;

(d) the appellants have liberty to apply; and

(e) there be such further or other relief as the court deems fit.

Decision below

21 The Judge dismissed the OS, finding that the collective sale transaction was not in good faith.

The Judge held that a strict and literal interpretation of s 84A(9)(*a*)(i) of the LTSA was unworkable, and that "good faith" required the CSC to discharge its statutory, contractual and equitable functions and duties faithfully and conscientiously (at [8] of the GD). The court, in determining whether the transaction was in good faith, would have to take into account how the 80% threshold was met and the circumstances which led to the agreement to make the Additional Payment to the Hans (at [8]–[10] of the GD).

22 The Judge held that the CSC owed fiduciary duties to all subsidiary proprietors and had to act in good faith in the interests of both the consenting and minority proprietors. The CSC had to take care not to put itself in a position of "actual conflict of duty" so that it could not fulfil its obligations to one group of subsidiary proprietors without failing in its obligation to another group with conflicting interests (at [19] of the GD). Colliers as sub-agent for all the subsidiary proprietors also had the duty to avoid any possible conflict of interest (at [22] of the GD).

23 The Judge found that the Colliers Agreement was not a private arrangement between the Contributing Proprietors and the Hans, but an agreement entered into by Colliers who was acting as a sub-agent of all subsidiary proprietors (at [23] of the GD). The Colliers Agreement had to be disclosed to the respondents. Under that agreement, Colliers stepped in to "underwrite" the shortfall of $15,881 due from Mr Miao before he signed the Contribution Agreement on 25 July 2012 (at [28] of the GD). It did not matter that Colliers would be reimbursed by the Contributing Proprietors under the Contribution Agreement, because Colliers was under a binding obligation to pay the Hans $200,000 in the event of a collective sale of the Development. The Colliers Agreement was drafted and executed to assist the CSC in breaching its duties to the respondents (at [29] of the GD). Such conduct was commercially unacceptable.

24 The CSC, by taking part in this scheme, had also acted in conflict of its duty to the respondents. The CSC did not act in a transparent manner in the sale process and breached its duty of disclosure by withholding the Contribution Agreement and the Colliers Agreement. The CSC also breached its duty of loyalty and honesty to the respondents by furthering the interests of the Consenting Proprietors to the prejudice of the respondents. On the argument that members of the CSC could offer incentive payments in their personal capacities as subsidiary proprietors, the Judge thought that this distinction was artificial. The CSC breached its fiduciary duties by acquiescing in Colliers' participation in the incentive payment arrangements (at [38] of the GD). Good faith required that the CSC ensure that it did not allow the conflict of interest faced by its professional advisers, including the marketing agent, "to take a foothold in the transaction" (at [38] of the GD).

25 The Judge however rejected Ms Chow's argument that the $200,000 would upset the method of distribution of the sale price contrary to the method of apportionment agreed under the CSA. The Judge thought that the Additional Payment was not part of the sale price of $33m under the SPA (at [39] of the GD).

The appellants' case

26 The appellants' written case differed from its skeletal arguments and oral submissions, possibly because of the involvement of instructed counsel midway. For the purposes of our decision, we will pay particular attention to the skeletal arguments and oral submissions of the appellants. Mr Hri Kumar Nair SC ("Mr Kumar"), counsel for the appellants, accepted that the court is entitled to examine all aspects of the sale price, including how it was arrived at. [note: 39] However, the Judge went beyond this to consider how the 80% threshold was obtained. [note: 40] There was no issue of the CSC placing themselves in a position of conflict of interest such that the best price was not obtained.

[note: 41] The respondents still received what they were entitled to under the CSA. [note: 42] The fact that the Contributing Proprietors agreed to redistribute the proceeds amongst themselves to make the Additional Payment also did not offend s 84A(9)(*a*)(i) of the LTSA. This court had also affirmed in *Chua Choon Cheng and others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 ("*Allgreen*") that there was nothing wrong with the making of incentive payments to some or all of the minority proprietors. He argued that incentive payments were private arrangements which facilitated collective sales in line with the policy underlying the LTSA. [note: 43] The subsidiary proprietors that were truly prejudiced were the Contributing Proprietors.

27 Mr Kumar accepted that the majority proprietors owed a duty of good faith to the minority proprietors but the scope of this duty differed from that owed by the CSC. Majority proprietors were entitled to act in their own interests. The duty of good faith only prohibited them from abusing their position to benefit themselves at the expense of the minority and from forcing the minority to sell their properties at a price or on terms which were objectively unfair. SC members, in their roles as subsidiary proprietors were entitled to act in their personal interests, provided it did not conflict with their duties as SC members. [note: 44] The Additional Payment was made by the Contributing Proprietors in their capacities as majority proprietors. It was not an initiative of the CSC or discussed at any CSC meeting, and the Additional Payment would come entirely from the Contributing Proprietors' pockets and not from a fund managed by the CSC. [note: 45] Mr Kumar also argued that if the ability to offer incentive payments was available only to those subsidiary proprietors who were not SC members, this would impede collective sales of smaller developments. [note: 46] There was no duty on the Contributing Proprietors to offer an incentive payment to Ms Chow. The respondents' argument that the Additional Payment should have been made and/or divided into a fair proportion between each minority proprietor did not comport with law or logic. The respondents conflated the duty of even-handedness owed by the CSC with the duty imposed on majority proprietors (who are in fact entitled to decide who they will make the incentive payment to and the amount thereof).

28 The CSC was not obliged to disclose the Contribution Agreement and the Colliers Agreement. In any event, the failure to disclose the agreements was not motivated by dishonesty or bad faith. [note: 47] The Judge erred in finding that Colliers agreed to underwrite the shortfall in the Additional Payment by entering into the Colliers Agreement. The Contributing Proprietors including Mr Miao agreed to make the Additional Payment even before the Colliers Agreement was executed. The Colliers Agreement did not conflict with Colliers' duty to market the Development and achieve the best possible price. [note: 48]

29 Mr Kumar also argued that the respondents' submission that para 7(3) of the Third Schedule to the LTSA was not complied with was not raised before the Board. The appellants were thus precluded from raising this point under s 84A(4A) of the LTSA. [note: 49] In any event, it was not Parliament's intention that a technical or procedural irregularity that did not prejudice the interests of any person would invalidate the order for a collective sale. [note: 50] In this case, the respondents were fully aware that the CSC had decided to put the Development up for sale by public tender even though the 80% threshold was not reached, and no objections were made. [note: 51]

The respondents' cases

30 The respondents' cases were similar. They emphasised that the 80% threshold achieved had to reflect the "genuine will" of the subsidiary proprietors. This was subverted through the use of incentive payments which were offered to achieve the 80% threshold. [note: 52] The respondents

were forced to sell their property and at a price that was lower than the reserve price because of the Additional Payment. [note: 53] The subsidiary proprietors who consented to the collective sale owed a duty of good faith to the Dissenting Proprietors, and could not use improper inducements or threats to cause a subsidiary proprietor to sign the CSA.

31 The respondents argued that the CSC also owed a duty of disclosure, a duty to avoid any potential conflict of interest, and a duty to act even-handedly between the subsidiary proprietors. The CSC breached its duty to act even-handedly because it had failed to obtain the best price possible (which was said to be a sale price that at least 80% of the subsidiary proprietors by strata area and share value found satisfactory). [note: 54] Instead, the Hans were now receiving more than they were entitled to if the Development had been sold at the reserve price. The CSC acted in conflict of interest when its members offered the Additional Payment which benefited them and the Hans only. [note: 55] The CSC breached its duty of transparency and disclosure by refusing to disclose the Contribution Agreement and the Colliers Agreement. [note: 56] The CSC also did not comply with para 7(3) of the Third Schedule to the LTSA by launching the public tender before the 80% threshold was met. [note: 57] Colliers also breached its duty to avoid possible conflicts of interest by undertaking a primary contractual obligation to make the Additional Payment to the Hans. [note: 58]

The issues before this Court

32 The overarching issue before this Court was whether the collective sale transaction was in good faith under s 84A(9) of the LTSA, which in turn required us to consider, on the facts of this case, the following sub-issues:

(a) What are the duties of a SC and its advisers/agents in facilitating the process of achieving the consent requirement for a collective sale?

(b) Did the CSC breach its duties under the law, resulting in the transaction not being in good faith?

(c) Did Colliers breach its duties under the law, resulting in the transaction not being in good faith?

(d) If the CSC and Colliers breached their duties, did the respondents suffer prejudice such that an order for a collective sale should not be made?

Our analysis of the law

33 The statutory scheme for collective sales of strata developments is a potentially divisive one, as seen from previous highly-publicised cases, some of which have come before the courts. The mandatory nature of a collective sale inevitably encroaches upon a homeowner's entitlement to decide whether and when to sell his or her property and at what price. Although there is no constitutional protection of property rights in Singapore, a homeowner's enjoyment of the property and the entitlement to decide on the sale of that property is undeniably an important one that can only be derogated from strictly in accordance with the law. A homeowner may have legitimate non-pecuniary reasons for refusing to sell a property, and for such a person, "the idea of compensation in pure monetary terms may be a poor substitute" (*Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at col 609 (Assoc Prof Ho Peng Kee, Minister of State for Law) ("*Parliamentary Debates July 1998*"). Whatever views one may hold on the desirability of the collective sale regime, Parliament has quite clearly decided to provide for this statutory scheme to essentially facilitate urban

renewal (*Ng Swee Lang and another v Sassoon Samuel Bernard and others* [2008] 2 SLR(R) 597 ("*Sassoon CA*") at [5]). The Land Strata Titles (Strata) (Amendment) Act 1999 (Act 21 of 1999) which came into effect on 11 October 1999 removed the requirement of unanimous consent for a collective sale application to be made. This was in line with Parliament's aim to "*make available more prime land for higher-intensity development to build more quality housing in Singapore*" [emphasis added], and to that end, facilitate collective sales (*Parliamentary Debates July 1998* at cols 601 and 634).

34 Parliament, nevertheless, was keenly aware that the interests of minority owners had to be strictly policed. The balance that has to be carefully struck between the rights and financial interests of the majority or consenting proprietors and the legitimate rights of the minority or dissenting proprietors is at the heart of the law on collective sales. In this regard, the LTSA scheme contains the "minimum standards of conduct [imposed by Parliament to ensure] that the whole process is fair, [and] transparent" (*Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 406 (Mr K Shanmugam, Minister for Law) ("*Parliamentary Debates May 2010*")). These "minimum standards" are the statutory baseline below which the majority owners cannot descend. Built within the LTSA scheme are important safeguards to ensure that minority proprietors, who are more often than not in a vulnerable position *vis-à-vis* the consenting majority, are "adequately protected from bullying and underhand tactics as well as any potentially collusive or improper conduct on the part of any of the majority owners" (*Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Horizon Towers*") at [3]). The need for procedural fairness and transparency cannot be overridden by the wishes of the majority proprietors (some of whom may concurrently be members of the SC) or by an undiscerning reliance on the policy of urban renewal. It must be remembered that the majority proprietors who are pressing for a collective sale are not precluded from selling their properties, but are merely denied the possible financial upside that come with a collective sale and the compulsion of the minority to sell their property should the requisite consent levels be met. *Procedural fairness is thus of fundamental importance, especially in the process by which the consent levels are achieved*. It bears emphasising that the relationship and dealings between SC and its advisers must also be strictly policed and bear the test of close scrutiny. The collective sale scheme requires that the letter and spirit of the collective sale processes are observed by all who are intimately involved in the proposed collective sale, and in particular, to ensure that the minority owners have not been prejudiced (see also *Allgreen* at [77]).

The 2010 amendments to the LTSA

35 As this is the first case before this Court after the amendments to the LTSA in 2010, it would be useful for us to sketch some of the main changes to the law on collective sales since the amendments introduced by the Land Titles (Strata) (Amendment) Act 2010 (Act 13 of 2010) ("Act 13 of 2010"). The intention behind some of the key amendments introduced in Act 13 of 2010 was to build upon the amendments to the LTSA in 2007 to enhance the transparency, fairness and the clarity of the procedures that ought to be observed prior to the making of a collective sale application. These are some of the key amendments introduced by Act 13 of 2010:

(a) The role of the Board was re-conceptualised to focus on its mediatory function with the power to issue a "stop order" in contentious cases where any further mediation would not be useful, and to allow the majority owners to apply to the High Court for adjudication if they wished. This was intended to reduce the strain on the Board's resources from having to deal with protracted and complex cases (*Parliamentary Debates May 2010* at col 376).

(b) Parliament imposed stricter requirements on initiating fresh attempts to achieve a

collective sale subsequent to failed attempts. Paragraph 2(1A) of the Second Schedule to the LTSA provides that the council of the management corporation shall not convene a general meeting of the management corporation for the purposes of constituting an SC on receipt of a requisition for such a meeting unless (a) a period of two or more years has elapsed since the happening of a relevant event; or (b) the requisition is signed by at least 50% of the total number of subsidiary proprietors of the lots whose subsidiary proprietors comprise the management corporation, or by one or more persons entitled to vote in respect of one or more lots whose share value or total share value is at least 50% of the aggregate value of all the lots of the subsidiary proprietors comprising the management corporation. This percentage is increased to 80% for second or subsequent requisitions (para 2(1A)(*b*)(ii), Second Schedule to the LTSA). Paragraph 2(8) of the Second Schedule to the LTSA states when "a relevant event" occurs, and lists what are essentially circumstances where an attempt at a collective sale would fail. In instituting this safeguard, Parliament was concerned that repeated attempts at collective sales "especially frivolous ones, should be discouraged", and owners should not be harassed, worn down or subjected to attrition tactics if there was no prospect of a collective sale succeeding (*Parliamentary Debates May 2010* at col 377).

(c) Particular attention was also given to the conflicts of interests that could arise from relationships that members of SCs had with other persons. Parliament had emphasised in the debates on the amendments to the LTSA in 2007 that those amendments (introduced by the Land Titles (Strata) Amendment Act 2007 (Act 46 of 2007) ("Act 46 of 2007")) were not intended to change the substantive law regarding the duties or liabilities of SCs and their advisers and agents so that "[w]hatever the legal position is, it will remain the same" (*Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 2042 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law). Parliament clearly meant that it would not be *diminishing* the duties of SCs, their advisers or agents; in the 2010 amendments to the LTSA, Parliament also *expanded* the requirements for the disclosure of actual or potential conflicts of interest by members of SCs (para 2, Third Schedule to the LTSA) to "enhance the transparency of the sales committee election process and help other owners make a more informed decision on whom they should elect to their sale committee" (*Parliamentary Debates May 2010* at col 379). These disclosure requirements are not restricted to the election phase, but take the form of continuing obligations so that SC members have to declare any changes to their declared interests or any new conflict of interests that arise after their appointment to the chairperson of the SC within seven days of becoming aware of such facts (paras 2(3) and 2(5)(*b*), Third Sched to the LTSA).

(d) Parliament also emphasised that the statutory cooling off period (*ie*, the provision which allows a subsidiary proprietor to rescind his agreement to a collective sale agreement within five days after signing it: see para 6 of the First Sched to the LTSA) and the requirement for the collective sale agreement to be signed in the presence of a lawyer would be retained. These safeguards were necessary to ensure that "the consent that the owner gives is informed, genuine consent" (*Parliamentary Debates May 2010* at col 382). The importance of a decision to sell a home requires the subsidiary proprietors to have access to legal advice and to have sufficient time to make that decision before becoming legally bound by a collective sale agreement.

36 We should also emphasise that in line with the need for transparency and procedural propriety, the SC and its advisers and agents are expected to keep proper records of communications and of the proceedings of both SC meetings and of general meetings of the subsidiary proprietors (paras 8(3) and 9(1), Third Sched to the LTSA). The SC is also required to keep the subsidiary proprietors informed of the proceedings of its meetings by either displaying these minutes on the notice board of

the development or extending a copy to the subsidiary proprietors, as the case may be (paras 9(2) and 9(4), Third Sched to the LTSA). The present appeal brought to light record-keeping practices on the part of the CSC which were plainly lacking. We take this opportunity to remind SCs of their obligations in this regard.

What are the obligations of the SC and its advisers/agents in facilitating the process of meeting the requisite consent requirements for a collective sale?

Duties of the SC vis-à-vis the subsidiary proprietors

37 We turn now to the duties that the law imposes on the SC and its advisers (as well as agents) in facilitating the collective sale process. The SC has duties at general law (both under common law as well as equity) and under the LTSA (*Horizon Towers* at [125]). The primary statutory duty is that of good faith. Section 84A(9)(*a*) of the LTSA provides:

> (9) The High Court or a Board shall not approve an application made under subsection (1) —
>
> (*a*) if the High Court or Board, as the case may be, is satisfied that —
>
> (i) the transaction is not in good faith after taking into account only the following factors:
>
> (A) the sale price for the lots and the common property in the strata title plan;
>
> (B) the method of distributing the proceeds of sale; and
>
> (C) the relationship of the purchaser to any of the subsidiary proprietors; or
>
> (ii) the sale and purchase agreement would require any subsidiary proprietor who has not agreed in writing to the sale to be a party to any arrangement for the development of the lots and the common property in the strata title plan; …
>
> …

38 The present s 84A(9)(*a*)(i) of the LTSA is substantially the same as s 84A(9)(*a*)(i) as originally enacted, except that the primary arbiter of whether an order for a collective sale should be made was the Board and not the court (see cl 8 of the Land Titles (Strata) (Amendment) Act 1999; *Parliamentary Debates July 1998* at col 604). By enacting s 84A(9)(*a*) of the LTSA, Parliament intended to lay down clear legislative guidelines to safeguard the procedural fairness of the collective sale process before a collective sale is allowed to proceed. This was in response to the Select Committee's recommendation that the matters that the Board should take into account be spelt out in greater detail (*Report of the Select Committee on the Land Titles (Strata) (Amendment) Bill [Bill No 28/98]* (Parl 2 of 1999, presented to Parliament on 19 April 1999) ("*Select Committee Report*") at p v, para 22). The Select Committee had been cited examples of improper tactics and threats used to pressure subsidiary proprietors into consenting to the collective sale. The representors emphasised the need for "total transparency in all dealings among the owners, interested buyers, property consultants, agents and lawyers" (*Select Committee Report* at Appendix B 34). Thus, Parliament enacted s 84A(9)(*a*) of the LTSA for the Board, and now the court, to exercise a key oversight function on the transparency, procedural propriety and fairness of the collective sale process. Parliament also emphasised that the Board (and under the present s 84A(9)(*a*), the court) should take into account the interests of all owners and all the circumstances of the case, and determine that

the proposed sale was *bona fide*, at arm's length and that there was no collusion in the collective sale process before allowing the transaction to proceed (*Parliamentary Debates July 1998* at col 604).

39 The assessment of "good faith" in the transaction is determined in relation to the three factors of sale price, method of distribution of the sale proceeds and the relationship of the purchaser to any of the subsidiary proprietors. A holistic appraisal of the relevant circumstances pertaining to how the sale price, for example, is arrived at, would feature in the court's assessment of "good faith". Thus, in relation to the sale price, the court will examine "the entire sale process, including the marketing, the negotiations and finalisation of that sale price (all of which steps ought to be evaluated in the context of prevailing market conditions)" to determine if the transaction is in good faith (*Horizon Towers* at [130]). In addition, the court would have regard to what is good faith under general law, which would include an assessment of whether the SC and its advisers or agents have discharged their duties under general law (*Horizon Towers* at [131]). In *Horizon Towers*, we also affirmed (at [133]) that:

> the term "good faith" under s 84A(9)*(a)*(i) must be read in the light of the SC's role as fiduciary agent (at general law and, now, under s 84A(1A)), and whose power of sale is analogous to that of a trustee of a power of sale. Thus, in our view, ***the duty of good faith under s 84A(9)(a) (i) requires the SC to discharge its statutory, contractual and equitable functions and duties faithfully and conscientiously, and to hold an even hand*** *between the consenting and the objecting owners in selling their properties collectively. In particular, an SC must act as a prudent owner to obtain the best price reasonably obtainable for the entire development*.
>
> [emphasis in italics in original; emphasis added in bold italics and underlining]

40 We had, in *Horizon Towers*, also stated that the SC is the agent of the subsidiary proprietors in relation to the collective sale of the units in a strata development, and has the power to affect the legal relations of all subsidiary proprietors with third parties (*Horizon Towers* at [107]). The SC's power to sell a development collectively is an extraordinary power which may result in the minority proprietors losing their property without consent, in exchange for compensation which is not their preferred right. The minority proprietors are invariably placed in a vulnerable position as the SC usually comprises the very same consenting majority proprietors whose primary objective is to sell the property contrary to the former's wishes. *Given that the SC would ordinarily have an inherent inclination to sell rather than not to sell, there is an obvious need for high standards of accountability and conduct on the part of the SC vis-à-vis all subsidiary proprietors*. The SC's duties include (see *Horizon Towers* at [124]):

(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.

Of these duties, the duty of even-handedness and the duty to make full disclosure of relevant information are especially pertinent to this appeal.

(1) Duty of even-handedness

41 In *Horizon Towers* (at [136]), we said that the duty of even-handedness requires the SC to be impartial in dealing with the interests of the consenting and minority proprietors, akin to that of a trustee who has to hold an even hand between the interests of different classes of beneficiaries. We also discussed the duties of the SC in dealing with factions of proprietors with conflicting interests (at [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.*** … [emphasis in original in italics; emphasis added in bold italics]

42 Fiduciaries dealing with the interest of different classes of beneficiaries have the duty to act fairly and impartially (Paul D Finn in *Fiduciary Obligations* (The Law Book Company Limited, 1977) ("*Fiduciary Obligations*") at para 122). The learned author emphasises (at paras 122–123 of *Fiduciary Obligations*) that:

> The fairness or unfairness of a particular decision is pre-eminently a matter which can be discussed only in the context of the actual relationship in which it is taken. … But … the cases do nonetheless fall into two broad categories, and through them it can be seen what the courts mean by fairness and how they expect it to be achieved …
>
> (1) where the fiduciary, whether deliberately or not, exercises a discretion for the purpose of advantaging/disadvantaging only some of his beneficiaries; and
>
> (2) where the fiduciary, while honestly intending to act in the interests of all his beneficiaries, takes a decision which in its consequences is unjust to some of them.

The author goes on to explain, in relation to the two categories (at paras 125–133) that:

> **125**. Some beneficiaries in a particular relationship may see the benefits they expect to derive from it evaporate before their eyes because their fiduciary chooses deliberately to ignore them for the sake of others, or because he honestly believes that they can be discriminated against, or because he fails to appreciate that he must in fact serve them. ***But no beneficiary or class of beneficiaries has the right to the exclusive attention of a fiduciary if there are other beneficiaries or classes of beneficiaries. All have the right to be treated fairly as between themselves, and any decision taken with the sole purpose in mind of advantaging only some without regard to the interests of the others will always be characterised as unfair.***
>
> …
>
> **131**. In exercising a discretion a fiduciary must take into account the effect his decision will have upon his various beneficiaries. If in fact it operates unjustly upon some of them the courts

will intervene on the grounds that it is unfair, irrespective of whether or not the fiduciary himself believes that his decision is in the interests of all. The difficulty and contention arise because a decision need not necessarily be unfair even though it can be shown that a particular beneficiary has gained an advantage, or has suffered a disadvantage, for—

> [it] is obvious that a decision which is considered to be for the ultimate benefit of the estate may be for the immediate advantage of one beneficiary, and to the disadvantage of the other.

…

> **133**. ... The court arrives at its determination [of fairness] by weighing the reasons and circumstances which are said to give rise to the decision … against the consequences which the decision occasions to all of the beneficiaries, but particularly to the beneficiary aggrieved.
>
> [emphasis in original in bold; emphasis added in bold italics]

Thus, what is clear is that an SC, when faced with factions of subsidiary proprietors whose interests conflict, cannot prefer the interests of one faction without regard to the interests of the other subsidiary proprietors.

(2) Duty of disclosure

43 Another key obligation of the SC is the duty of disclosure and openness to all the subsidiary proprietors on whose behalf it acts. We held in *Horizon Towers* (at [147]) that "[a] fiduciary must disclose a personal interest as soon as a possible conflict arises, or as soon after as practicable". The objective of this obligation is to prevent a fiduciary from being influenced by an undisclosed personal interest. An "interest" may be constituted by the presence of "an actual, prospective, or possible profit [or saving or diminution of personal liability] to be made in, or as a result of, the decision he takes or the transaction he effects" (*Fiduciary Obligations* at para 472). This rule applies where the fiduciary does not have express authority to benefit himself and the conflict of duty or interest that arises is of the fiduciary's own making, and remains undisclosed when the decision is taken (*Fiduciary Obligations* at para 100).

44 Parliament's pre-occupation with the procedural fairness and transparency of the collective sale process can also be seen from the amendments made in 2007 and 2010 to the Third Schedule to the LTSA to provide for disclosure of conflicts of interest by SC members. The requirements in the Third Schedule to the LTSA have important implications because if a conflict of interest on the part of the SC is not disclosed to the subsidiary proprietors, this could taint the *bona fides* of the transaction especially if the relevant SC member played a decisive, influential or leading role in a SC's decision to enter into the transaction (*Horizon Towers* at [150]–[151]). *Vide* Act 46 of 2007, the Third Schedule was amended to provide that persons standing for election as SC members had to disclose interests "in any property developer, property consultant, marketing agent or legal firm" which could conflict with the proper performance of his functions as a SC member (see para 2(1)(*d*), Third Sched to the LTSA). However, we observed in *Horizon Towers* (at [152]) that there was no reason why a conflict of interest which arose after a member has been appointed to the SC should not be similarly subject to the same requirement of disclosure. Parliament now accepts this. In 2010, the Third Schedule was amended to expand the types of interests and circumstances that may give rise to a conflict of interest on the part of SC members (Explanatory Statement to the Land Titles (Strata) (Amendment) Bill (Bill 9 of 2010) at p 30), and to provide that conflict of interests that arise after election to the

SC also have to be disclosed (see above, at [35(c)]). The effect of breaching a requirement for disclosure of conflict of interests would ultimately depend on the significance and consequences of the breach in relation to the transaction as a whole (*Horizon Towers* at [151]).

Duties of advisers and agents of the SC

45 Marketing agents and legal advisers to the SC are agents of the SC and sub-agents of the subsidiary proprietors on whose behalf the SC acts. It is not necessary to list compendiously here the fiduciary duties that ought to be imposed on marketing agents. It suffices to say that the content and scope of the fiduciary duties imposed on marketing agents would depend on whether the particular relationship between the marketing agent and the SC bears the distinguishing characteristics of a fiduciary relationship, and whether on the facts, the marketing agent is exercising a power for its principal's benefit and in so doing is "not subject to the immediate control and supervision of [the principal] in their exercise" (*Fiduciary Obligations* at para 11; see also *Horizon Towers* at [110]–[113]). In *Horizon Towers* (at [107]), we affirmed that the SC's advisers had the duty to avoid any actual or potential conflict of interest. *Consistent with the spirit of this collective sale scheme, marketing agents and legal advisers of the SC also have duties of transparency and openness in their dealings with the SC and all the subsidiary proprietors.*

Did the CSC breach its duties under the law, resulting in the transaction not being in good faith?

46 In our view, the CSC patently breached its duty to act even-handedly as between the Consenting Proprietors and the respondents, having regard to the CSC's involvement in the manner in which the Additional Payment was offered.

47 We disagreed with Mr Kumar's argument in so far as he relied on *Allgreen* as authority for the proposition that incentive payments are not prohibited by the law irrespective of the form and manner in which such payments are offered. In *Allgreen*, this Court was concerned, amongst other matters, with whether an implied term or duty of good faith should be imposed to prohibit purchasers from offering incentive payments to minority proprietors to secure their consent to a collective sale. In this context, we stated in *Allgreen* (at [91]) that:

> 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.
>
> [emphasis in italics in original; emphasis added in bold italics]

48 The facts of *Allgreen* were materially different from those in the present appeal. In *Allgreen*, the 80% threshold had already been met before the incentive payments were offered. The purchaser offered the incentive payments to secure unanimous consent and persuade the minority proprietors to withdraw their objections before the Board (*Allgreen* at [3], [11] and [16]). Ironically, after that offer was made it was the majority proprietors (rather than the minority proprietors) who attempted to resile from the sale as they felt that they had mistakenly short-changed themselves in agreeing to a sale price "below" the market value of the property (*Allgreen* at [1]). In the present appeal, the

Additional Payment was offered to *secure and achieve* the 80% threshold. Second, the terms of the collective sale agreement and the sale and purchase agreement in *Allgreen* were such that the incentive payments did not alter the agreed method of distribution of the sale proceeds amongst the subsidiary proprietors. The incentive payments did not fall under the definition of "Sale Price" or "Purchase Price" in the collective sale agreement and the sale and purchase agreement. Those defined terms referred to the $34m bid from the purchaser, and did not include payments from the purchaser over and above that price. In contrast, in the present case, the Additional Payment would effectively result in a redistribution of the sale proceeds of the Development, inconsistent with the agreed method of distribution under the CSA. Clause 41 of the CSA provided that: [note: 59]

> The Collective Sale Price and the Disbursements shall be apportioned amongst the Vendors according to the Apportionment Method and Each Vendor shall be entitled to receive his Unit's Entitlement less the apportioned Disbursements for his Unit.

"Collective Sale Price" was defined in Schedule 1 to the CSA as "the price for the sale of the Development as set out in the [agreement entered into by the CSC with the Purchaser]" for the collective sale. [note: 60] In recital (e) of the SPA, the purchase price is referred to as $33m. [note: 61] The Contributing Proprietors agreed that the monies to be contributed to the Additional Payment would be deducted from the sale proceeds otherwise due to them under the CSA and SPA. This would alter the method of apportionment as agreed under the CSA. Thus, in this case, both the factors of sale price and method of distribution under s 84A(9)(*a*)(i) of the LTSA were engaged.

49 The Additional Payment was not an offer that was equally open to each of the Dissenting Proprietors to accept. Mr Kumar argued that the same amount was offered to the Tans as to the Hans, and it would be unworkable if the Contributing Proprietors were obliged to satisfy the demands of each minority proprietor based on what was subjectively fair to them. We emphasise that the law, in determining whether the CSC held an even hand between factions of subsidiary proprietors, is not concerned with what each subsidiary proprietor subjectively deems as a fair offer. The law is concerned with the CSC's treatment of the different factions of subsidiary proprietors. In this case, the Dissenting Proprietors did not have the equal opportunity to accept and benefit from the Additional Payment because it was effectively only offered to the Hans. The Contributing Proprietors had already taken the view that Ms Chow should not be given any incentive payment because her consent was immaterial for the purposes of meeting the 80% threshold. As for the Tans, they were asked to accept $200,000 for one of their two units, and told that they could remain a dissenting proprietor for the purposes of the other unit. On an objective view, the Tans naturally did not think that this was fair because the collective sale required them to sell both units, not one.

50 Mr Kumar argued that there was no impropriety in an SC member participating in the offer of an incentive payment in his or her capacity as a subsidiary proprietor. We were not persuaded to draw such a forced distinction on the facts of this case. All the members of the CSC with the exception of Mr Han agreed to contribute to the Additional Payment. It appeared to us that the CSC, in its undue haste to meet the deadline for the private treaty to be concluded, acted in a manner inconsistent with the duties owed to the subsidiary proprietors. To compound matters, the Additional Payment was offered to one of their own. In short, the CSC was privy to an arrangement that benefited only one of its members and furthered the interests of the consenting majority proprietors alone, and this infected the entire arrangement. The CSC members who participated in the Additional Payment allowed their individual interests as subsidiary proprietors to take precedence over their obligation to ensure an even-handed approach to the Tans and Ms Chow. Additionally, Mr Han was in breach of his duty as a CSC member in accepting an offer that was not open to the other Dissenting Proprietors. In the light of this, Mr Kumar's argument that the CSC members, in their capacities as subsidiary proprietors, had

the unfettered discretion to decide who the incentive payments should be offered to and the amount that should be offered falls away.

51 The CSC also breached its duty of disclosure, transparency and openness. The CSC was privy to the involvement of Colliers in the Contribution Agreement and the Colliers Agreement but this was not disclosed to the Dissenting Proprietors. We also note that the minutes of the CSC's meetings and the meetings of the owners did not reflect Colliers' involvement in the Additional Payment at all. The only minutes pertaining to the issue of the Additional Payment was that for the general meeting of the owners on 23 July 2012 at 7.30pm. We set out the relevant extracts from these minutes: [note: 62]

> **4. To give an update on the total number of subsidiary proprietors who, immediately before the date of the meeting, have signed the Collective Sale Agreement (CSA)**
>
> - Andy from Colliers reported that 11 subsidiary proprietors have signed the CSA. They constitute 77.41% by strata area & 80.33% by share value [because Mr Toh's consent had not yet been excluded]. Andy noted that the minimum of 80% had not been achieved. He further noted that, even if all the owners that had signed the CSA sign the SA, 1 more unit would still be required to sign both documents before the CSC is in a position to accept the offer.
>
> - The owners discussed amongst themselves as to whether or not they would contribute a portion of the sale proceeds of their units to make an additional payment to one or more of the owners that had not signed the CSA in order to get them to agree to sign the CSA and the SA. Andy emphasized that any contributions would be strictly voluntary and would be a private matter between those owners who agreed to contribute and the owner(s) receiving such contribution. In other words, no part of the purchase price of the development would be set aside to pay any owner to obtain his signature.
>
> - The owners who indicated that they would be prepared to contribute to the proposed compensation decided that their contributions should be based on the same formula as the method of apportionment of the collective sale proceeds.

The fact of Colliers' involvement in facilitating the incentive payment ought to have been disclosed by the CSC to all the subsidiary proprietors, at the very least. This was a material fact that would have revealed that Colliers had been interposed directly in the incentive payment arrangements in a manner which was not appropriate and which facilitated the CSC's breach of its duties to the proprietors, and this would have given the minority proprietors a basis on which to impugn the "good faith" of the transaction. Unfortunately, the CSC acted to the contrary, adamantly refusing to disclose the Contribution Agreement and the Colliers Agreement until ordered to do so by the Judge. We also note that para 2(3)(*b*) of the Third Schedule to the LTSA requires SC members to disclose any conflict of interest or potential conflict of interest with their duties as SC members arising from an "interest in *any contract*, whether alone or together with any of his associates" [emphasis added]. The CSC, in our view, acted in a manner that was not transparent, contrary to the spirit of the LTSA.

Did Colliers breach its duties under the law, resulting in the transaction not being in good faith?

52 We also found that Colliers breached its duty of transparency and openness owed to all the proprietors in the Development, including the Tans and Ms Chow. We think it was inappropriate for Colliers to be so intimately involved in the incentive payment arrangements as party to the Contribution Agreement and the Colliers Agreement without full prior disclosure of this role to all the

proprietors. Colliers ought to have left it to the Contributing Proprietors to make their own arrangements, instead of interposing itself into the arrangements. Further, Colliers did not disclose its role to the Tans and Ms Chow. The court was also left none the wiser as to why Colliers acted in this manner. The only witness who testified at the hearing before the Judge was the first appellant, and when cross-examined on why Colliers was interposed in the agreements for the Additional Payment, he simply stated that the Consenting Proprietors gave Colliers the mandate to approach the Dissenting Proprietors with the Additional Payment. [note: 63] This was no answer to the fact that Colliers and the CSC had breached its duties to the Tans and Ms Chow.

Did the respondents suffer prejudice as a result of the CSC's and Colliers' breaches of duty?

53 Mr Kumar argued that Ms Chow and the Tans were not prejudiced by the arrangements for the Additional Payment because they would still receive what they would be entitled to under the SPA with a sale price of $33m and there was no allegation that a price higher than $33m could have been obtained. According to Mr Kumar, the persons that suffered prejudice were in fact the Contributing Proprietors who would receive less than what they would otherwise have been entitled to from the sale proceeds, having agreed to contribute to the Additional Payment. We disagreed with Mr Kumar's narrow conception of "good faith". In assessing whether there was good faith in the transaction having regard to the sale price and method of apportionment of the sale proceeds, the court is not simply confined to an inquiry of whether the sale price was fair based on the market conditions, but the process by which the price and the consent for the collective sale was secured. Thus in *Horizon Towers*, we observed (at [131]) that:

> "good faith" in s 84A(9)(*a*)(i)(A) is not merely confined to whether the sale price is fair or not, but also how the price is arrived at. … Suppose a case where the decision of an SC is tainted by a number of its members being bribed by the purchaser, as a result of which the SC votes in favour of the sale, is [the Board]'s role confined to simply determining whether the price is a fair price and whether the SC has fulfilled its original mandate? Can [the Board] ignore facts showing that a better price could have been obtained by simply holding that the SC has fulfilled its original mandate? In our view, an affirmative answer cannot be legally correct.

Procedural fairness in arriving at the 80% threshold (or, in general, the requisite consent level) is crucial because the remaining minority proprietors would be obliged to sell their properties without having consented to the collective sale if that threshold is met. Thus the court would expect nothing less than strict compliance with the standards of accountability, fairness, openness and propriety consistent with the letter and spirit of the LTSA scheme, by the SC and its agents in facilitating the collective sale process. In the present case, we found that the process was tainted by elements of non-disclosure and lack of even-handedness on the part of the CSC, with one member of the CSC obtaining the most favourable offer and effectively, the only offer of an incentive payment, at the expense of the other minority proprietors. This amounted to an unacceptable inequality of treatment of the Dissenting Proprietors, and *a fortiori*, where a member of the CSC was favoured over the other minority proprietors. In the circumstances, the process by which the 80% threshold was achieved had been seriously tainted, and the respondents suffered prejudice as a result.

A final observation

54 We note that the public tender for the Development was launched even before the 80% threshold was achieved, and the respondents argued that this was in breach of para 7(3) of the Third Schedule to the LTSA which states:

> (3) ***After the subsidiary proprietors referred to in section 84A(1) or 84FA(2) have***

signed a collective sale agreement but before the launch for sale referred to in paragraph 11 , the collective sale committee must convene a meeting of subsidiary proprietors, of which at least 7 days' notice is given —

(*a*) to give an update on the total number of subsidiary proprietors who, immediately before the date of the meeting, have signed the collective sale agreement; and

(*b*) to provide information on the sale proposal and the sale process.

[emphasis added in bold italics]

Although para 7(3) of the Third Schedule to the LTSA does not explicitly state that the 80% threshold must be reached before a public tender is launched, it is, in our view, implicit in the opening words of para 7(3) that the requisite threshold under s 84A(1) of the LTSA should be met before the specified modes of sale under para 11 (*viz*, public tender and auction) can be launched. We observe that this irregularity is consistent with our finding that the CSC acted with undue haste and inadequate regard for the propriety of the process leading to the collective sale application. We reiterate that adherence to the procedural requirements laid down by Parliament in the LTSA by SCs and their advisers and agents is undeniably important (see also s 84A(3) of the LTSA), and if a breach of those requirements results in prejudice, an application for a collective sale would not be allowed to proceed.

Conclusion

55 For these reasons, we dismissed the appeal and ordered that the costs of the appeal be borne by the appellants with the usual consequential orders.

[note: 1] GD at [2]

[note: 2] Core Bundle ("CB") vol II Part A, p 24

[note: 3] 3rd Respondent's Case, para 9; CB vol II Part B, p 3

[note: 4] CB vol II Part A, p 10 para 9

[note: 5] AC, para 7; CB vol II Part A, p 222

[note: 6] CB vol II Part A, p 10 para 10

[note: 7] CB vol II Part A, p 232

[note: 8] CB vol II Part A, p 225

[note: 9] AC, para 8; CB vol II Part A, pp 84 and 110

[note: 10] AC, para 10

[note: 11] CB vol II Part B, p 53

[note: 12] AC, para 10

[note: 13] CB vol II Part B, p 9; AC, para 12

[note: 14] AC, para 12

[note: 15] CB vol II Part A, p 226

[note: 16] CB vol II Part A, pp 10 and 227

[note: 17] CB vol II Part B, p 7

[note: 18] CB vol II Part B, p 36

[note: 19] CB vol II Part A, p 10 para 14

[note: 20] CB vol II Part A, p 179

[note: 21] AC, para 15

[note: 22] AC, para 17

[note: 23] CB vol II Part A, p 121

[note: 24] CB vol II Part A, p 230

[note: 25] AC, para 19

[note: 26] CB vol II part B, p 38 at para 16

[note: 27] CB vol II Part B, p 72

[note: 28] CB vol II Part A, p 110

[note: 29] CB vol II Part B, p 39

[note: 30] CB vol II Part B, p 270

[note: 31] CB vol II Part B, p 259-262

[note: 32] CB vol II Part B, p 257

[note: 33] CB vol II Part B, p 269

[note: 34] CB vol II Part B, pp 263-268

[note: 35] CB vol II Part A , p 235

[note: 36] GD at [18]

[note: 37] CB vol II Part A, p 9 para 4

[note: 38] CB, vol II Part A, pp 3–4

[note: 39] Appellants' Skeletal Arguments, para 8

[note: 40] Appellants' Skeletal Arguments, para 9

[note: 41] Appellants' Skeletal Arguments, para 14

[note: 42] Appellants' Skeletal Arguments, para 22

[note: 43] Appellants' Skeletal Arguments, para 37

[note: 44] Appellants' Skeletal Arguments, paras 29-33

[note: 45] Appellants' Skeletal Arguments, para 34

[note: 46] Appellants' Skeletal Arguments, para 38

[note: 47] Appellants' Skeletal Arguments, paras 53-55

[note: 48] Appellants' Skeletal Arguments, para 64

[note: 49] Appellants' Skeletal Arguments, para 67

[note: 50] Appellants' Skeletal Arguments, para 68

[note: 51] Appellants' Skeletal Arguments, para 72

[note: 52] 1st and 2nd RC, para 37

[note: 53] 1st and 2nd RC, para 42

[note: 54] 1st and 2nd Respondents' Skeletal Arguments, para 39

[note: 55] 1st and 2nd RC, para 75

[note: 56] 1st and 2nd RC, paras 81–82

[note: 57] 1st and 2nd RC, para 71

[note: 58] 1st and 2nd Respondents' Skeletal Arguments, para 52

[note: 59] CB, vol II Part A, p 84

[note: 60] CB, vol II Part A, pp 92 and 94

[note: 61] CB, vol II Part A, p 149

[note: 62] CB, vol II Part A, p 230

[note: 63] CB vol II Part B, pp 89-90

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