Then Khek Koon and another *v* Arjun Permanand Samtani and another and other suits [2013] SGHC 213

Case Number	: Suit No 1084 of 2009 consolidated with Suit No 1085 of 2009 and Suit No 1086 of 2009
Decision Date	: 18 October 2013
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Mr Kannan Ramesh SC, Mr Eddee Ng, Ms Cheryl Koh, Ms Ho Xin Ling, Ms Yang Sue Jen (Tan Kok Quan Partnership) for the plaintiffs; Mr N Sreenivasan SC, Mr Shankar s/o Angammah Sevasamy (Straits Law Practice LLC) for the first defendant; Mr Subramanian Pillai, Ms Luo Ling Ling, Mr Leow Zi Xiang (Colin Ng & Partners LLP) for the second defendant.
Parties	: THEN KHEK KOON — JASMINE TAN KIM LIAN — ARJUN PERMANAND SAMTANI — TAN KAH GEE — RUDY DARMAWAN — WIDIA SETEONO — MARYANI SADELI

Equity – Remedies – Equitable Compensation

Damages – Recovery of Legal Costs

18 October 2013 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

Three consolidated actions

1 In these three consolidated actions, five plaintiffs seek equitable compensation against two defendants for breaches of fiduciary duties. [note: 1] All seven parties – the five plaintiffs and both defendants – are subsidiary proprietors of flats in a condominium known as Horizon Towers. Both defendants were members of the sale committee in charge of the collective sale. The plaintiffs' claims arise from the ill-fated collective sale of Horizon Towers.

2 All five plaintiffs resisted fiercely the proceedings which would have forced them to sell their homes against their will. They did so twice before the Strata Titles Board ("STB") and twice before the High Court. There was much satellite litigation also. The plaintiffs incurred substantial legal costs as a result.

3 The STB and the High Court sanctioned the collective sale over the plaintiffs' objections. Three of the five plaintiffs pursued their objections to the Court of Appeal. The appeal thoroughly vindicated the plaintiffs. The Court of Appeal upheld virtually the entirety of the plaintiffs' suite of objections, both on the facts and on the law. The Court of Appeal set aside the collective sale. The plaintiffs kept their homes.

4 All five plaintiffs – including the two who did not appeal – asked the Court of Appeal for an award of costs. The Court of Appeal made certain costs orders in the plaintiffs' favour, accepting some, but not all, of their submissions on costs. That left a margin between what the plaintiffs

recovered under the costs orders and what they actually paid to their own solicitors.

5 The plaintiffs in these proceedings seek equitable compensation equivalent to their unrecovered costs.

Plaintiff's case

6 The plaintiffs' case is that the defendants are obliged to compensate them in equity for these unrecovered costs because the two defendants were members of the sale committee which initiated the collective sale of Horizon Towers and: (1) owed them fiduciary duties in their conduct of the collective sale; (2) breached those fiduciary duties; (3) caused the plaintiffs to resist the collective sale and to participate in the associated satellite litigation; and (4) thereby caused loss to the plaintiffs being their unrecovered costs.

7 To establish the fiduciary duties and to establish the breach of those duties, the plaintiffs rely on the Court of Appeal's comprehensive judgment setting aside the collective sale in *Ng Eng Ghee and Others v Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, intervener) and Another Appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee (CA)*"). They do so in two senses. First, they rely on it as a matter of *stare decisis*: as precedent binding on me that members of a sale committee in a collective sale owe all subsidiary proprietors certain fiduciary duties. Second, the plaintiffs rely on *Ng Eng Ghee (CA)* under the extended doctrine of *res judicata* giving rise to an abuse of process: that *Ng Eng Ghee (CA)* – which considered precisely the same conduct by precisely the same defendants (amongst others) in precisely the same collective sale – precludes those defendants from denying that they owed fiduciary duties to the plaintiffs and from denying that they breached those fiduciary duties. Any attempt by the defendants to do so, the plaintiffs say, would amount to a collateral attack on the Court of Appeal's decision in *Ng Eng Ghee (CA)* and is therefore illegitimate and impermissible.

8 The plaintiffs' case, therefore, is that the only issue for me to determine in these proceedings is the *quantum* of the equitable compensation which the defendants should pay to the plaintiffs and not the liability of the defendants to pay that compensation.

Defendants' case

9 The defendants accept, at this stage of these proceedings, that I am bound as a matter of *stare decisis* by *Ng Eng Ghee (CA)* to hold that, as members of a sale committee overseeing a collective sale, the defendants owed the plaintiffs certain fiduciary duties. They do, however, reserve the right to challenge the existence of these fiduciary duties if this matter goes further. But the defendants submit that *Ng Eng Ghee (CA)* does not preclude them from seeking to prove to me that the defendants did not in fact *breach* those fiduciary duties. The defendants therefore assert in this action that they did in fact act in good faith throughout the collective sale process. They assert also that they would have been able to prove this in the collective sale proceedings if only they had been afforded the opportunity to give evidence.

10 The defendants' alternative case is that the plaintiffs' action is itself barred by the doctrine of *res judicata*, by the doctrine of issue estoppel or as an abuse of process because the court which determined each stage of the collective sale proceedings, including the satellite litigation, heard from the plaintiffs as to the appropriate order for the costs of that stage and awarded or withheld costs as each court thought appropriate. This culminated in the Court of Appeal's reasoned decision on costs in *Ng Eng Ghee and Others v Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, intervener)* [2009] 4 SLR(R) 155 ("*Ng Eng Ghee (Costs)")*.

Parties

11 The plaintiffs in Suit No 1084 of 2009 ("S1084") are Mr Then Khek Koon and his wife Ms Jasmine Tan Kim Lian. They are the joint owners of a flat in Horizon Towers. Ms Tan gave evidence before me. Mr Then did not. Together, they incurred costs of $291,850.92 in the course of the collective sale proceedings from 2007 to 2009. They recovered $118,341.30 under the costs orders made in those proceedings. Their claim against the defendants in these proceedings is therefore for the difference: $173,509.62. [note: 2]

12 The plaintiffs in Suit No 1085 of 2009 ("S1085") are Mr Rudy Darmawan and his wife, Ms Widia Seteono. They are the joint owners of a flat in Horizon Towers. Mr Darmawan gave evidence before me. Ms Seteono did not. Together, they incurred costs of $414,403.31 in the course of the collective sale proceedings. They also incurred interest of $109,699.94 on an overdraft facility used to finance their costs. [note: 3] The two sums together total $524,103.25. They recovered $186,028.84 under the costs orders made in the collective sale proceedings. Their claim against the defendants in these proceedings is therefore for the difference: $338,074.41. [note: 4]

13 The plaintiff in Suit No 1086 of 2009 ("S1086") is Ms Maryani Sadeli. She is the sole owner of a flat in Horizon Towers. She is Mr Darmawan's aunt. She associated herself entirely with Mr Darmawan's position during the collective sale proceedings and in the action before me. She did not give evidence before me. She relies on Mr Darmawan's affidavit of evidence in chief and his cross-examination to support her claim. By an oral agreement in October 2007, Mr Darmawan agreed to pay Ms Sadeli's past and future costs of the collective sale proceedings. [note: 5] She was billed costs of $123,785.98 in the course of the collective sale proceedings. She recovered $50,000 under the costs orders made in those proceedings. Her claim against the defendants in these proceedings is therefore for the difference: $73,785.98. [note: 6]

The collective sale proceedings

First SC is constituted

14 The detailed background to the collective sale of Horizon Towers is set out in full in *Ng Eng Ghee (CA)* at [6] to [74]. I will endeavour to summarise it here to the extent that it is relevant for my decision on the matters before me.

15 In October 2005, the first defendant was the chairman of the Management Committee of Horizon Towers. It was at that time that the idea of a collective sale of Horizon Towers was first mooted, though not by either defendant. The first defendant was attracted by the idea and was involved in the informal preparatory work for a potential collective sale. Starting in February 2006, First Tree Properties Ltd ("First Tree"), a property broker, made a series of presentations to increasingly-large groups of subsidiary proprietors on the feasibility of a potential collective sale. First Tree ultimately proposed a reserve price of $500m. At that price, each subsidiary proprietor stood to gain 80% more for his flat by a collective sale than by an individual sale. This margin is known as the collective sale premium.

16 On 21 March 2006, the second defendant took an option to purchase an additional flat in Horizon Towers at $1.2m. He exercised the option on 3 April 2006. [note: 7] He and his wife completed the purchase and became co-owners of the flat on 26 June 2006. Separately, on 24 March 2006, the first defendant took an option to purchase an additional flat in Horizon Towers at $1.35m. He

exercised the option on 7 April 2006. He and his daughter completed the purchase and became co-owners of the flat on 16 June 2006. Each defendant financed his purchase with bank borrowings.

17 On 23 April 2006, the subsidiary proprietors of Horizon Towers held an Extraordinary General Meeting ("EGM") to launch the collective sale process. The first defendant chaired the EGM. The second defendant was present at the EGM and played an active role in it. Neither defendant disclosed to all the subsidiary proprietors that he had purchased an additional flat in Horizon Towers. First Tree and Drew & Napier LLC ("D&N") made presentations to the subsidiary proprietors. Following the EGM, nine subsidiary proprietors formed a sale committee ("the First SC") to carry out a collective sale of Horizon Towers. The first defendant and the second defendant were among these nine. The first defendant was elected the Chairman of the First SC. On 26 April 2006, the First SC formally appointed First Tree as the sole marketing agent for the collective sale. The First SC also formally appointed D&N as its legal adviser for the collective sale.

18 In due course, a Collective Sale Agreement ("CSA") dated 11 May 2006 was presented to the subsidiary proprietors for accession. On 6 July 2006, the press reported that if the collective sale went ahead, the $500m demanded for Horizon Towers would smash the existing collective sale price records. By 20 July 2006, subsidiary proprietors representing 80.65% of the share value of Horizon Towers had signed the CSA. The defendants still did not disclose to all the subsidiary proprietors that each of them had purchased an additional flat in Horizon Towers, whether in the CSA itself, when the CSA was circulated or while it remained open for accession.

19 The plaintiffs did not sign the CSA.

20 First Tree launched the public tender for Horizon Towers in July 2006. The tender closed in August 2006 with no bids. First Tree then solicited buyers by private treaty. In December 2006, First Tree learned from Hotel Properties Limited ("HPL") that it was interested in purchasing Horizon Towers. On 3 January 2007, Vineyard Holdings (H.K.) Ltd ("Vineyard") offered $510m for Horizon Towers. This offer was circulated to all members of the First SC. On 4 January 2007, at HPL's request, a meeting took place between a representative of HPL and some of the members of the First SC including the first defendant. HPL indicated orally an interest in purchasing Horizon Towers at a price of $500m. HPL wanted to place a deposit of $5m with First SC and then take up to 30 days to consider whether to proceed with the purchase. HPL proposed that if it decided not to purchase Horizon Towers within those 30 days, the subsidiary proprietors would have to return the $5m but could keep the interest earned on it. The First SC rejected HPL's proposal but invited HPL to come back with improved terms.

21 On the same day, one of the members of the First SC, Mr Henry Lim, informed Vineyard of HPL's interest and suggested that Vineyard make a deposit of $50m as proof of its intent. Mr Henry Lim testified in later proceedings (see [50] below) that he received no response from Vineyard despite making efforts to contact Vineyard up until 16 January 2007.

22 On 6 January 2007, the First SC convened a meeting to consider the offers they had by then received and to discuss whether the reserve price should be raised above $500m due to the rising property market. A member of the First SC, Mr Bharat Mandloi, felt very strongly that the subsidiary proprietors should be consulted before accepting any offer. He gave two reasons. Both reasons were related to the rapidly-rising property market at the end of 2006 and into 2007. His two reasons were that a collective sale in January 2007 at a reserve price which had been fixed many months earlier meant that: (a) the collective sale premium had almost entirely disappeared as at January 2007; and (b) each subsidiary proprietor would no longer receive sufficient funds to buy an equivalent property as a replacement and leave surplus cash. The First SC decided not to seek a fresh mandate from the

consenting subsidiary proprietors. The first defendant said that if they did that, they were unlikely to get that mandate and the collective sale would come to an end. The remaining eight members of the First SC, including both defendants, therefore voted in favour of negotiating with HPL with a view to a sale to HPL. Although Mr Mandloi was recorded as having abstained, in fact he abruptly walked out of the meeting.

23 On 8 January 2007, First Tree invited HPL to make a formal offer. On 12 January 2007, the second defendant emailed the first defendant and the other members of the First SC. He said that although he had voted with the majority at the meeting on 6 January 2007, he did so to maintain unanimity and in light of the legal advice received. He said, further, that two points were continuing to cause him concern: (a) the terms of HPL's offer meant it could back out with little loss; and (b) the reserve price of $500m was too low in light of the changed market conditions. He therefore suggested that the First SC should protect itself by doing three things: (a) getting legal advice in writing that the First SC was entitled to accept HPL's offer as it met the reserve price and that the First SC would be exposed to claims if it did not accept HPL's offer and no better offer came along; (b) getting First Tree's opinion that HPL's offer was the best so far and the First SC should accept it; and (c) writing to all parties who had expressed earlier interest to note that none of them had followed through with a firm bid.

24 On 14 January 2007, as a result of an exchange of emails with D&N, the second defendant emailed D&N to say that he was changing his "yes" vote at the meeting on 6 January 2007 to an abstention. No other member of the First SC changed his vote.

25 On 15 January 2007, an HPL group company made an offer to purchase Horizon Towers at $500m. On 22 January 2007, the First SC issued an option to HPL's special purpose vehicle, Horizon Partners Pte Ltd ("HPPL") to purchase Horizon Towers *en bloc* ("the Option") at a price of $500m. HPPL exercised the Option on 12 February 2007. On that date, therefore, the Option became a binding agreement ("the S&P") for the sale of Horizon Towers to – and for the purchase of Horizon Towers by – HPPL, subject to its terms. One of the terms of the S&P was an express condition precedent that the STB approve the collective sale under s 84A of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("the Act").

26 The S&P imposed an obligation on the consenting subsidiary proprietors to *apply* for the STB's approval expeditiously. But it imposed no obligation on the consenting subsidiary proprietors to *obtain* the STB's consent, presumably because that was a matter not within their control, or at least not *entirely* within their control. Instead, the S&P provided simply that if the condition precedent was not fulfilled within six months from the date of the S&P – that is, on or before 11 August 2007 – the consenting subsidiary proprietors had the right, but not the obligation, to extend the deadline for up to another four months. The result was that if the consenting subsidiary proprietors applied to the STB expeditiously but the STB did not grant its approval, the S&P would lapse with no liability in damages on the part of the consenting subsidiary proprietors.

27 A general meeting of the subsidiary proprietors of Horizon Towers was held on 25 March 2007 to consider the collective sale. Lawyers from D&N attended the meeting to explain the terms and conditions of the CSA and the Option and to explain the collective sale procedure. As at the date of this meeting, subsidiary proprietors representing 82.98% of the total share value in Horizon Towers had signed the CSA. But many consenting subsidiary proprietors were unhappy about the S&P. Their concerns included the First SC's failure to: (1) keep the consenting subsidiary proprietors informed; (2) to obtain a proper valuation before granting the Option and (3) to seek a fresh mandate to sell at the original reserve price despite the changed market conditions.

28 At the time of the S&P in January 2007 the $500m which HPPL agreed to pay for Horizon Towers was the highest price ever paid in a collective sale in Singapore. But by March 2007, the steadily-rising property market meant that the consenting subsidiary proprietors would be no better off selling their flats through a collective sale than they would if they were to sell them individually. As time went on after March 2007, the price agreed with HPPL became more and more unfavourable to the consenting subsidiary proprietors. The property market continued its surge and the record set by Horizon Towers in January 2007 was broken just six months later by the collective sale of a neighbouring and comparable property.

29 The consenting subsidiary proprietors were stuck with a bad bargain. What was worse, that bargain had been made for them by someone else: the First SC. The S&P bound them to sell their flats to HPPL at a price which was below what they could otherwise achieve. But if they refused to sell their flats to HPPL, they would find themselves liable to pay substantial damages. The only way for them to escape the bad bargain without any liability was to ensure that they applied expeditiously for the collective sale order and to hope that the STB did not order the collective sale, or at least, not on or before the deadline of 11 August 2007.

Consenting subsidiary proprietors file application to STB

30 It was against this background that three members of the First SC, acting on behalf of all consenting subsidiary proprietors, filed an application to the STB on 13 April 2007 by way of STB 43 of 2007 ("STB43") to order the collective sale of Horizon Towers ("the Collective Sale Application"). The first defendant was one of the applicants. The STB's order, if granted on or before 11 August 2007, would compel the objecting subsidiary proprietors – including the plaintiffs – to sell their flats against their will. But it would also force the consenting subsidiary proprietors to sell their flats at a price which no longer met their expectations.

31 Tan Kok Quan Partnership ("TKQP") represented all five plaintiffs in opposing the Collective Sale Application. Harry Elias Partnership ("HEP") represented another group of subsidiary proprietors who were also opposed to the Collective Sale Application, but on different grounds.

32 The five plaintiffs filed substantial written objections in the Collective Sale Application on 4 May 2007. To succeed in opposing the Collective Sale Application, they had to establish that the transaction was not one in good faith within the meaning of section 84A of the Act. They alleged that this test was satisfied because:

(a) The price for the collective sale was too low and did not represent the true market value of Horizon Towers;

(b) The First SC had inadequate justification or analysis to accept First Tree's reserve price of $500m at the time it was set or at the time the First SC granted the option to HPPL, particularly in light of the rising property market;

(c) The First SC failed to obtain a proper valuation before granting an option to purchase to HPPL;

(d) The First SC should either have conducted a second tender exercise to take account of improved market sentiment since the first tender exercise failed to attract any bids or should have sought a fresh mandate from the subsidiary proprietors given First Tree's inability to secure a purchaser above the reserve price;

(e) The First SC granted an option to HPPL to buy Horizon Towers at $500m even though the basis on which the consenting subsidiary proprietors had given their mandate at that price – the opportunity to realise a collective sale premium sufficient to allow purchase of an equivalent replacement residence and leave a surplus – no longer held true in January 2007.

(f) The First SC failed to consult the subsidiary proprietors before granting an option at a reserve price which the First SC knew or ought to have known was too low.

(g) The First SC rushed the collective sale and should instead have consulted subsidiary proprietors on the method of sale and the reserve price.

(h) Certain members of the First SC or their families had purchased additional flats in Horizon Towers and did not disclose this fact to all subsidiary proprietors. This put those members of the First SC in a position of potential conflict of interest as their interest in obtaining the highest price for the collective sale might have been outweighed by their interest in achieving a quick sale.

(i) The First SC appointed First Tree as the exclusive property broker for the collective sale of Horizon Towers, apparently without properly evaluating its credentials. The First SC then relied exclusively on First Tree for information on the value of Horizon Towers and the state of the market. First Tree was in a position of apparent conflict of interest when it recommended that the First SC sell to HPPL at $500m because this came just a few days before First Tree's exclusivity came to an end.

33 I have set out at length these points which the plaintiffs made to the STB on 4 May 2007 – at the very outset of the protracted collective sale proceedings – because these were the very points which ultimately won the day in the Court of Appeal almost 2 years later in April 2009 (see [75] below). I draw specific attention to the plaintiffs' point at [32(h)] above. I do so for two reasons. First, this is the only one of the plaintiffs' nine points which is clearly associated with a fiduciary duty: in this case, a fiduciary's core duty of loyalty. All the remaining points are framed in the language of a breach of a duty to exercise care and skill, which could equally be a tortious duty at common law or a fiduciary duty in equity. Second, the plaintiffs framed this point in the language of a *potential* conflict, not an *actual* conflict. This, it will be seen, was also the basis on which the Court of Appeal in *Ng Eng Ghee (CA)* approached the issue.

First SC resigns, save for the second defendant

34 By June 2007, the consenting subsidiary proprietors' unhappiness over the S&P was mounting. Anonymous letters circulated at Horizon Towers called for the consenting subsidiary proprietors to withdraw from the CSA and to remove the members of the First SC from office. As a result, the first defendant resigned from the First SC and Ms Doreen Siow ("Ms Siow") became a sale committee member. Although this was in law simply a change in the persons constituting the First SC rather than the dissolution of the First SC and the reconstitution of a new SC, I will call this the "Second SC". The second defendant and Mr Henry Lim did not resign and continued to serve on the Second SC.

STB sets a compressed timeline

35 In light of the deadline under the S&P to satisfy the condition precedent (see [25] above), the STB held a procedural hearing on 4 July 2007 to decide whether to set a compressed procedural timeline to ensure that the Collective Sale Application could be heard and determined on or before 11 August 2007. The plaintiffs, not surprisingly, objected to a compressed timeline. Their stated ground

was that it did not allow them enough time to prepare properly their case in opposition to the Collective Sale Application. The consenting subsidiary proprietors, not surprisingly (see [29] above), took a neutral position. They left it to the STB to decide whether to fix the hearing before or after 12 August 2007 and declined to commit themselves as to whether they would or would not agree to extend the deadline under the S&P if the hearing took place after on or after 12 August 2007. HPPL was the only party whose interests would be prejudiced without a compressed timeline. Not surprisingly, it was the only party who submitted positively that the timeline should be compressed. The STB agreed. It gave directions for an expedited hearing to ensure that the Collective Sale Application could be heard and determined on or before 11 August 2007.

Plaintiffs apply for judicial review

36 All five plaintiffs applied on 12 July 2007 by way of Originating Summons No 1057 of 2007 ("OS1057") for leave to seek judicial review of the STB's decision to expedite the hearing of the Collective Sale Application. TKQP represented the plaintiffs in their application. If their application had been allowed, the timing was such that it would have been practically impossible to satisfy the condition precedent by obtaining the STB's consent on or before 11 August 2007. That result would benefit *all* the subsidiary proprietors – both objecting and consenting – by bringing the S&P to an end without any liability.

37 The consenting subsidiary proprietors were not parties to OS1057. They could not support the plaintiffs' application without breaching their obligation under the S&P to pursue the Collective Sale Application expeditiously. So they did not seek to be heard on OS1057 at all. It was only HPPL who had a real interest in opposing this application. It therefore applied successfully to intervene in OS1057. On 19 July 2007 and 20 July 2007, Tan Lee Meng J heard submissions from the plaintiffs and from HPPL on OS1057. He dismissed the plaintiffs' application. He made no order as to costs.

38 Part of the plaintiffs' claim in these proceedings is to recover equitable compensation from the defendants for the costs the plaintiffs incurred in bringing OS1057 and which costs Tan J denied them entirely.

STB dismisses the Collective Sale Application

39 The STB heard the Collective Sale Application over 6 days between 17 July 2007 and 3 August 2007. On 3 August 2007, part-way through the evidential phase, the STB dismissed the Collective Sale Application ("the 1st STB decision"): see *Doreen Siow and Others v Lo Pui Sang/Kuah Kim Choo and Others* [2007] SGSTB 3. It did so expressly and solely on the basis of a technical defect and not on the merits of the Collective Sale Application. The STB declined to award the costs of the Collective Sale Application to the objecting subsidiary proprietors because it had dismissed the Collective Sale Application on a ground which none of the objecting subsidiary proprietors had raised (at [25]).

40 Part of the plaintiffs' claim in these proceedings is to recover equitable compensation from the defendants for the costs which the plaintiffs incurred in participating in this first tranche of STB43 and which the STB declined to award them entirely.

Condition precedent is not satisfied and the S&P lapses

41 On 11 August 2007, the six-month deadline for the consenting subsidiary proprietors to secure the STB's approval of the collective sale expired. No approval had been obtained. As was their right, the consenting subsidiary proprietors chose not to extend the deadline for obtaining the STB's

approval.

42 The Second SC took the view that this meant that the collective sale had come to an end in failure. It disbanded. Everyone at Horizon Towers was happy. The plaintiffs were happy: their fight to save their homes had succeeded. The consenting subsidiary proprietors were happy: they had been relieved of any obligation to sell their flats to HPPL at a price which no longer met their expectations without breaching their contract with HPPL.

HPL sues the consenting subsidiary proprietors for $1bn

43 HPPL, of course, was unhappy: they had lost an opportunity to buy Horizon Towers at $500m. That was a price which was becoming a better and better price – from their perspective as buyers – as the property market continued its surge upwards during 2007.

44 On 23 August 2007, HPPL commenced legal proceedings by way of Originating Summons No 1238 of 2007 ("OS1238"). In it, HPPL alleged that the consenting subsidiary proprietors had breached the S&P by failing to do everything in their power to obtain a collective sale order from the STB. HPPL claimed $1bn against the consenting subsidiary proprietors collectively as damages for this breach.

High Court sets aside the STB's decision

45 HPPL's action in OS1238 had its desired effect. On 30 August 2007, the consenting subsidiary proprietors appealed to the High Court by way of Originating Summons No 1269 of 2007 ("OS1269") seeking to reverse the entirety of the 1st STB decision. They filed this appeal without exercising their right to extend the 11 August 2007 deadline under the S&P. Presumably, therefore, the consenting subsidiary proprietors continued to take the position that the S&P had lapsed while reserving to themselves the right to exercise their option at some later date to extend the deadline for fulfilment of the condition precedent.

46 Also on 30 August 2007, all five plaintiffs collectively applied to the High Court to reverse the STB's decision not to award them the costs of the first tranche of the Collective Sale Application and for an order that those costs be paid by the consenting subsidiary proprietors. Their application was by way of Originating Summons No 1270 of 2007 ("OS1270").

47 On or about 7 September 2007, a new Sale Committee ("Third SC") was constituted with one Mr Lim Seng Hoo as its chairman. The second defendant did not stay on to serve as a member of the Third SC. The Third SC granted HPPL the extension of the S&P that it wanted.

48 HPPL applied to intervene in OS1269 on 20 September 2007. On 26 September 2007, a group of 13 subsidiary proprietors (which included the first defendant) also filed an application to intervene in OS1269. The plaintiffs opposed both applications to intervene. Choo Han Teck J heard the applications to intervene. He allowed these applications on 28 September 2007. He reserved the costs of these applications.

49 On 1, 2 and 3 October 2007, Choo J heard the substantive application in OS1269. He determined it on 11 October 2007. He set aside the 1st STB decision and remitted the Collective Sale Application to the STB for a determination on the merits. He reserved the issue of the costs of OS1269 to a later date. Part of the plaintiffs' claim in these proceedings is to recover equitable compensation from the defendants for the costs which the plaintiffs incurred in connection with OS1269, including the costs of unsuccessfully opposing HPPL's application to intervene, all of which costs Choo J reserved.

STB allows the Collective Sale Application

50 The Collective Sale Application therefore returned to the STB for a second tranche of hearings in STB43. The hearing in this second tranche took place over 12 days between 16 October and 15 November 2007. The Third SC offered three members of the First SC as witnesses during this hearing. The defendants were not amongst these three witnesses. The defendants did not take any steps to offer themselves for cross-examination. The plaintiffs did not seek to compel either defendant to testify by subpoena.

51 On 25 October 2007, the group of objecting subsidiary proprietors represented by HEP (that is, the group not including the plaintiffs (see [31] above) applied to the STB for a subpoena to compel the first defendant to testify. Nobody attempted to subpoena the second defendant. The STB rejected the application on the basis that the applicants had failed to provide sufficient particulars of the first defendant's proposed testimony. This was a significant procedural decision. The Court of Appeal later found in *Ng Eng Ghee (CA)* (at [56]) that by this decision, the STB had deprived itself of key information.

52 The parties filed closing submissions in the Collective Sale Application on 23 November 2007. They filed reply submissions on 30 November 2007. On 7 December 2007, the STB granted the order for the collective sale of Horizon Towers: see *Mamata Kapildev Dave and Others v Lo Pui Sang/Kuah Kim Choo and Others* [2008] SGSTB 7 ("*Ng Eng Ghee (STB)*"). Exceptionally, even though the plaintiffs had lost *Ng Eng Ghee (STB)*, the STB did not order them to pay costs. In *Ng Eng Ghee (CA)*, the Court of Appeal reversed the substantive decision in *Ng Eng Ghee (STB)*. In *Ng Eng Ghee (Costs)*, the Court of Appeal made costs orders in favour of the five plaintiffs for their costs of this second tranche of STB43.

53 Part of the plaintiffs' claim in these proceedings is to recover equitable compensation from the defendants for the difference between the actual costs which the plaintiffs incurred in connection with this second tranche of STB43 and the costs they recovered for it under *Ng Eng Ghee (Costs)*.

Plaintiffs appeal to the High Court and lose

54 On 4 January 2008, all five plaintiffs (together with another objecting subsidiary proprietor) applied to the High Court to set aside *Ng Eng Ghee (STB)*. They did so by way of Originating Summons No 11 of 2008 ("OS11"). Also on 4 January 2008, the group of objecting subsidiary proprietors represented by HEP filed a similar but separate appeal. Their appeal was by way of Originating Summons No 10 of 2008 ("OS10"). A day earlier, a third group of three objecting subsidiary proprietors led by one Mr Lo Pui Sang filed their own application to set aside *Ng Eng Ghee (STB)*. Their appeal was by way of Originating Summons No 5 of 2008 ("OS5"). However, Mr Lo and one of his two co-plaintiffs in OS5 discontinued their application before it could be determined, leaving the third co-plaintiff to go it alone.

55 Choo J heard OS5, OS10 and OS11 on 19 March 2008, 20 March 2008 and 30 April 2008. Although the plaintiffs were represented at the outset of OS11, they soon discharged their solicitors and acted thereafter in person. Mr Darmawan appeared in person and on behalf of Ms Seteono and Ms Sadeli. Ms Tan appeared in person and on behalf of Mr Then. Both Mr Darmawan and Ms Tan put forward substantial principal and reply written and oral submissions in OS11. It is no false compliment to say that, despite the odds being stacked against them, they presented their case ably to Choo J both on the facts and on the law.

56 On 17 July 2008, Choo J upheld *Ng Eng Ghee (STB)* and dismissed OS5, OS10 and OS11. He

commented, in the course of his judgment, that if the First SC had deliberately or negligently failed to consider the Vineyard offer (see [20] above), the objecting subsidiary proprietors' recourse against the First SC was by way of separate litigation and not by attempting to set aside *Ng Eng Ghee (STB)* (see *Lo Pui Sang and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and other appeals* [2008] 4 SLR(R) 754 ("*Ng Eng Ghee (HC)*") at [17]). Choo J invited further submissions on costs but it appears that none were made. In any event, the Court of Appeal in *Ng Eng Ghee (Costs)* subsequently awarded the costs of OS11 to the plaintiffs.

57 Part of the plaintiffs' claim in these proceedings is to recover equitable compensation from the defendants for the difference between the actual costs which the plaintiffs incurred in connection with OS11 and the costs they recovered for OS11 under *Ng Eng Ghee (Costs).*

Plaintiffs appeal to the Court of Appeal and win

58 On 15 August 2008, Mr Darmawan, his wife and Ms Sadeli appealed to the Court of Appeal against Choo J's decision in *Ng Eng Ghee (HC)*. They did so by way of Civil Appeal No 120 of 2008 ("CA120"). They filed their notice of appeal through HEP but acted in person thereafter through Mr Darmawan for virtually all of CA120. Mr Then and Ms Tan did not appeal against Choo J's decision. On the same day, 15 August 2008, the objecting subsidiary proprietors represented by HEP also filed an appeal to the Court of Appeal by way of Civil Appeal No 119 of 2008 ("CA119").

59 The Court of Appeal heard CA120 and CA119 together on 3 February 2009. Mr Darmawan argued the appeal as a litigant in person and also on behalf of his wife and Ms Sadeli. Again, despite the odds being stacked against him, he presented his case ably on the facts and the law.

60 On 2 April 2009, the Court of Appeal delivered its judgment in *Ng Eng Ghee (CA)*. It allowed the appeals. The Court of Appeal accepted virtually all of Mr Darmawan's arguments (see [32] above). The Court of Appeal's decision saved the plaintiffs' homes from compulsory sale.

Court of Appeal gives the plaintiffs costs

61 Following its decision in *Ng Eng Ghee (CA)*, the Court of Appeal received and considered submissions on costs from the parties to CA119 and CA120 and from Mr Lo, Mr Then and Ms Tan as non-parties. I go into this in more detail at [259] to [265] below. On 7 July 2009, the Court of Appeal delivered its judgment in *Ng Eng Ghee (Costs*) and made certain costs orders, which I have summarised at [267] below.

The issues raised in these proceedings

Plaintiffs' case

62 The costs orders in *Ng Eng Ghee (Costs)* left the plaintiffs out of pocket. I have summarised at [11] to [13] above the precise extent of the shortfall. Table 1 at the end of this judgment shows how the plaintiffs arrived at these sums. I have left out of Table 1 – because it raises different issues – Mr Darmawan's claim of $109,699.94 for overdraft interest.

[LawNet Admin Note: Table 1 is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

63 The plaintiffs collectively rely on the holdings of law and findings of fact in *Ng Eng Ghee (CA)* to claim this sum from the defendants as equitable compensation for breach of fiduciary duties.

First defendant's case

64 The first defendant says that he is not liable to pay equitable compensation to the plaintiffs for the following reasons:

(a) As a member of the First SC, he did not owe any fiduciary duties to the subsidiary proprietors of Horizon Towers, including the plaintiffs.

(b) Even if he did, he did not breach those fiduciary duties in the collective sale of Horizon Towers because:

(i) His purchase of an additional flat in Horizon Towers was not a conflict of interest which could be a breach of fiduciary duties;

(ii) Even if it was, the first defendant made an effort to disclose the potential conflict to D&N and was not advised that he needed to disclose this purchase to the other subsidiary proprietors;

(c) The finding in *Ng Eng Ghee (CA)* that the first defendant breached his fiduciary duties was arrived at in breach of natural justice because the first defendant did not have an opportunity to be heard before those findings were made;

(d) In any event, the plaintiffs are precluded from bringing these claims as their entitlement to costs has been disposed of as a by-product of the collective sale proceedings and, in particular, in *Ng Eng Ghee (Costs)*. The first defendant therefore asserts that the plaintiffs' claims in the actions before me are barred by *res judicata* or as an abuse of process.

Second defendant's case

65 The second defendant's defence focuses on the lack of causation and failure to prove loss. He contends that:

(a) The second defendant did not breach his fiduciary duties. He disclosed his purchase of an additional unit to D&N and was not advised that he needed to disclose this to all subsidiary proprietors. He also changed his vote to one of abstention when the First SC voted on the sale to HPPL;

(b) The plaintiffs' loss was not caused by the second defendant's alleged breaches of fiduciary duties. The responsibility for the final sale to HPPL lay in the hands of the Third SC. It was the Third SC which granted an extension of the S&P to HPPL when there was no obligation to do so. After the 1st STB decision, the 11 August 2007 deadline passed without extension and it was agreed that the collective sale was at an end. The Third SC succumbed to pressure from HPPL and revived the collective sale. The second defendant contends that this broke the chain of causation between the second defendant's alleged breach and the plaintiffs' loss.

(c) In the alternative, the plaintiffs' losses are too remote to be recovered.

(d) In the alternative, the quantum of loss and damage claimed is manifestly excessive or unreasonable or includes items which were unreasonably incurred.

(e) In any event, the second defendant argues that the plaintiffs are barred by the doctrine

of *res judicata* from making any claims for costs over and above those awarded in the collective sale proceedings and, in particular, in *Ng Eng Ghee (Costs)*.

Four issues to be decided

66 I therefore have to determine the following four issues:

(a) Did the defendants owe the plaintiffs fiduciary duties?

(b) If so, did the defendants' breach their fiduciary duties to the plaintiffs?

(c) If so, did the defendants' breach of their fiduciary duties cause loss to the plaintiffs?

(d) If so, can the plaintiffs recover equitable compensation for their unrecovered legal costs?

First issue: did the defendants owe the plaintiffs fiduciary duties?

Interpretation of section 84A before Ng Eng Ghee (CA)

67 The plaintiffs based their objection to the Collective Sale Application on s 84A(9)(a)(i)(A) of the Act. At the time the Collective Sale Application was filed, that material parts of that provision stood as follows:

(9) The Board shall not approve an application… (a) if the Board is satisfied that… (i) the transaction is not in good faith after taking into account… (A) the sale price for the lots and the common property in the strata title plan . . . .

68 Until *Ng Eng Ghee (CA)*, s 84A(9)(a)(i)(A) of the Act was understood and applied as follows:

(a) The legislature's underlying intention in enacting these provisions "was to facilitate – and not to place unnecessary obstacles in the way of – collective sales": see *Ng Swee Lang and another v Sassoon Samuel Bernard and others* [2008] 2 SLR(R) 597 at [8]; *Tsai Jean v Har Mee Lee and others* [2009] 2 SLR(R) 1 ("*Tsai Jean*") at [21].

(b) There was a core meaning to the expression "good faith" as used in this section which involves "honesty or the absence of bad faith": see *Dynamic Investments Pte Ltd v Lee Chee Kian Silas and others* [2008] 1 SLR(R) 729 at [18]. Therefore an objecting subsidiary proprietor could not resist a collective sale application unless he could show outright dishonesty or the presence of bad faith in the transaction, and not merely egregious recklessness which approached but did not constitute intent. "To construe good faith in any other manner would tend to undermine the legislative intent as it would lower the threshold for objectors to cross": *Tsai Jean* at [21]. This was also how the STB understood the concept of good faith in this provision in *Ng Eng Ghee (STB)*. It found that "good faith" within the meaning of s 84A(9)(a)(i) of the LTSA simply meant "honesty, fairness and absence of unconscionable and perhaps even reckless behaviour" (at [60]).

(c) The STB and the High Court specifically rejected any suggestion that a sale committee owed to the subsidiary proprietors the same duty to act in good faith and to take reasonable care to obtain the true market value of the property which a mortgagee owes a mortgagor when exercising its power of sale: see *Tsai Jean* at [22]; *Ng Eng Ghee (STB)* at [58]; *cf Thevasan Gnanasundram & Others v Khaw Seng Ghee & Another* [2000] SGSTB 4. That duty is, of course, a less stringent duty than the duty which a trustee owes a beneficiary when exercising a power

of sale: see *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452 at [27] and the cases cited there. The understanding of s 84A typified in *Tsai Jean*, therefore, impliedly excluded any scope for a sale committee to be bound by the more onerous duty of a trustee exercising a power of sale: *cf. Ng Eng Ghee (CA)* at [121].

(d) The High Court accepted that s 84A(9)(a)(i) of the Act is not so narrow as to require the court to focus *only* on the sale price in applying the section. Section 84A(9)(a)(i) was therefore seen to permit the court to consider also an independent valuation of the property and, possibly, how the sale price had been arrived at: *Tsai Jean* at [24]. But the general approach of the High Court was that so long as the sale price was within an acceptable range from the market value of the development, the STB ought to approve the collective sale: *Tsai Jean* at [31]. Further, the market value was to be determined at the time the development was sold: a sale did not lack good faith for the sole reason that it became apparent later – for example, while the collective sale application was pending but before it was finally determined – that the sale committee could have sold the development at a higher price if they had waited longer: *Chang Mei Wah Selena and others v Wiener Robert Lorenz and others and other matters* [2008] 4 SLR(R) 385 at [33]; on appeal on other points *sub nom Kok Chong Weng and others v Wiener Robert Lorenz and others (Ankerite Pte Ltd, intervener)* [2009] 2 SLR(R) 709.

(e) The STB's role was to determine whether the proposed sale was a *bona fide* and arm's length transaction by considering the minority's objections in light of the interests of all the subsidiary proprietors and in light of the scheme and intent of the collective sale provisions of the Act, paying particular attention to: the sale price; the method of distributing the sale proceeds, ensuring 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: see *Ng Eng Ghee (STB)* at [49].

69 The old thinking outlined above kept the concept of a "transaction... not in good faith" within strict bounds so as to avoid (i) too easily defeating the statutory majority's will to sell; (ii) too easily defeating the purchaser's interest in his bargain with the statutory majority; and (iii) too easily defeating the purpose of the Act. The Act envisages a collective sale *process* which results in a collective sale *price* and ultimately, with the approval of the STB, in an actual collective sale to the purchaser. An objecting subsidiary proprietor is an unwilling seller. He therefore has a legitimate interest in both the collective sale *process* (which he has refused to participate in) and the collective sale *price* (at which his property will be monetised against his will). A consenting subsidiary proprietor, by contrast, is a willing seller and must be taken to be motivated by price. It was therefore thought that the law would go too far to vindicate an objecting subsidiary proprietor's interest in the collective sale *process* if the court were to strike down a collective sale on grounds of defective *process* alone, when the collective sale *price* was within an acceptable range from the market value of the development, assessed at the time of sale and without the benefit of hindsight. To reject the collective sale in these circumstances, it was thought, would defeat the will of the consenting subsidiary proprietors even though the price which resulted from the collective sale process provided, within an acceptable margin, a fair monetary exchange for the property rights of both the objecting and the consenting subsidiary proprietors. Cited in support of this approach was the scenario of the property market falling after the collective sale price was agreed: should the consenting subsidiary proprietors be deprived of their bargained-for price simply because of defects in the collective sale process in circumstances where the objecting subsidiary proprietors would receive fair compensation for their property rights? If the defective process had caused the objecting subsidiary proprietors any loss, the thinking was, they retained such recourse as the substantive law permitted them against those responsible for the defective process and could pursue that recourse without depriving the consenting subsidiary proprietors of their bargain (see *Ng Eng Ghee (HC)* at [17]).

70 So the key finding by the STB in the Collective Sale Application was that the sale price agreed by the First SC for Horizon Towers was within an acceptable range from the market value of Horizon Towers in January 2007, assessed at the time of hearing without the benefit of hindsight: see *Ng Eng Ghee (STB)* at [87], [103]. This finding was crucial on the old approach. Choo J upheld that approach and that finding on appeal to the High Court: *Ng Eng Ghee (HC)* at [16].

Interpretation of section 84A in Ng Eng Ghee (CA)

71 The Court of Appeal's closely-reasoned textual, historical and policy-based analysis of s 84A of the Act in *Ng Eng Ghee (CA)* therefore came as an epiphany. It revealed that the STB, the High Court and the profession had misunderstood the scope and operation of that section. Although the Court of Appeal accepted that the legislative intent of s 84A was to facilitate collective sales, it also made emphatically clear that the legislation did not decree that *price* is everything: *process* is equally important, particularly for objecting subsidiary proprietors and not only in the narrow sense previously understood. It is significant that the Court of Appeal had evidence of the market value of Horizon Towers at the time the First SC granted the option to purchase to HPPL, examined that evidence (*Ng Eng Ghee (CA)* at [44]) but expressly declined to make a finding whether the sale price agreed by the First SC with HPPL was or was not within an acceptable range of the market value in January 2007. Instead, the Court of Appeal expressly rested its decision on its finding that the defects in the *process* had depressed the price, not on any finding that that depressed price was beyond an acceptable margin below the market value at the time of sale.

72 The Court of Appeal's reasoning in *Ng Eng Ghee (CA)* proceeded as follows. A sale committee in a collective sale has the power to affect the legal relations of all the subsidiary proprietors with third parties. It is therefore an agent for the subsidiary proprietors. This gives rise to a fiduciary relationship between a sale committee and the subsidiary proprietors (at [108]). At the very outset of the collective sale process, before the statutory majority is achieved, there is no clear separation between those who consent to the collective sale and those who object. The sale committee is therefore an agent for *all* the subsidiary proprietors (at [104] and [108]). The content of its fiduciary duty then is simply to obtain the requisite consent for the collective sale, to appoint competent professional advisers and to avoid any potential conflict of interest (at [107]). Once the statutory threshold is reached and there is a clear separation between those who consent and those who object, a sale committee's role becomes that of an impartial agent acting for both groups: an agent obliged to hold an even hand between them (at [107]). These fiduciary duties prohibit a sale committee from acting against the interests of the subsidiary proprietors (at [110]). The content of the sale committee's fiduciary duties to the consenting subsidiary proprietors is derived from the substantive law supplemented, to the extent that the law permits derogation, by the contractual provisions of the collective sale agreement (at [116]). The objectors are not of course parties to or bound by the collective sale agreement (at [117]). So the content of the sale committee's duties to the objecting subsidiary proprietors arises under the substantive law alone. Because a sale committee always represents the interests of all the subsidiary proprietors, its fiduciary duties are akin to the fiduciary duties of a trustee exercising a power of sale (at [122]). It must exercise its power of sale in the interests of all the subsidiary proprietors as a body (at [123]). A sale committee must therefore act as a prudent owner to obtain the best price reasonably obtainable for the entire development (at [133]). As such, there is no point of time in a collective sale where a sale committee may act solely in the interests of any group of subsidiary proprietors, whether they are consenting or objecting to the collective sale (at [107]).

73 The duty of good faith that a sale committee owes to the subsidiary proprietors is a broad one. The Court of Appeal held at [131] – [133]:

131 In our view, "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. The collective sale agreement is governed by the common law. Its formation, validity, expiry and renewal are subject to the common law. The duties of the [sale committee] are subject to the substantive law (common law and equity) to the extent that they have not been supplanted by the [Act]. 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 STB's role confined to simply determining whether the price is a fair price and whether the SC has fulfilled its original mandate? Can the STB 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. It is not correct because Pt VA of the LTSA does not abrogate or purport to abrogate all substantive law principles. In our view, therefore, in considering whether there is good faith in the transaction, regard should be had to what is good faith at substantive law.

132 In *Dynamic Investments*… the High Court reviewed several English cases involving the meaning of "good faith" in specific statutory contexts… and concluded that the "core meaning" of "good faith" under s 84A(9) of the LTSA involved just "honesty or absence of bad faith" (at [17]) … However, the meaning of good faith is always contextual….

133 In our view, 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 substantive 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… The issue before this court is whether the [STB] made errors in law in holding that the SC acted in good faith in the transaction in selling the Property to HPL at $500m in the manner and at the time it did, having regard to all the circumstances that might have had a bearing on the price of [Horizon Towers].

74 The fiduciary duties which a sale committee owes the subsidiary proprietors as a body include (at [124] and [134]):

(a) A duty of loyalty and fidelity;

(b) A duty of even-handedness;

(c) A duty to avoid any conflict of interest;

(d) A duty to make full disclosure of relevant information; and

(e) A duty to act with conscientiousness.

75 In the specific factual context of the collective sale of Horizon Towers, the Court of Appeal found that the First SC owed the following specific fiduciary duties to all of the subsidiary proprietors:

(a) A duty to increase the prospects of obtaining the best price by exercising due diligence in appointing a competent property agent to market the property and negotiate with potential purchasers;

(b) A duty to follow up on all expressions of interest and offers that result from its marketing efforts;

(c) A duty to try and create competition between interested purchasers where reasonable to obtain the best sale price;

(d) A duty to inform itself of matters relevant to the decision to sell the property and take advice from appropriate experts on when and at what price to sell the property;

(e) A duty to obtain an independent valuation prior to settling on the final sale price, particularly where the market is in a state of flux;

(f) A duty to wait for the most propitious timing for the sale in order to obtain a best price. A sale committee should not settle for the reserve price or the market value of the property if there is a reasonable basis to believe (*ie* with the benefit of independent expert advice) that a better price may be obtained within a reasonable time frame in the future;

(g) A duty to disclose to all subsidiary proprietors any personal interest on the part of its members that *might* conflict with the duty to obtain the best sale price, either prior to the appointment of the member having the interest (in the case of pre-appointment interests) or well before the sale committee makes a decision to sell the property (in the case of post-appointment interests); and

(h) A duty to seek fresh instructions or guidance from the consenting subsidiary proprietors from whom it draws its mandate whenever there is reasonable doubt as to the proper course to adopt.

Court of Appeal's holdings of law are binding

76 I am bound by this part of the decision of the Court of Appeal in *Ng Eng Ghee (CA)*. Both defendants accept that to be the case, while reserving the right to argue to the contrary if this matter goes on appeal. I am therefore constrained to hold that the defendants as members of the First SC stood in the position of an agent, and therefore a fiduciary, to the subsidiary proprietors (including the plaintiffs) and owed them all of the duties laid out at [75] above.

77 I cannot, however, ignore the fact that it was only in *Ng Eng Ghee (CA)* that it became clear that a sale committee is an agent of all the subsidiary proprietors from the time of its appointment. The fiduciary relationship between a sale committee and the subsidiary proprietors revealed in *Ng Eng Ghee (CA)* is not the traditional principal/agent paradigm and is a novel one. This observation will acquire significance in my discussion of equitable compensation.

Second issue: did the defendants' breach their fiduciary duties to the plaintiffs?

Court of Appeals found multiple breaches by the First SC

78 On the facts of *Ng Eng Ghee (CA)*, the Court of Appeal held that the First SC breached its duties to the subsidiary proprietors in the following specific ways (at [210(b)]):

(a) failing to act with due diligence and transparency in appointing a property agent;

(b) failing proactively to follow up on the Vineyard offer and other expressions of interest;

(c) failing to use the Vineyard offer as leverage in negotiations with HPL;

(d) failing to obtain advice from an independent property expert before the sale;

(e) acting with undue haste in selling to HPL in a surging property market when there was no legal or moral obligation to do so;

(f) deciding to sell to HPL even though the defendants were in undisclosed potential conflict of interest because of their undisclosed purchase of an additional unit each;

(g) failing to consult (or even notify) the consenting subsidiary proprietors to seek further instructions despite the surge in the market after the consenting subsidiary proprietors had given their mandate to sell at the reserve price.

79 The plaintiffs argue that these findings of breach of duty bind the defendants, as they were members of the First SC. The defendants, on the other hand, argue that these findings do not bind them because the Court of Appeal made these findings in breach of natural justice: the defendants had no opportunity to be heard in CA120 or in the proceedings giving rise to it. The defendants argue therefore that the plaintiffs must prove breach in this consolidated action as an essential element of their claim. To that end, the defendants led substantial evidence in this action to satisfy me that they did not breach their fiduciary duties. [note: 8] This evidence was not available in CA120 or in STB43 which gave rise to CA120. The defendants' case is that if this evidence had been available, the Court of Appeal might well have made different findings on breach than it did in *Ng Eng Ghee (CA)*. Therefore, argue the defendants, I can and should make my own findings whether they had breached their duties. In response, the plaintiffs say that the defendants had every opportunity to come clean and give evidence in STB43 chose not to do so. Therefore, the plaintiffs say, the defendants cannot try now belatedly to rectify the consequences of their deliberate choice.

80 I have no hesitation in rejecting the defendants' allegation that the Court of Appeal denied them natural justice in CA120. I do so for the following reasons, which I first summarise and then expand upon:

(a) The Court of Appeal was well aware of the importance of direct evidence from the two defendants. It would not, therefore, have made findings against the two defendants which were essential for its decision in the absence of such evidence.

(b) The only finding that the Court of Appeal made against the defendants – and the only finding that was necessary for its decision – is that the defendants were in *potential* conflict of interest. That finding was perfectly open to the Court of Appeal on the evidence before it.

(c) As for the other breaches of fiduciary duties, the Court of Appeal did not attribute those breaches to specific members of the First SC.

Court of Appeal knew the importance of hearing from the defendants

81 The Court of Appeal said expressly that the evidence of the first defendant was key information in the collective sale proceedings when it held that the STB had erred in shutting it out (at [56]):

> An STB is not a court of law. Its key duty is to ensure that there is good faith in a given collective sale. *Its findings of fact are critical*. Yet, by refusing to subpoena Arjun Samtani [the first defendant], *the Horizon Board effectively deprived itself of key information*, for example,

pertaining to Arjun Samtani's involvement in the preliminary steps prior to the commencement of the collective sale, his reasons for the purchase of the additional unit at a significant point immediately preceding the sale process and, vitally, his precise role as well as influence on the other SC members in the sale decision. Instead, as an unhappy compromise, the Horizon Board irresolutely indicated that the objectors could file another application with the necessary details. No such application was eventually filed given the constraints of time.

[emphasis added]

82 Having noted the STB's error in arriving at its decision without this key information, the Court of Appeal is hardly likely to have fallen itself into the error of arriving at *its* decision without this key evidence. It did not. As will be seen, the Court of Appeal had sufficient material before it to make all the findings of fact against the First SC which the Court of Appeal considered were necessary for its decision.

83 The Court of Appeal did not make its findings of breach *in vacuo*. It made its findings after the lower tribunals had heard from the First SC. Other members of the First SC were cross-examined and their evidence was in the record. The Court of Appeal therefore had access to ample oral and documentary evidence which allowed it to make each of the findings of breach by the First SC set out in [78] above, notwithstanding that the defendants elected to remain silent. The defendants cannot even plausibly argue that the Court of Appeal breached the rules of natural justice in arriving at these findings, with one possible exception.

Court of Appeal was concerned with potential conflict

84 That one possible exception is the Court of Appeal's finding in [78(f)] above. An argument that the Court of Appeal denied the defendants natural justice in respect of this finding would be plausible if the Court of Appeal had found that the defendants were in *actual* conflict of interest in taking the decision to sell. But the Court of Appeal made no such finding. As the plaintiffs themselves point out in their closing submissions, [note: 9] the Court of Appeal's decision rested not on a finding that the defendants were in *actual* conflict of interest but on a finding that the defendants were in *potential* conflict of interest, unmitigated by disclosure of that potential conflict to all subsidiary proprietors.

85 This is apparent on the face of the Court of Appeal's reasoning.

86 First, the Court of Appeal held that the STB had erred in law in looking for evidence that the defendants were in *actual* conflict of interest because the relevant question was whether the defendants were in *potential* conflict of interest. The Court of Appeal first set out at length cogent reasons why equity focuses on *potential* conflict rather than *actual* conflict (at [137] – [145] under the heading "Duty to avoid any potential conflict of interest") and the importance equity places on the duty of full disclosure (at [146] – [152]). The Court of Appeal then went on to say (at [200]):

> In respect of the [STB's] findings [of no actual conflict and on disclosure]… the Horizon Board has found as a fact that the SC members who purchased additional units were not in a position of a conflict of interest because it was apparently also in their interest to sell their units at the best price in order to obtain the highest profit. We have at [188] above doubted the logic and the truth of this finding. However, we do not need to overrule it as a finding of fact. It is a sufficient basis for the appeal to succeed on this point that, in our view, the Horizon Board… applied the wrong legal test for conflict of interest by focusing on actual conflict. As set out above at [138]–[145], the correct question to ask was whether there was a *possible* conflict of interest arising out of the additional purchases of units…

[emphasis in original]

Having relied on this error of law – amongst others (the full list is at *Ng Eng Ghee (CA)* at [197]) – to reverse the STB's decision, it is scarcely arguable that the Court of Appeal made a finding that the defendants were in *actual* conflict of interest, when it expressly held that that finding was unnecessary to decide the case before it and when the necessary evidence was not in the record of appeal.

87 Second, when the Court of Appeal assessed both defendants' failure to give evidence, it was in the context of a *potential* conflict of interest and their failure to *disclose* that potential conflict of interest (at [189]):

> Arjun Samtani [the first defendant] and Tan Kah Gee [the second defendant] elected not to testify to explain their failure to disclose their additional purchases to the other original SC members or to the subsidiary proprietors. Even Henry Lim (who was one of only two original SC members who testified before the Horizon Board…) thought that disclosure of the ownership of the new units was *necessary*. (William Kwok also did not disclose his purchase of an additional unit when he became a member of the SC in February 2007; we recognise, however, that his ***potential*** conflict of interest cannot be a basis for impugning the good faith of the decision to sell to HPL since that decision was made before he joined the SC.) The subsequent attempt (in or around April 2007) by the original SC's solicitors to ascertain the position of the original SC members in relation to any ***potential*** conflicts of interest also demonstrated that the solicitors eventually thought this was a relevant concern. For completeness we should point out that Arjun Samtani claimed in his 30 April 2007 letter to the original SC's solicitors that he had disclosed his extra unit in response to an earlier query from the solicitors, but if this is true then it is equally puzzling that neither Arjun Samtani nor the solicitors disclosed this in turn to the other SC members or the subsidiary proprietors. As it turned out, the other subsidiary proprietors only found out about the additional units in May 2007, after the application to the Horizon Board for the collective sale of Horizon Towers had been filed.
>
> [emphasis in italics in original; emphasis added in bold italics]

88 Third, the Court of Appeal was very careful in its use of the terms "potential conflict of interest" and "actual conflict of interest" in *Ng Eng Ghee (CA)*. It refers to "potential" or "possible" conflict of interest at [107], [139], [150], [165], [168(h)], [173], [188], [189], [192] and [210(b)(iv)] of the judgment. These are the key passages where the Court of Appeal is expressing its own view on why it is only *potential* conflict which is relevant for the inquiry under s 84A of the Act. By contrast, it refers to "actual" conflict of interest at [138], [142], [144], [145], [197(c)] and [200] of the judgment. All of these references appear where the Court of Appeal emphasises why it is the *potential* conflict and not the *actual* conflict which ought to be the subject of the inquiry under s 84A of the Act.

89 It is true that at [188] and [190] of *Ng Eng Ghee (CA)*, the Court of Appeal appears to draw an inference, reinforced by the defendants' silence, that an *actual* conflict of interest motivated them to push for a quick collective sale to HPPL and therefore to accept the bird in the hand instead of pursuing the two in the bush. However, these two passages cannot be read in isolation and out of context. When these passages are read in context and read in light of the points I have made in [84] – [88] above, it is clear that these two passages are mere observations, intended to illustrate precisely why an undisclosed *potential* conflict of interest is capable of showing that a collective sale transaction is not a transaction in good faith within the meaning of s 84A of the Act, and not intended to be findings of fact as to what actually happened in the collective sale of Horizon Towers..

90 It is indisputable that the defendants were in *potential* conflict of interest. The Court of Appeal made no finding beyond that that. That finding alone sufficed for the Court of Appeal's approach to setting aside the collective sale order. That finding suffices also to establish the defendants' liability in principle for equitable compensation in the action before me. As the plaintiffs point out, the evidence led by the defendants which showed that they were not in *actual* conflict of interest because they were under no financial pressure to sell their additional units was therefore beside the real point. [note: 10] That evidence cannot establish a defence to the plaintiffs' claim and is therefore not something I need to take into consideration.

Court of Appeal made findings against the First SC as a body

91 In order for the Court of Appeal in *Ng Eng Ghee (CA)* to set aside the collective sale order, it was unnecessary for it to go on and attribute individual responsibility for the breaches of fiduciary duties to any specific member of the First SC. In *Ng Eng Ghee (CA)*, the question was whether the First SC breached its fiduciary duties, and in particular, the core duty of fidelity. To set aside the collective sale order, the Court of Appeal needed to find only that the First SC *as a body* breached its fiduciary duties and not that any particular fiduciary had breached his duty. The reason for this is explained in Alastair Hudson, *Equity and Trusts* (Routledge-Cavendish, 7th Ed, 2013) at p 864:

> Where there is more than one trustee, those trustees are expected to act jointly… [I]t would be expected that liability for breach of trust would attach to the trustees jointly and severally, no matter which of them was directly responsible for the breach of trust. The trustees are jointly liable in that each of them is equally liable for any breach of trust, subject to what is said below [the qualifications discussed by the author are not relevant for our purposes]. …
>
> The reason for all of these trustees being held to be jointly and severally liable for the breach of trust is that to do otherwise would encourage trustees to take no responsibility for the decisions made in connection with their trusteeship. That is, it would be attractive to individual trustees to take no part in the management of the trust so that they could claim later not to have been responsible for any decision or action. It has been held that encouraging the trustees to act in this way would be an 'opiate on the consciences of the trustees', whereas it is in the interests of the beneficiaries to have all of the trustees taking an active part in the management of the trust so that they exercise control over one another [citing *Bahin v Hughes* (1886) 31 Ch D 390, at 398 per Fry L]. Thus all of the trustees are made equally liable for any loss to the trust.

92 In *Bahin v Hughes* (1886) 31 Ch D 390, one of the questions was whether a non-acting trustee could seek an indemnity from an acting trustee for a breach of trust by the co-trustee. The non-acting trustee testified that he had not been willing to mortgage trust assets, but did so at the insistence of the co-trustee. The English Court of Appeal found that both trustees were equally responsible for the breach of trust which resulted. It disallowed the non-acting trustee's application for an indemnity from the acting trustee. Fry LJ held (at 398):

> In my judgment the Courts ought to be very jealous of raising any such implied liability as is insisted on, because if such existed it would act as an opiate upon the consciences of the trustees; so that instead of the cestui que trust having the benefit of several acting trustees, each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties. Such a doctrine would be against the policy of the Court in relation to trusts.
>
> In the present case, in my judgment, the loss which has happened is the result of the combination of the action of Miss Hughes with the inaction of Mr. Edwards. If Miss Hughes has

made a mistake, it was through simple ignorance and want of knowledge, and if on the other hand Mr. Edwards had used all the diligence which he ought to have done, I doubt whether any loss would have been incurred. The money might have been recovered before the property went down in value.

93 The Court of Appeal therefore did not need to make any findings which were essential for its decision against specific individuals. If it had needed to do so, it would undoubtedly have been alive to the rules of natural justice and would have allowed those individuals a right to be heard in their own defence.

94 The plaintiffs now sue the defendants as members of the First SC. Personal liability of each individual member of the First SC was not at issue in CA120 and is not an issue before me. Rather, the defendants are held liable for the actions of the First SC not because of personal default but because they are jointly liable with all its other members. The First SC was undoubtedly heard in the collective sale proceedings which culminated in CA120. There was no breach of natural justice.

Defendants' submission of no breach is an abuse of process

95 Of course, the Court of Appeal arrived at these conclusions on breach of fiduciary duties not for the purposes of determining the liability of the First SC to compensate the plaintiffs in equity but to determine the only question which was before the Court of Appeal: whether, within the meaning of s 84A(9)(a)(i)(A) of the Act, the collective sale transaction was not in good faith after taking into account the sale price.

96 The issue which then arises for me is whether the Court of Appeal's findings on that question of mixed fact and law preclude the defendants from asserting before me that the First SC was not in breach of its fiduciary duties. The position on issue estoppel is summarised in Spencer Bower and Handley, *Res Judicata* (LexisNexis, 4th Ed, 2009) at p 103:

> A decision will create an issue estoppel if it determined an issue in a cause of action as an essential step in its reasoning. Issue estoppel applies to fundamental issues determined in an earlier proceeding which formed the basis of the judgment.

97 The *dicta* of Diplock LJ (as he then was) in *Thoday v Thoday* [1964] P 181 CA (at 197-198) was quoted with approval in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 ("*Thrasyvoulou*") at 295-6:

> The particular type of estoppel relied upon by the husband is estoppel *per rem judicatam*. This is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, *transit in rem judicatam*. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped *per rem judicatam*. This is simply an application of the rule of public policy expressed in the Latin maxim 'Nemo debet bis vexari pro una et eadem causa.' In this application of the maxim, 'causa' bears its literal Latin meaning. The second species, which I will call 'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are

conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

98 The plaintiffs do not, however, rely on *res judicata* or *issue estoppel*. They cannot, because it is clear that the defendants were not parties to CA120 in their capacity as members of the First SC. They were parties only in their capacity as consenting subsidiary proprietors and even then only because the respondents in CA120 were nominal respondents nominated by the sale committee to represent all consenting subsidiary proprietors under the terms of the CSA. The plaintiffs' case, instead, is that the defendants are precluded by the extended doctrine of *res judicata* from challenging the finding in *Ng Eng Ghee (CA)* that the First SC breached its duties. [note: 11]

99 The extended doctrine of *res judicata* precludes, as an abuse of process, a party from pursuing a claim or a defence for the purpose of mounting a collateral attack upon a final decision made by a court of competent jurisdiction in earlier proceedings when that party had the full opportunity to contest the decision in the earlier proceedings: see *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529 at 541. The extended doctrine of *res judicata* forms part of Singapore law: see *Lee Hiok Tng (in her personal capacity) v Lee Hiok Tng and another (executors and trustees of the estate of Lee Wee Nam, deceased) and others* [2001] 1 SLR(R) 771 at [25]; *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 at [62]; and *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [19].

100 The extended doctrine of *res judicata* does not require that the parties to both suits be the same. That must be so: the whole point of the extended doctrine of *res judicata* is to avoid an unnecessary and undesirable proliferation of proceedings relating to the same subject-matter: see the speech of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100. To hold otherwise would allow a plaintiff with a cause of action against a number of severally-liable defendants to bring successive separate actions against each defendant until he got the desired result. To permit that would lead to a multiplicity of proceedings, the possibility of inconsistent findings of fact and would fail to achieve finality in litigation.

101 In my view, it is an abuse of process within the extended doctrine of *res judicata* for the defendants now to deny that they were in breach of their fiduciary duties as members of the First SC. Each of the Court of Appeal's findings set out at [78] above was an essential step for it to arrive at its decision to set aside the collective sale order. I accept the plaintiffs' submission that the defendants had every opportunity to put their side of the story forward before the STB, before Choo J in OS11 and before the Court of Appeal in CA120, either through the persons having the carriage of those proceedings or separately of their own initiative. They chose not to do so. I have no doubt that they did not do so because, by the time the Collective Sale Application was filed in April 2007, it was clear that the collective sale was a very bad bargain indeed for all subsidiary proprietors. It was no longer in the self-interest of any subsidiary proprietor, including the defendants, for the collective sale to succeed. But that makes no difference. Whether the defendants' failure to put their side of the story forward in the earlier litigation was the result of an innocent oversight, a negligent omission or a deliberate tactical choice, the result is the same: they are precluded from trying to put their side of the story forward now.

102 The Court of Appeal set aside the collective sale order because it was satisfied that the First SC's breaches of fiduciary duties meant that the collective sale was not a transaction in good faith after taking into account the sale price within the meaning of s 84A of the Act. Although it arises in a different context, the question before me on breach of fiduciary duties is the same question which the Court of Appeal considered and answered in CA120. The defendants' invitation to me to decide afresh whether they were in breach of their fiduciary duties is in fact an invitation to me to ignore findings of fact by the Court of Appeal which were essential to its decision in CA120. That invitation is an abuse of process. I am unable to accept it. I am therefore bound by the decision in *Ng Eng Ghee (CA)* to hold that the defendants were in breach of their fiduciary duties to the plaintiffs.

Third issue: did the defendants' breach of their fiduciary duties cause loss to the plaintiffs?

Equitable compensation and causation

103 The parties have referred to the plaintiffs' claim as a claim for "damages" throughout their pleadings and the proceedings. But the plaintiffs' statement of claim – drawing on the Court of Appeal's judgment in *Ng Eng Ghee (CA)* – is founded upon breaches of duties by the defendants as fiduciaries. [note: 12] Damages at common law is not a remedy available in equity for a breach of fiduciary duties. The appropriate equitable remedy is equitable compensation (see *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] SLR 631 ("*QAM*") at [32] – [33]).

104 In *QAM*, I considered the position of a fiduciary who breaches his core duties of honesty and fidelity. I began by repeating Millett LJ's caution in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16C ("*Mothew*") against indiscriminately treating every breach of duty by a fiduciary as a breach of fiduciary duty. An award of equitable compensation to restore the trust property to its original state or as compensation for a breach of the core fiduciary obligations of honesty and fidelity stands on a different footing from an award of equitable compensation for breach of a fiduciary's equitable duties of skill and care.

105 I set out in full what Millett LJ said in *Mothew* (at 17G-H):

> Although the remedies which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context is in my opinion a distinction without a difference. Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.

106 I then went on in *QAM* to review the authorities on equitable compensation and arrived at certain conclusions as to the principles on which equity awards equitable compensation for breaches of the core duties of honesty and fidelity. I summarise those conclusions below:

> (a) The deterrent function of equitable compensation means that the common law principles of causation, foreseeability and remoteness do not "readily" apply to equitable wrongdoers: *In re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 at 215; *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049 at [35]; *Firstlink Energy Pte Ltd v Creanovate Pte Ltd and another action* [2007] 1 SLR(R) 1050 at [85].

(b) In one class of cases, therefore, equity holds a breaching fiduciary liable to pay equitable compensation without regard to the principles of causation, foreseeability and remoteness including even the need for fundamental "but for" causation: *Brickenden v London Loan & Savings Company of Canada* [1934] 3 DLR 465 ("*Brickenden*") (at [16]).

(c) There is another class of cases in which equity holds a breaching fiduciary liable to pay equitable compensation only if the "but for" test of causation is satisfied: *Target Holdings Ltd v Redferns (a firm) and Another* [1996] 1 AC 421 ("*Target Holdings*") at 432E and 434C. That is what the word "readily" in the statement of principle in [106(a)] above signifies: *QAM* at [50].

(d) I did not have to decide in *QAM* what constituted the dividing line between the *Brickenden* class of cases and the *Target Holdings* class of cases.

(e) Where a case falls within the *Target Holdings* class of cases, and but-for causation is accordingly essential for liability to pay equitable compensation, the burden of proving but-for causation rests on the plaintiff: *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR(R) 633 at [27].

1 0 7 *Brickenden* and *QAM* were cases in which a fiduciary in a well-established category of fiduciaries committed highly culpable breaches of his irreducible core fiduciary obligations of honesty and fidelity. A fiduciary's duties of skill and care, prudence and diligence do not form part of the irreducible core of a fiduciary's obligations: *Spread Trustee Co Ltd v Hutcheson and others* [2012] 2 AC 194 at [165] citing with approval the judgment of Millett LJ (as he then was) in *Armitage v Nurse* [1998] Ch 241 at 253-254.

108 The result of the foregoing analysis is that:

(a) Any fiduciary's liability for breaches of his duties of skill and care and of prudence and diligence are subject to the doctrines of foreseeability, causation and remoteness: Mothew.

(b) A fiduciary who is in one of the well-established categories of fiduciaries and who commits a culpable breach of his core duties of honesty and fidelity is liable to pay equitable compensation even if the object of those duties is unable to prove but-for causation: *Brickenden*.

(c) A fiduciary who is in one of the well-established categories of fiduciaries and who causes loss to the trust property as a result of an innocent breach of his fiduciary duties is not liable to reconstitute the trust property unless the object of those duties is able to prove at least a but-for causal connection between the breach of fiduciary duty and the loss to the trust fund: *Target Holdings.*

Do the plaintiffs have to prove but-for causation?

109 The question now is whether the plaintiffs' claim against the defendants falls within the *Brickenden* class of cases (where but-for causation is not essential for liability) or the *Target Holdings* class of cases (where but-for causation is essential for liability). I consider in this section only the scope of the fiduciary relationship between the sale committee and the *plaintiffs*, as *objecting* subsidiary proprietors. The analysis of the sale committee's relationship with the *consenting* subsidiary proprietors will be quite different, with the position overlaid with contract (see *Ng Eng Ghee (CA)* at [116]).

Fiduciary's equitable duties of care and skill, diligence and prudence

110 Of the catalogue of breaches by the First SC identified by the Court of Appeal (see [78] above), there is only one breach which is framed as a breach of the core fiduciary obligation of honesty and fidelity. That is the finding that the sale committee decided to sell to HPPL even though the defendants were faced a potential conflict of interest which remained, at that time, undisclosed to all subsidiary proprietors. All of the other breaches found in *Ng Eng Ghee (CA)* were framed in the language of *negligence*. They are breaches of a fiduciary's duties of care and skill, diligence and prudence. *Mothew* is authority that the defendants' liability to pay equitable compensation for these breaches is subject to all of the principles developed by the common law. These include foreseeability, causation and remoteness.

Fiduciary's equitable duty of honesty and fidelity

111 As far as the breach of the core duty of honesty and fidelity is concerned, there was no suggestion by the plaintiffs before the Court of Appeal, and therefore there is no finding by the Court of Appeal, that the defendants failed to act honestly. I am concerned therefore only with a breach of a fiduciary's core duty of fidelity.

112 In my view, the defendants' breach of their duty of fidelity falls within the *Target Holdings* line of cases. The plaintiffs must therefore establish but-for causation in order to succeed. I arrive at this conclusion for a number of reasons.

113 First, *Ng Eng Ghee (CA)* makes clear that a sale committee's relationship with the objecting subsidiary proprietors is not a classic principal/agent relationship. Instead, it is a *sui generis* and modern analogue of agency which differs in significant respects. The Court of Appeal itself acknowledged in *Ng Eng Ghee (CA)* that a sale committee's "agency" relationship does not have all of the features of a classic principal/agent relationship (at [104]). By way of example, the irreducible core of any principal/agent relationship is a principal who consensually confers actual, implied or ostensible authority upon the agent and an agent who has the ability, by acting within the scope of his authority, unilaterally to engage the principal's civil liability. A sale committee's relationship as agent for the objecting subsidiary proprietors now has its foundation in statute (see *Ng Eng Ghee (CA)* at [105]) and has neither of these hallmarks. An objecting subsidiary proprietor never consensually confers any authority upon a sale committee. And a sale committee has no power unilaterally to negotiate with potential purchasers on behalf of the objectors, unilaterally to compel the objectors to sell their flats to the purchaser or otherwise unilaterally to engage the objectors' civil liability in contract to do so. A sale committee's only power under the statutory scheme is to make application to the STB to approve and order the collective sale. And a sale committee cannot even do that unless the statutory majority necessary for the application has been reached. So it is only in this broad sense that a sale committee is the analogue of an agent because it "has the power to affect the legal relations of all the subsidiary proprietors with third parties" (*Ng Eng Ghee (CA)* at [104]).

114 Second, the Court of Appeal did not hold that this *sui generis* agency relationship constitutes a sale committee an *actual* trustee of its power of sale for the subsidiary proprietors or that a sale committee's duties are *identical* to those of a trustee exercising a power of sale. Instead, it held that a sale committee's duties "are *akin* to those of a trustee with a power of sale" [emphasis added] (at [121]), that "it must exercise the power of sale granted to it *in the same way* as a trustee of his power of sale" [emphasis added] (at [123]) and that its "power of sale is *analogous* to that of a trustee of a power of sale" [emphasis added] (at [133]). It is true that the Court of Appeal refers on occasion to a sale committee *as* a trustee (see for example the heading immediately before [118] and in [124]) in a collective sale rather than as the *analogue* of a trustee. But I do not read these references as the Court of Appeal resiling from its position that a sale committee's fiduciary duties to objectors are *analogous* to those of a trustee exercising a power of sale rather than *identical* to those

duties. I say this for two reasons.

(a) A sale committee cannot be a trustee of a literal power of sale because a sale committee has no power of sale in the same sense as a trustee who holds a power of sale conferred by a settlor. A trustee holds legal title to trust property and can therefore can dispose of the trust property unilaterally, without impediment. A sale committee holds legal title to nothing – not even the common property – and cannot dispose of anything unilaterally. As I have said above, all it can do is to make application to the STB for a collective sale order, and even that, only when the statutory majority is achieved.

(b) The Court of Appeal in *Ng Eng Ghee (CA)* held that because a sale committee "is the agent of the subsidiary proprietors collectively, there is no point at which the [sale committee] may act solely in the interests of any group of subsidiary proprietors, whether they are consenting or objecting proprietors." The sale committee must therefore hold an even hand between the interests of the consenters and the objectors from the time that their interests are differentiated (see [107]; and also [116]). But a sale committee must of necessity work throughout a collective sale process actively and directly *against* the desires and interests of those subsidiary proprietors who do not wish to sell their flats. The sale committee will act against those subsidiary proprietors' interests when it solicits signatures for the collective sale agreement in order to reach the statutory majority and trigger the condition precedent to force the objectors to sell their flats. It will act against those interests when it negotiates with potential purchasers to set a price at which to force the objectors to sell their flats. And it will act against those interests when it takes out and pursues to its conclusion a collective sale application, arguing against the objections of the objectors – no matter how strenuous and heartfelt their wish to save their homes – and obtains a collective sale order to force them to sell their flats against their will. In doing all of these things, the sale committee will be acting exclusively in accordance with the desires and interests of those who wish to sell and contrary to the desires and interests of those who don't. If a sale committee were in fact an *actual* trustee instead of an *analogue* of a trustee, and even if it carried out all of these acts honestly, it would by doing so be in clear and actionable breach of its core fiduciary duty of fidelity. That cannot have been the intent of the Court of Appeal or of the statutory scheme under which a sale committee operates.

115 Third, the defendants' breach of the duty of fidelity was an innocent breach. While the defendants undoubtedly put themselves in a position of potential conflict by purchasing an additional flat each and undoubtedly failed to make the necessary full and proper disclosure to all subsidiary proprietors of their potential conflict, they equally took no steps to hide their additional purchases:

(a) The first point, of course, is that each bought his second flat in his own name (albeit with a co-purchaser) and not through nominees or corporate vehicles. That indicates to me that each of them saw no reason to hide their purchases. The plaintiffs suggested in cross-examination that the first defendant that he tried to hide his purchase of his second flat by using his son as a nominee. It is true that that was the original intention, but in the event, it was the first defendant who was the registered legal co-owner of the flat together with his daughter upon completion on 16 June 2006.

(b) D&N, as solicitors to the First SC, was tracking new purchases of units in Horizon Towers in the second quarter of 2006. Their purpose was to inform each new subsidiary proprietor personally about the CSA and to invite them to sign it. Thus, an email string between D&N, First Tree and all members of the First SC dated 6 June 2006 includes each defendant by name in the list of recent purchasers of flats Horizon Towers. Further, on 31 May 2006 [note: 13] and on 6 June 2006, [note: 14] D&N wrote to each defendant and his co-purchaser as co-owners of their

new flat in Horizon Towers to inform them about the CSA and to invite them to sign it.

(c) On 12 June 2006, D&N circulated to all members of the First SC and to First Tree an updated status list showing, at serial numbers 18 and 116 of that list, each defendant by name as the co-purchaser of a flat pending completion.

(d) Both defendants' ownership of their respective additional flats was reflected in the list of consenting subsidiary proprietors dated 6 July 2006 circulated to the First SC. [note: 15] Mr Lawrence Eu, a member of the First SC, gave evidence that he was aware of the first defendant's purchase of a second flat from this list. [note: 16]

(e) On 11 July 2006, D&N corresponded with the first defendant's conveyancing solicitors to clarify the exact date of completion and registration of the first defendant and his daughter as the new owner of their recently-purchased flat.

(f) The second defendant's evidence was that he disclosed the additional purchase in May 2006 when he asked D&N about the consequences for him in a collective sale if his tenant refused to vacate his second unit. [note: 17] I accept the second defendant's evidence.

(g) The second defendant's evidence was that he had told Mr Then, one of the plaintiffs in S1084, of his intention to purchase another flat in Horizon Towers in view of the potential collective sale. [note: 18] Mr Then did not testify to rebut this. I accept the second defendant's evidence.

(h) The second defendant's evidence was that Ms Sadeli, a realtor and the plaintiff in S1086, showed him a flat in Horizon Towers for him to consider purchasing. Ms Sadeli did not testify to rebut this. I accept the second defendant's evidence.

116 A year later, in April 2007, there was further correspondence with D&N on this issue. It is undoubtedly true that April 2006, not April 2007, is the point in time when the defendants could and should have made full and proper disclosure of their potential conflict to all subsidiary proprietors. But I find that this correspondence in April 2007 casts relevant light on the defendants' continuing state of mind from April 2006 right up to that point. On 30 April 2007, D&N advised the first defendant on disclosure as follows:

> Our view on this point is that as far as the relevant legislation is concerned, only the relationship between the purchaser and the proprietors is in issue for considering if the transaction is in good faith. Whether any SC member has more than one unit is not relevant and neither yourself nor Kah Gee are likely to be under a duty to disclose that you purchased additional units before the first EGM. However, there is nothing wrong, if you or Kah Gee so wish, to disclose this to prevent allegations being made against either of you or against the other members of the SC. Do let us know. [note: 19]

This letter affords the defendants no defence for their failure to make full and property disclosure in April 2006. But this letter and the advice in it supports the defendants' assertion that they did not hide their purchases of additional units and were reliably advised – even as late as April 2007 – that they were unlikely to have any legal *obligation* to make formal, full and proper disclosure of their purchase of the additional units to the subsidiary proprietors. Neither the defendants nor D&N can be faulted for this view of the law in April 2006 and April 2007: as I have said above, the true extent of a sale committee's fiduciary duties to the subsidiary proprietors was revealed only as a result of the

Court of Appeal's decision in *Ng Eng Ghee (CA)* in April 2009. All of this indicates to me that the defendants' culpability is at the lower end of the scale.

Conclusion on whether the plaintiffs have to prove causation

117 In conclusion, I hold that the fiduciary relationship between a sale committee and the body of subsidiary proprietors is a novel one. It is far-removed from the paradigm fiduciary relationship between a trustee and a beneficiary and other well-established categories of fiduciaries. Further, I find that the breach of the duty of fidelity by the defendants was an innocent breach at the lower end of the scale of culpability. A sale committee's relationship with subsidiary proprietors is therefore outside the *Brickenden* class of cases and within the *Target Holdings* class of cases. As such, a subsidiary proprietor who seeks equitable compensation from a sale committee for breach of the fiduciary duty of fidelity must establish a causal link between the sale committee's breach of *that* fiduciary duty and the subsidiary proprietor's loss.

118 The remainder of the defendants' breaches are breaches of a fiduciary's duties of care and skill and diligence and prudence. It is clear that the plaintiffs must establish all of the usual common law requirements – including foreseeability, causation and remoteness – to recover equitable compensation for these breaches (see [105] above).

The defendants' liability for the plaintiffs' unrecovered costs

Whether the defendants' breach caused the plaintiffs' loss

119 The plaintiffs' submission on causation is simple: if not for the First SC's breaches of its fiduciary duties, the defendants would not have felt compelled to commence or resist any of the legal proceedings in which they incurred the unrecovered costs. I find that that submission is not borne out by the evidence.

120 It is essential to distinguish between cause and effect. To succeed, the plaintiffs must show that the breaches of fiduciary duty by the First SC *caused* the plaintiffs to object. Put another way, the plaintiffs must show that if the First SC had not breached their fiduciary duties, the plaintiffs would not have objected to the Collective Sale Application. The plaintiffs cannot succeed in this action if the true position is that they were resolved to object to the collective sale and it was pursuing that resolve which led them to discover the First SC's breaches. In that scenario, the plaintiffs' decision to object came before – and therefore cannot be caused by – the eventual grounds found to support the objection. That is so even if those very same grounds were the reason that the Court of Appeal set aside the collective sale order.

121 For the reasons set out below, I find that the plaintiffs would have resisted the collective sale in any event, even if the First SC committed no breaches of its duties.

Breach of core duty of fidelity could not be a but-for cause

122 I deal first with the defendants' breach of their core fiduciary duty of fidelity. That breach is their failure to make full and proper disclosure to all subsidiary proprietors of their potential conflict of interest. Although it was each defendant's purchase of an additional flat which put the defendants in a potential conflict of interest, those purchases were not in themselves breaches of duty. The breach of the duty of fidelity was the failure to make disclosure.

123 But assume that the defendants *had* made full and proper disclosure to all subsidiary proprietors

of their purchases at the EGM in April 2006. What would have happened? The plaintiffs would *still* have objected to the collective sale application. Indeed, disclosure would have entrenched the plaintiffs' objection on this ground rather than dissipated it. The only difference that disclosure would have made is that their objection would be based on the defendants' admission rather than on the plaintiffs' suspicion. That shows that the defendants' breach of their duty of fidelity by making proper formal disclosure of their additional purchases cannot be a but-for cause of the plaintiffs' decision to object and for the costs they incurred in doing so.

124 The only remaining breaches of fiduciary duties by the defendants are breaches of the equitable duties of care and skill, diligence and prudence. I have held (at [118]) that the plaintiffs must establish an unbroken chain of causation leading from these breaches to the unrecovered legal costs which they now claim. This they have failed to establish.

Position of Mr Darmawan and his wife

125 Mr Darmawan gave evidence to explain his and his wife's reasons for objecting to the collective sale. Mr Darmawan's testimony made clear to me that – to his credit and unlike some of the consenting subsidiary proprietors – he saw his home first and foremost as a home and not as just another asset to be monetised. That clarity of vision enabled Mr Darmawan the moral high ground of a consistent position of principle from the very beginning to the very end of the entire collective sale process.

126 Mr Darmawan explained to me his thought process when the collective sale was first mooted. His initial reaction was neutrality: [note: 20]

> Okay. Sorry, your Honour, as I explained, it was a whole host of reasons that my wife and I had to discuss. We just moved into the unit. We bought it about a year or two before they commenced the en bloc process.
>
> We just started our family. I had a young son. It was a hassle to move in. I did some renovation. It was also a hassle to have to move out so soon.
>
> So, after our discussions with my wife – you see, you said I was – or I am an experienced banker, so I see things in pro and con [sic]. Right? The pro was the hefty premium. It was exciting at the time, but the cons were it will be a hassle for me to move. I just moved in. Therefore, on the balance of things, we decided to just go with the flow.
>
> If they want to make the collective sales successful, let them be and I'll just go with it and I will contribute to success of it by not objecting to it.

127 The fact that Mr Darmawan was initially attracted by the 80% premium that he stood to gain from a collective sale but nevertheless was not prepared – even before he started to have doubts about the collective sale process – to sign the CSA [note: 21] confirmed to me that he saw his home as something he would not voluntarily agree to sell. This I find remained Mr Darmawan's view, even after the statutory majority was reached and the First SC filed the Collective Sale Application.

128 It was at this point that Mr Darmawan changed his mind from neutrality and decided to object to the collective sale. Mr Darmawan's evidence was that he changed his mind in March or April 2007, after the EGM (see [17] above). [note: 22] However, there was no evidence in March or April 2007 that the First SC had breached any of its duties in the collective sale process. The plaintiffs discovered the evidence of these breaches only in May 2007 after discovery in the first tranche of

the Collective Sale Application (*Ng Eng Ghee (CA)* at [18]). Counsel for the plaintiffs, Mr Kannan Ramesh SC ("Mr Ramesh") relied on this during his opening statement, where he contended as follows: [note: 23]

> The reason why the plaintiffs resisted the en bloc application was because of the conduct of the various individuals which was *discovered in the process of litigation*, and as a result, the *plaintiffs dug in and they sought to establish that the transaction was tainted by bad faith*.
>
> …
>
> … The basis for resistance arises from matters that came to our knowledge, came to our knowledge *in the course of the litigation process* as to the conduct of specific members of the sale committee.
>
> [emphasis added]

129 Mr Darmawan admitted that he did not know that the defendants had bought additional units at the time he decided to object. [note: 24] He had "received rumours that there were additional purchasers [sic]" [note: 25] but he agreed in cross-examination that he would not have changed his mind to object based on rumour. [note: 26] This was despite the fact that it was the plaintiffs' case that the principal concern at that time was the conflict of interest arising from these additional purchases. [note: 27] If Mr Darmawan was not aware of the existence of this conflict at the time he decided to object, how could the breach of the duty to disclose a potential conflict of interests have caused Mr Darmawan to object to the collective sale by actively resisting the Collective Sale Application from the time it was filed? The plaintiffs provided no satisfactory answer to this question.

130 The only outward indication of a breach of fiduciary duty in March/April 2007 was the fact that the First SC had not consulted the consenting subsidiary proprietors about increasing the reserve price before agreeing the S&P with HPPL. Mr Darmawan testified that this was one of his grounds for objecting. [note: 28] However, Mr Darmawan's own evidence is that he learned that there was something wrong with the First SC's decision-making on this issue only during a meeting at TKQP's office. [note: 29] The purpose of this meeting was to discuss the grounds on which the plaintiffs and the other objecting subsidiary proprietors could object to the collective sale. In other words, the decision to object had already been made and the plaintiffs were now seeking the grounds to support their objection. This meeting was the first discussion of the potential evidence at their disposal which would allow them to successfully mount an objection to the collective sale. Mr Darmawan admitted as much: [note: 30]

> Q: And the reason for doing all this was to see whether there were valid grounds to object to the sale, am I right?
>
> A: Yes.
>
> Q: So the reason was to oppose the sale, am I right?
>
> A: Yes.

131 Mr Darmawan testified that the actions of the First SC led the plaintiffs to conclude that it had breached its duties in the collective sale process. But even then, he explained that his motivation in

relying on those breaches was the desire "to defend our homes". [note: 31]

132 Mr Darmawan's position that his home was not for sale at any price continued throughout his resistance to the Collective Sale Application. When asked why he filed the judicial review application to challenge the STB's expedited timeline, he testified that "it's not a fight to recover one or two dollars. It's a fight to save my home". [note: 32] In *Ng Eng Ghee (Costs)*, Mr Darmawan told the court that the plaintiffs had been "engaged in a legal battle… *in order to prevent their homes from being force-sold.*" [emphasis added]. [note: 33]

133 The point was put to him that the First SC's breaches of duty had benefited him and the other plaintiffs because the result of the breaches was not only that they got their unwavering wish to save their home from being force-sold, but also that they could enjoy the significant capital appreciation of their homes which resulted from the surging property market from the end of 2006 onwards. Mr Darmawan, to his credit, again emphasised that it was never a question of money. He had been fighting not to get more money but for him, his wife and family to continue living in their home: *[note: 34]*

> So if anyone is to ask me, you should be happy because after the setting aside of the collective sale, the price or the value of your homes all have risen, I would say, yes, but *the **only** benefit to me would be the setting aside of the collective sale allows me to continue living in my home*. I managed to save my home from being [force-sold].
>
> But if anyone is going to ask me, "Yeah, so really you make profits, you must be happy that the value, the price of your home has gone up", I would say no, because *I have no intention to take any profit out of my home. I intend to live in this place.*
>
> …
>
> … The **only** benefit out of setting aside of the collective sale is I get to continue living at Horizon towers. This is what I wanted to complete in terms of my answer to your Honour.
>
> [emphasis added in italics and bold italics]

134 I find that in his own words, Mr Darmawan objected to the collective sale because he "was really afraid of losing [his] home", [note: 35] and *not* because the defendants acted in breach of their fiduciary duties. Mr Darmawan decided to object first and then looked for, and found, reasons or grounds for that objection later. There is no causal link between the defendants' breach and the costs which Mr Darmawan incurred in resisting the Collective Sale Application.

Position of Ms Tan and her husband

135 Ms Tan gave evidence to set out her position and that of her husband on the collective sale. She testified that her intention all along was to fight for her home. She explained her situation thus: [note: 36]

> For me, I did not want to sell.
>
> …
>
> It's because of my own personal situation, as in my family situation, and before we had bought

this place, we had told everyone, okay, you can design your own room and have your own space and all that, and to be frank, I have got two stepkids, so it will not be easy to sort of replicate that same thing elsewhere and we had all settled down in quite a harmonious fashion, so that was the reason why we thought, you know, we don't want to move away, but if the law forces us, 80 per cent wants to sell, we accepted that we had to move, we're not going to object with no reasonable basis.

136 The upshot of Ms Tan's testimony is that her main purpose in objecting to the Collective Sale Application was to keep her home. The only function of the defendants' breaches of fiduciary duties was to provide her the grounds to mount her objection to the sale and to achieve her main purpose. The First SC's breaches were not the but-for cause of Mr Then and Ms Tan's objections.

Position of Ms Sadeli

137 Ms Sadeli gave no evidence. Mr Darmawan sought to give evidence on her behalf. The causation inquiry I have to undertake involves an analysis of each plaintiff's *subjective* intention. That requires direct, non-hearsay evidence from each plaintiff of their thinking process throughout the collective sale process and litigation. I have no direct, non-hearsay evidence on which to find that Ms Sadeli's decision to incur the costs of objecting to the Collective Sale Application was caused by the defendants.

138 Even if I were to take Mr Darmawan's evidence into account in assessing Ms Sadeli's subjective state of mind, that would lead me to the same conclusion for Ms Sadeli as I have found for Mr Darmawan and for the same reasons: that she objected to the collective sale because she viewed her home too as not being for sale and that she found the grounds for her objection in the course of pursuing the decision to object.

Need to focus on correct causal inquiry

139 It is, of course, true that the plaintiffs could not have succeeded in blocking the collective sale if the First SC had not breached its fiduciary duties. But it does not follow from that that it was the First SC's breach that *caused* the plaintiffs to incur costs in objecting to the Collective Sale Application. The correct causal inquiry is whether the plaintiffs *would* have incurred the costs of resisting the Collective Sale Application if the First SC had not breached its fiduciary duties. The causal enquiry does not ask whether the plaintiffs *could* have resisted the Collective Sale Application if the defendants had not breached their fiduciary duties. Given that the plaintiffs' primary purpose was, and always had been, to fight for their homes, the answer to the correct causal inquiry is clearly yes. The evidence as a whole points to the fact that there was no causal link between the loss which the plaintiffs allegedly suffered and the defendants' breach of fiduciary duty. There is no sense in which the plaintiffs can claim that, but for the defendants' breach, they *would* not have objected to the Collective Sale Application.

140 Mr Ramesh's argument to the contrary involves, with no disrespect intended, sleight of hand. Instead of posing the relevant causal question, he posed a different question involving a different casual inquiry. This is clear from the plaintiffs' opening remarks, the following aspect of which was emphasised during trial: [note: 37]

> It is evident that if these breaches had not been committed, the Plaintiffs *could* not have objected to the en bloc application.
>
> [emphasis added]

Judicial review application

141 My analysis is fortified by considering OS1057. Tan J's finding in the judicial review application is a useful starting point. Tan J made no order as to costs. On Mr Darmawan's own evidence, this was because Tan J considered the application an attempt to delay matters past the long stop date for the collective sale order in the S&P. [note: 38] In other words, Tan J found that the plaintiffs' judicial review application was a tactical move designed to forestall the collective sale by ensuring that the S&P expired before the STB could hear and determine the Collective Sale Application.

142 It should be noted that at the time of OS1057, the plaintiffs were unaware of the defendants' failure to disclose the additional purchases and the resulting potential conflict of interest. It does not make sense, therefore, for the plaintiffs to argue that it was the defendants' breach of the duty to disclose potential conflicts of interest which caused them to commence OS1057. The causal link between the defendants' breach of duty and the plaintiffs' decision to file OS1057 is, at best, tenuous. The plaintiffs say that the defendants initiated it all. They lay the costs for this judicial review application at the feet of the defendants (see [38] above). But it was the plaintiffs who took this step to file the judicial review application: a decision which Tan J held to be tactical.

Novus actus interveniens

143 Even if the plaintiffs had been able to establish some form of causal link between the defendants' breach of fiduciary duties and their alleged loss, I find that HPPL's decision to commence proceedings claiming $1bn against the consenting subsidiary proprietors and the Third SC's reaction of extending the deadline to obtain the STB's approval broke the chain of causation. All claims for unrecovered costs after August 2007 are not caused by the defendants' breaches of their fiduciary duties of care and skill, diligence and prudence.

144 On 11 August 2007, the S&P with HPPL expired with no remaining obligations on the consenting subsidiary proprietors' part. The consenting subsidiary proprietors were under no duty to extend the S&P. They could have walked away. The collective sale would have fallen through. There would have been no need for the plaintiffs to continue their resistance to the Collective Sale Application. They would have incurred no further costs. Mr Darmawan accepted that this was the correct understanding of the consenting subsidiary proprietors' obligations under the S&P: [note: 39]

> A: Based on my understanding of the option or the sale purchase agreement [sic], the option not to extend or to extend was in the hand of the sellers or, in that case, would be the third sales committee.
>
> Q: So they could decide not to extend, am I right?
>
> A: Yes. And I was hoping they did not extend.
>
> Q: They would decide not to extend?
>
> A: Yes.

145 As mentioned above at [44], on 23 August 2007, HPPL filed OS1238 seeking $1bn in damages against the consenting subsidiary proprietors. I am satisfied from the evidence of Mr Lim Seng Hoo, the chairman of the Third SC, that the fear of potential liability under that application is the only reason the Third SC revived the S&P and extended in HPPL's favour the deadline to secure a collective sale order. HPPL's lawsuit and the Third SC's response were *novus actus interveniens*. It

could not have been foreseen that HPPL would sue the consenting subsidiary proprietors. It could not be foreseen that they would claim $1bn in damages. It was this unforeseeable act which weighed on everybody's mind and caused the unforeseeable extension of the S&P. Mr Lim explained the circumstances in which the decision to extend the S&P had been made as follows: [note: 40]

> A lot of consenting owners actually on the Raffles – the first meeting at the Holiday Inn Park View were actually standing up, some were like, almost crying saying, "I'm an old person, I'm retired and I can't take a suit", many of them were just quite in despair.
>
> And then they were forming a lot of groups and saying "I'm going to sue you" and "We're going to sue each other" and the whole thing was chaotic. If you went in for the suit [by HPPL] in such disunity, there's no way we will win because we're going to sue each other and we would probably be – it's unprecedented to be sued, but I think we can't win a court case in that kind of circumstances against someone like HPPL.

146 Mr Lim testified that he was aware that there was no legal obligation to give an extension of the S&P to HPPL. Rather, he testified that it was "the suit [filed by HPPL] it makes everything different". [note: 41]

147 It should be noted that the Third SC consulted their lawyers, Tan Rajah and Cheah LLP ("TRC"), on their obligation to extend the S&P and also on the pending suit filed by HPPL. Ms Siow voted against the extension of the S&P. She testified that this was because "the contract was written in such a way that it would have lapsed" [note: 42] and allowing it to lapse instead of extending it would have been the right thing to do. [note: 43] Ms Siow clearly understood the legal position in relation to the S&P and was not intimidated by HPPL's suit. There was no suggestion that TRC had been remiss in their duties to explain the legal implications of both the HPPL lawsuit and the S&P. The decision to extend the S&P did not flow from the First SC's decision to sign the S&P or from a misunderstanding about the legal effect of the S&P. HPPL's claim was a new and independent factor. Mr Lim agreed that the real cause for the extension was "overall" because of HPPL's claim. The collective sale proceedings had come to a natural end before HPPL's application was filed. But for that application and the extension it extracted from the Third SC, the collective sale proceedings would not have revived and the plaintiffs' further costs would not have been incurred. This was *novus actus interveniens*.

148 Mr Darmawan must be taken to have accepted this, for this was the very basis of his application to the Court of Appeal in *Ng Eng Ghee (Costs)* that HPPL be jointly liable for costs. He argued that the collective sale was over after the S&P expired and after the Second SC had decided not to extend it. It was Mr Darmawan's own submission that the S&P had been revived because of the "threat of lawsuits from the Interveners". [note: 44] In his further submissions on costs before the Court of Appeal, Mr Darmawan characterised the proceedings after the 1st STB decision as follows: [note: 45]

> A sale that had ended, was revived by the HPPL's lawsuit. What transpired between the CSPs and HPPL had had the effect of dragging the minority objectors back into the ring.

149 Ms Tan's submissions before the Court of Appeal seeking costs against HPPL made similar points to Mr Darmawan's. She stated that the majority owners had refused to extend the S&P, and it was "noteworthy that they subsequently exercised the option to extend in September 2007, in the face of lawsuits from the purchaser". [note: 46] She also characterised the proceedings as follows: [note: 47]

The "*on again, off again*" en bloc was due to HPPL's $1 billion contract action against the majority owners for breach of contract.

[emphasis in original]

150 It does not now lie in the plaintiffs' mouths to claim that the filing of HPPL's application did not cause the revival of the S&P and, in turn, cause the continued collective sale proceedings after 27 August 2007.

Fourth issue: can the plaintiffs recover equitable compensation for their unrecovered legal costs?

151 Even if I am wrong and the plaintiffs could prove causation, I find that the plaintiffs are barred, both as a matter of law and on the facts of this case, from claiming their unrecovered costs from the defendants as equitable compensation. The plaintiffs argue that they are entitled to recover these costs from the defendants because they have an independent cause of action against the defendants for breach of fiduciary duty. That is an oversimplification of the law. My analysis of the cases which follows at [187] – [257] below shows that an independent cause of action is a necessary, but is not a sufficient, pre-requisite.

152 Before I turn to the cases, however, it is necessary to understand the conceptual and practical underpinnings of an award of costs under the procedural law.

How the procedural law views costs

The indemnity principle

153 The incidence of costs in civil litigation is governed by the indemnity principle. The indemnity principle gives the winning party in civil litigation an indemnity in respect of his costs from the losing party, subject always to an overriding discretion vested in the court. The indemnity principle is therefore made up of two component rules: (a) a cost-shifting rule; and (b) a quantification rule.

154 The cost-shifting component of the indemnity principle dictates that the costs of civil litigation should ordinarily follow the event, the "event" being the outcome of the litigation: O 59 r 3(2) of the Rules of Court (Cap 322, R5, 2006 Rev Ed). But costs which have been shifted must also be quantified. The quantification component of the indemnity principle dictates that the winner is entitled to recover a sum which indemnifies him for the fees and disbursements he has to pay his own solicitors.

Policy factors underlying the indemnity principle

155 The indemnity principle makes the vindicated winner whole for the costs of what he has shown, by the court's judgment, to be unmeritorious litigation. It therefore serves to compensate the winner, rather than to punish the loser for his original wrongdoing. Exceptionally, the quantification component of the indemnity principle can be used to punish the loser for his misconduct of the litigation itself: *Ng Eng Ghee (Costs)* at [7].

156 In that sense, it could be said that the indemnity principle achieves the same compensatory function as an award of compensation under the substantive law. But while compensation is the immediate effect of applying the indemnity principle, the ultimate policy of the indemnity principle is rooted not in compensation but in enhancing access to justice. The indemnity principle facilitates a

meritorious litigant's pursuit of justice by ensuring retrospectively that he attains justice at his opponent's expense rather than his own. As the Court of Appeal said in *Ng Eng Ghee (Costs)* at [1]:

> In adjudicating on costs, the court also has to bear in mind that unmerited barriers in the path of recovering reasonably incurred costs might well have the chilling effect of deterring parties, in future, from legitimately pursuing or defending their rights.

157 At the risk of oversimplification, the indemnity principle is the procedural law's functional equivalent of legal aid. But this form of legal aid is funded not by the state but by the opposing litigant; its grant is based not on need but on judicially-established merit; it is granted not as a matter of right, but as a matter of judicial discretion; and it is granted not *ex ante*, at the outset of litigation, but *ex post*, at the conclusion of the litigation.

158 The indemnity principle cannot achieve its policy of enhancing access to justice, however, if it does not hold a balance between the interests of the victor against those of the vanquished. All that that the vanquished has done is to lose his attempt to vindicate his legal rights. It is not a civil wrong for a party to lose civil litigation, even if motivated by malice. That remains the general rule in Singapore (*Strategic Worldwide Assets Ltd v Sandz Solutions (Singapore) Pte Ltd and others (Tan Choon Wee and another, third parties)* [2013] SGHC 162 at [93]) and in England (see *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 432), though no longer in Victoria (*Little v Law Institute of Victoria (No 3)* [1990] VR 257) or in the Cayman Islands (*Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another* [2013] UKPC 17). So the indemnity principle must not only set a *floor* on the winner's entitlement to recover costs, it must also set a *ceiling* on the loser's liability to pay costs.

159 In addition to the interests of the victor and the vanquished, the indemnity principle must also bear in mind the interests of *potential* litigants. The effect of the indemnity principle is to multiply the costs at stake in civil litigation by the number of separately-represented litigants involved. This costs-multiplying effect deters potential litigants who are risk averse from pursuing or defending their rights.

160 The deterrent effect of the indemnity principle arises because it enhances access to justice only *ex post.* The only litigants who can claim its benefits are meritorious litigants who had, at the outset of the litigation, the resources to take on the worst-case risk of paying multiple sets of costs and the fortitude to carry that risk throughout the litigation. But looked at *ex ante*, the indemnity principle deters potential litigants who are meritorious but who are unwilling or unable to take on that worst-case risk. The risk-averse litigant is almost always the individual and the impecunious litigant. And so the indemnity principle has the potential to deter these litigants from pursuing or defending their rights. An indemnity principle which has no regard for its deterrent effect therefore risks *denying* access to justice.

161 To address these risks, procedural law modifies both components of the indemnity principle: (a) in the particular case, to balance the interests of the victor and the vanquished; and (b) across the board, to mitigate its deterrent effect on the risk-averse and the impecunious.

Mitigation of the cost-shifting component

162 The cost-shifting component is modified by making it not an invariable rule but merely a default rule, subject to discretionary displacement if the circumstances of the case warrant it (see the proviso to O 59 r 3(2)). So too, the court has a discretion to take a more granular approach to the "event". Rather than feeling compelled to make a winner-takes-all order that all the costs of the

entire litigation should follow a single event, the court can make differentiated, issues-based costs orders which reflect which party won or lost on particular issues (see O 59 r 6A). The court is also empowered to deprive a successful party who has been guilty of neglect or misconduct of the associated costs or even order him to pay those costs to the unsuccessful party (see O 59 r 7). It is also to enhance access to justice that recent amendments in England have abrogated costs shifting *against* an individual in personal injury cases by introducing qualified one-way costs shifting: see the English Civil Procedure Rules 1998, Parts 44.13 to 44.17 implementing recommendations by Sir Rupert Jackson and his committee in *Review of Civil Litigation Costs: Final Report*. There are also proposals to extend qualified one-way costs shifting to other classes of cases to enhance access to justice for the individual litigant.

The limits on the quantification component

163 Procedural law also modifies the quantification component of the indemnity principle to enhance access to justice. The first limit is that the winner is entitled on taxation not to an *actual* indemnity for his costs but to what the procedural law *defines* to be an indemnity. As the Court of Appeal held in *Ng Eng Ghee (Costs)* at [7]:

> … the indemnity principle as applied in Singapore rests on one bedrock feature. It only extends to *costs reasonably incurred and not all costs incurred*. Therefore, the principle, does not, in practice, amount to a full and complete indemnity to the successful party against all the expenses to which he has incurred in relation to the proceedings (see *Singapore Civil Procedure 2007* at para 59/27/5) unless this has been *contractually agreed upon* or *if the court makes a special order in exceptional circumstances*.
>
> [emphasis in original]

164 What the procedural law defines to be an indemnity has changed over the years. The procedural law now defines an indemnity by applying a double test of reasonableness:

> (a) The default quantification rule is the standard basis of taxation (see O 59 r 27(2)). On a taxation of costs on the standard basis, the receiving party recovers a *reasonable* amount in respect of all costs *reasonably* incurred, with any doubts about reasonableness resolved in favour of the *paying* party.
>
> (b) By way of exception to the default standard basis of taxation is the indemnity basis of taxation (see O 59 r 27(3)). On a taxation of costs on the indemnity basis, the receiving party recovers all costs except those which are *unreasonable* in amount or those which have been *unreasonably* incurred, with any doubts about reasonableness resolved in favour of the *receiving* party.

165 Defining the indemnity in this way operates *ex post* to protect a litigant who conducts the litigation reasonably but nevertheless loses by limiting his liability for costs to reasonable costs. The indemnity thus defined also operates *ex ante* as an assurance to all potential litigants that their worst-case risk if they lose will be limited to reasonable costs. That mitigates the indemnity principle's deterrent effect and enhances access to justice.

The latent limit on the quantification component

166 There is also a latent limit on the quantification component of the indemnity principle which arises from how the test of reasonableness operates in reality both as between party and party and

as between solicitor and client. The procedural law intends there to be a margin between each of the following: (a) costs taxed on the standard basis; (b) costs taxed on the indemnity basis; and (c) costs which a solicitor is entitled to be paid by his own client (see *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No. 2) Ltd (No. 2)* [1993] Ch 171 at 188D). Each of these margins exist to avoid deterring risk-averse litigants and thereby to enhance access to justice.

Party and party costs

167 The phrasing of the standard basis and the indemnity basis has an obvious difference: the standard basis is phrased positively in terms of *reasonableness* whereas the indemnity basis is phrased negatively in terms of *unreasonableness*. The only real difference of substance between the two quantification rules is the incidence of the burden of proof. On the standard basis, the burden of proof is on the receiving party and so doubts are resolved *against* recovery. On the indemnity basis, the burden of proof is on the paying party and so doubts are resolved *in favour* of recovery. But there will almost always be sufficient evidence before the court for it to form a positive view as to whether a particular item of costs was or was not reasonably incurred or is or is not reasonable in amount. So a court taxing costs will not in the usual case have to rely on the incidence of the burden of proof to decide the recoverability of a particular item of costs, whether on principle or on quantum.

168 Despite that, the difference in wording between the standard and the indemnity basis signals an intended difference in outcome between the two bases of taxation. If that were not so, there would be no need for two bases. The result is that as a norm rather than as an exception, the quantification rules are applied to as to maintain an appreciable margin between the two bases. I consider the explanation for this at [172] below, after dealing with solicitor and client costs.

Solicitor and own client costs

169 The indemnity principle compensates a winner for the fees and disbursements which he has to pay his own solicitor. A solicitor's entitlement to recover from his client fees and disbursements for work done arises in the first instance from his contract of retainer with his client but is ultimately under the control of the court through its jurisdiction to tax a solicitor's bill to his own client.

170 The court taxes costs as between a solicitor and his own client on the indemnity basis (see O 59 r 28(2)), supplemented by three presumptions. The first two presumptions are that an item of costs is presumed to have been reasonably incurred or to be reasonable in amount if the client expressly or impliedly approved either the incurring of that item of costs or its quantum (see O 59 r 28(2)(a) and (b)). The third presumption is that an item which is "of an unusual nature" is presumed to be unreasonable unless the solicitor advised the client that that item may not be recoverable on a taxation between the parties (see O 59 r 28(2)(c)).

171 Again, the existence of these presumptions signals that a difference is intended between the result of assessing costs on the indemnity basis and assessing costs on the solicitor and own client basis. But that means that a winner who secures an exceptional order for costs on the indemnity basis will not be made whole for all the reasonable costs which he has to pay his own solicitor. There is in reality and as a norm a small but appreciable margin between the quantum of costs which a loser has to pay a winner assessed on the indemnity basis and the costs which the winning party has to pay his own solicitor.

Unrecovered costs is the result of mitigating the indemnity principle

172 The result of all this is that although the indemnity principle dictates –as its name suggests –

that a successful party in litigation is entitled to recover through an award of costs a sum which is an *actual* indemnity for the costs he has incurred (or at least for the costs he has *reasonably* incurred), the procedural law does not define a single indemnity. Instead, it quantifies the indemnity on a calibrated three-point scale. Where on that scale a particular case falls depends on the court's discretion, exercised judicially. The first point on the scale is costs on the standard basis: this is the norm and permits the winner to recover most of his own costs from the loser. The second point on the scale is costs on the indemnity basis: this permits the winner to recover more costs from the loser than on the standard basis, but still almost always not an actual indemnity. The third point is what the solicitor is entitled to receive from his own client. The latter basis of recovery is available as between party and party only if the parties have agreed to it by contract.

173 Having created this calibrated three-point scale, the procedural law sets the default as between party and party at the lowest point on the scale. This is, in effect, telling potential litigants *ex ante* that if they lose the litigation, their liability for costs will *not* be multiplied by the number of parties involved. So a litigant involved in the paradigm two-party litigation will know that his maximum exposure for costs in the worst-case is not 200% but something less than that – perhaps 170%. That margin of 30 percentage-points is intended to reduce the deterrent effect on the potential litigant. The by-product of this mitigation is that a successful litigant is almost always out of pocket for an appreciable part of his costs.

174 These unrecovered costs therefore exist as a norm, rather than as an exception, to hold the balance between the interests of: (1) litigants who are able and willing *ex ante* to take on the worst-case risk of having to pay multiple sets of costs and who go on to win; (2) litigants who take on that risk and lose; and (3) potential litigants who might be deterred entirely from litigating by the prospect of cost-multiplication. And this policy is a policy only of the *procedural* law; it is no part of the policy of the *substantive* law that governs their dispute.

175 The existence of these unrecovered margins as a norm does not mean that the principles of costs quantification are routinely being flouted, ignored or misapplied. Nor does it mean that clients are routinely behaving irrationally or abusively by agreeing to incur unreasonable costs. Nor does it mean that solicitors are routinely overcharging their own clients. It simply means that reasonableness, quite understandably, is taken to mean different things in different contexts; all in order to advance the procedural law's policy of enhancing access to justice for all. What the procedural law considers reasonable on the exceptional indemnity-basis taxation is not necessarily what it considers reasonable on the default standard-basis taxation or what it considers reasonable for a client to pay his own solicitor.

176 But merely imposing these limits on the loser's liability to pay costs is not in itself sufficient to advance the procedural law's policy of enhancing access to justice. To advance this policy, procedural law must – and therefore does – go further and by a fiction *deem* an award of costs made as between party and party on the indemnity principle to be an actual indemnity for the winner, even though in virtually every case, it is not. I explain in the next section why this must be so.

Substantive law and the procedural law intersect

177 Costs incurred in litigation to vindicate one's rights can be analysed as recoverable both: (a) in that litigation itself, under the procedural law as a by-product of that litigation; and (b) by separate action, under the substantive law as part of the compensation for the underlying wrong. This sets up a tension. As I have shown above, the policy of the procedural law in awarding and quantifying costs is to enhance access to justice for actual and potential litigants. To do that, it limits the losing party's liability to pay costs. By contrast, the policy of the substantive law in awarding compensation

for a civil wrong is to make whole the victim of the wrong. When a party who has incurred costs in litigation subsequently commences separate litigation to try to recover damages under the substantive law for all or part of those costs, the policy of the procedural law and of the substantive law compete. To balance these competing policies, a claim to recover compensation forcosts incurred in previous proceedings is governed by special rules.

178 In addition to the overarching procedural policy of enhancing access to justice, there are two subordinate policies of the procedural law which underpin the special rules which apply under the substantive law to a claim to recover costs as damages. I consider these subordinate policies next before I turn to the case law.

Achieving finality in litigation

179 It is contrary to the procedural objective of achieving finality in litigation to permit a party who has secured an award of costs under the procedural law as a by-product of earlier litigation later to invite a court to consider anew under the substantive law the very same question. This is a straightforward application of the principles which underlie issue estoppel (see above at [95] to [98]) or *res judicata*.

180 It could be said, of course, that the later court considering the plaintiff's claim for compensation under the substantive law is not concerned with the same question which the earlier court considered when awarding costs under the procedural law. The later court is now considering the recoverability of compensation for a civil wrong on the usual principles of breach, causation, foreseeability, remoteness and mitigation. The earlier court considered the award and quantification of costs on the indemnity principle with all its patent and latent limits.

181 At one level of generality, that is undoubtedly true. But at a fundamental level, both courts are in fact considering the very same question: how should the law compensate the plaintiff for the costs incurred in the earlier litigation. The fiction of the procedural law deems that the award of costs to be an actual indemnity. The question for the substantive law in the later action, then, is whether it should accept that fiction or inquire into that fundamental question afresh

182 The procedural policy of achieving finality in litigation is engaged only because of the procedural law's fiction that its award of costs is an actual indemnity for the costs incurred in the earlier proceedings. Finality is therefore not an independent policy which shapes either the rule about recovering costs as damages or the exceptions to that rule. But the cases do recognise it as a subsidiary policy engaged in a claim of this nature.

Suppressing parasitic litigation

183 Another policy of procedural law which is engaged in a claim for costs as damages is the policy of suppressing parasitic litigation. The resources of the civil justice system are finite. They should be conserved and directed only towards litigating substantive claims over substantive rights. Parasitic litigation is not litigation about substantive rights and is nothing more than litigation about litigation. A claim to recover costs as damages is therefore parasitic litigation which this policy suggests ought to be suppressed. Although there is separate recognition in the cases of this policy, the cases again suggest that it is a subordinate policy which is not always determinative.

Cases in England and Singapore

184 I now examine the case law to see what happens when the policy of the substantive law in

making whole the victim of a wrong intersects with the policy of the procedural law of enhancing access to justice and the subordinate policies of achieving finality in litigation and of suppressing parasitic litigation.

185 I have shown that the civil procedural law limits a losing party's liability for costs to the result yielded by applying the indemnity principle – subject to its patent and latent limits and subject to judicial discretion – and goes on to deem that result, by a fiction, to be an actual indemnity. An analysis of the cases shows that the substantive law has developed the following special rules to avoid undermining the procedural law and its policies:

(a) The substantive law will not award compensation for costs incurred in prior litigation unless:

(i) The court in the prior litigation did not make an order under the procedural law for the costs of that litigation as a by-product of that litigation *and* the party now seeking to recover compensation for those costs had no reasonable opportunity to seek such an order; or

(ii) The court in the prior litigation did make an order under the procedural law for the costs of that litigation as a by-product of that litigation *but* the costs so awarded were not awarded under the indemnity principle as an actual indemnity.

(b) Where the court awards compensation for costs under one of the two exceptions above:

(i) If the prior litigation was before a court of the same forum:

(A) those costs will be limited to costs as quantified under the procedural law's default quantification rule, as it stands from time to time; and

(B) those costs will be quantified by the procedure of taxation rather than by an assessment of damages.

(ii) If the prior litigation was before a foreign court, the above limitations will not necessarily apply.

I have used the neutral term "compensation" in my synthesis of these special rules because these rules apply to a claim for costs as damages as well as to a claim for costs as equitable compensation. Equity follows the law.

186 For ease of exposition, I will go through the cases chronologically: each case is best seen in light of the cases which preceded it.

The Quartz Hill Consolidated Gold Mining Company v Eyre

187 *The Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) LR 11 QBD 674 ("*Quartz Hill*") illustrates the general rule which bars the recovery of costs as damages.

188 In *Quartz Hill*, the defendant presented a winding up petition against the plaintiff. The defendant advertised the petition in a number of newspapers. But because of supervening circumstances, he did not serve the petition on the plaintiff. He even gave the plaintiff notice before the hearing of his intention to withdraw the petition. The plaintiff nevertheless instructed solicitors who appeared on the petition. A Vice-Chancellor dismissed the defendant's petition. The plaintiff

applied for an order for its costs of opposing the petition. The Vice-Chancellor rejected the application. At that time, English procedural law provided that a losing party in civil litigation would ordinarily pay to the winning party only those costs which the winning party had *necessarily* incurred in attaining justice. That is, of course, different from our procedural law (see [164] above) under which the touchstone is not necessity but reasonableness. So it appears that the Vice-Chancellor took the view, on the facts before him, that the plaintiff had incurred *unnecessary* costs.

189 The plaintiff then brought a separate action against the defendant, claiming damages for malicious prosecution in presenting the failed winding up petition. It is not an actionable wrong to prosecute civil litigation maliciously unless the plaintiff has suffered special damage of one of the three kinds recognised by Holt CJ in *Savile v Roberts* (1698) 91 ER 1147. The only special damage the plaintiff claimed and proved at trial was the costs it had incurred in defending the petition. The trial judge held that the plaintiff could not rely on these costs as special damage because the Vice-Chancellor had, in the earlier litigation, refused to award the plaintiff those very costs. An essential element of the plaintiff's cause of action – special damage – was missing. The plaintiff was therefore nonsuited at trial.

190 The plaintiff appealed to the Court of Appeal. Brett MR and Bowen LJ (as they both then were) in a two-judge coram agreed with the trial judge that the plaintiff's extra costs could not constitute special damage under the substantive law. Brett MR rested his decision on the fiction of the procedural law which deems an award of costs under the indemnity principle to be an actual indemnity. If those costs were irrecoverable under the applicable procedural law because they were unnecessary, so too they were irrecoverable under the substantive law because they were caused by the plaintiff's decision to incur unnecessary costs and not by the defendant's malicious prosecution. The unrecovered costs therefore could not constitute the essential element of special damage in an action for malicious prosecution. Brett MR said (at 682):

> The theory of extra costs is that they are not necessary to the purposes of the party who has incurred them. When the costs are taxed as against the losing party in the litigation, he is bound to pay only what are called technically "the costs between party and party;" and the successful party is left to pay what are called technically "the extra costs". The theory is that the costs which the losing party is bound to pay, are all that were necessarily incurred by the successful party in the litigation, and that it is right to compel him to pay those costs because they have been caused by his unjust litigation; but that those which are called "extra costs," not being necessarily incurred by the successful party in order to maintain his case, are not incurred by reason of the unjust litigation. It may be quite reasonable as between the successful party and his solicitor that the "extra costs" should be paid to that solicitor; but it is unreasonable that the losing party should pay them, they not having been caused by his litigation. If this be taken to be the reason why "extra costs" are not allowed upon taxation, it is obviously immaterial whether or not the litigation was false and malicious and without reasonable or probable cause; the "extra costs" are not damage caused by the unjust litigation, and therefore they are not damage for which an action will lie.

191 Bowen LJ agreed with Brett MR that unrecovered costs cannot constitute the necessary special damage as defined by Holt CJ in *Savile v Roberts*. But Bowen LJ did not rely on the particular phrasing of the procedural rule which then governed recovery of costs. He rested his decision on a more general proposition: it is for the court hearing the original litigation – and only that court – to determine the winner's proper entitlement to the costs of the earlier litigation and to award those costs under the procedural law. So Bowen LJ said (at 690):

> The bringing of an ordinary action does not as a natural or necessary consequence involve any

> injury to a man's property, for this reason, that the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action.

192 The plaintiff's claim for his unrecovered costs therefore failed. Despite this, the plaintiff secured a new trial. That was only because the Court of Appeal found the essential element of special damage elsewhere. It held that the allegations in the defendant's winding up petition had damaged the plaintiff's "fair fame and credit", thereby supplying a type of special damage recognised in *Savile v Roberts* as sufficient to support a claim for malicious prosecution.

193 The plaintiff in *Quartz Hill* had a cause of action in malicious prosecution against the defendant. That cause of action was independent of the earlier winding up proceedings. But that was not sufficient to sustain the plaintiff's claim to recover the costs of the winding up proceedings as damages. That claim failed entirely. It came within neither exception to the general rule barring recovery (see [185(a)] above). Indeed, the plaintiff's entire claim would have failed but for the court identifying other special damage on which it could be founded.

Berry v British Transport Commission

194 Does it make a difference if a plaintiff seeks to recover costs incurred in earlier *criminal* proceedings rather than *civil* proceedings? The English Court of Appeal considered that question in *Berry v British Transport Commission* [1962] 1 QB 306 ("*Berry*"). The plaintiff was convicted at trial of a minor criminal offence but was acquitted on appeal. The criminal appeal court, on the plaintiff's application, ordered the prosecutor to pay her 15 guineas as costs. She then commenced civil proceedings against her prosecutor claiming damages of £64 2s in the tort of malicious prosecution. That sum was the actual costs she incurred in defending the criminal prosecution less the 15 guineas already awarded to her. The question for the English Court of Appeal was whether, in light of *Quartz Hill*, these extra costs were capable of constituting the special damage essential for an action in malicious prosecution.

195 Devlin LJ (as he then was) gave the leading judgment. He began (at 319) by setting out the rule:

> … The defendants allege that this sum of £64 2s. is not recoverable because it is too remote in law.
>
> This allegation is based on an old rule which is stated in Mayne on Damages, 11th ed. (1946), p. 119, in the following terms: "It was regarded as a general principle that the right to costs must always be considered as finally settled in the court where the question to which that right was accessory was determined; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the court could be recovered; or if costs were expressly withheld in the particular case, none would be recoverable by suit in any other court." This principle is part of the substantive law of damage and is not specifically related to actions for malicious prosecution.

196 Devlin LJ (at 319) identified the policy of achieving finality in litigation as the policy underlying the rule. He said (at 320):

> The reason for the rule is not that the costs incurred in excess of the party and party allowance

are deemed to be unreasonable; it is that what is presumed to be the same question cannot be gone into twice. The rule appears to have been first laid down by Mansfield CJ in *Hathaway v Barrow* where he put it on the ground that "it would be incongruous to allow a person one sum as costs in one court, and a different sum for the same costs in another court." If in the earlier case there has been no adjudication upon costs (as distinct from an adjudication that there shall be no order as to costs), a party may recover all his costs assessed on the reasonable, and not on the necessary, basis. If a party has failed to apply for costs which he could have got if he had asked for them, a subsequent claim for damages may be defeated; but that would be because in such a case his loss would be held to be due to his own fault or omission.

197 Devlin LJ acknowledged that the two courts were actually considering two different questions: the procedural law (then) applied the test of necessity when awarding costs whereas the substantive law, broadly speaking, applied the test of reasonableness when awarding damages. Thus, the policy of achieving finality in litigation was engaged only because of the procedural law's fiction that an award of costs is a deemed indemnity, regardless of precisely how the procedural law quantifies the award and regardless of the margin between actual and recovered costs. But Devlin LJ justified this fiction on the basis of the procedural law's policy that it is in the public interest to limit a loser's liability for a winner's costs in civil litigation in order to protect all those who have resort to the law. Thus, he said (at 322):

> … [T]he reason for the rule is that the law cannot permit a double adjudication upon the same point. It would be a rational rule and in accordance with the ordinary principle as to *res judicata* if in truth it were the same point. But it is not. It may be that when the rule was first laid down by Mansfield C.J. in 1807 the two standards of assessment were not so far apart as they are now. By 1844 the distinction had begun to appear in practice if not in theory. In *Doe v. Filliter* Pollock C.B. said: "The taxed costs are a fair indemnity; and if they are not so, the rules which govern taxation ought to be altered." Alderson B. said: "The taxed costs are intended to be a full indemnity to the plaintiff for his expenses in getting back the land. That is the principle; whether it be fully carried out in practice is another matter. ... If the taxed costs are not a full indemnity, they ought to be made so." But this advice has not been taken and the rules which govern taxation have not been altered. In 1869 Blackburn J. in *Wren v. Weild* said that it was "artificial" to say that the party aggrieved had an adequate remedy in his judgment for costs. In *Barnett v. Eccles Corporation* Bigham J. said: ***"The law does not recognise the difference between the sum which it gives as costs, that is, costs taxed as between party and party, and the larger sum which in practice a litigant has to pay."***
>
> I find it difficult to see why the law should not now recognise one standard of costs as between litigants and another when those costs form a legitimate item of damage in a separate cause of action flowing from a different and additional wrong. Limitation of liability is a principle that is now well recognised. In the case of damage done by a ship it has been in force for the last two centuries in this country, and for longer in others, and the basis of it is simply that it is not in the public interest that shipowners should be deterred from seafaring by the prospect that they might be crippled by awards of heavy damages. ***The stringent standards that prevail in a taxation of party and party costs can be justified on the same sort of ground; see, for example, Smith v. Buller, per Malins V.-C. It helps to keep down extravagance in litigation and that is a benefit to all those who have to resort to the law*** . But the last person who ought to be able to share in that benefit is the man who *ex hypothesi* is abusing the legal process for his own malicious ends. In cases of malicious process Mansfield C.J.'s rule has not always been applied. Lord Ellenborough refused to apply it in 1816 and Lord Abinger in 1838 (*Sandback v. Thomas* and *Gould v. Barratt*. But the other view has prevailed, though Tindal C.J. indicated in *Grace v. Morgan* that his opinion might have been different if the matter was *res integra*.

If the matter were *res integra*, ***I should for myself prefer to see the abandonment of the fiction that taxed costs are the same as costs reasonably incurred and its replacement by a statement of principle that the law for reasons which it considers to be in the public interest requires a litigant to exercise a greater austerity than it exacts in the ordinary way, and which it will not relax unless the litigant can show some additional ground for reimbursement over and above the bare fact that he has been successful*** . Without a restatement of that sort, there is undoubtedly a practical need for the rule [in *Quartz Hill*] in civil cases. ***Otherwise, every successful plaintiff might bring a second action against the same defendant in order to recover from him as damages resulting from his original wrongdoing the costs he had failed to obtain on taxation*** ; this was unsuccessfully attempted by the plaintiff in *Cockburn. v. Edwards*. Or as Lord Tenterden C.J. said in *Loton v. Devereux*: "actions would frequently be brought for costs after the court had refused to allow them." ***The rule is thus essential to the administration of justice in civil suits and will continue to be so until the time comes, if it ever does, when the law either allows to a successful litigant all the costs he has reasonably incurred or recognises openly that an assessment of damage and a taxation of costs as between party and party are two different things*** .

[emphasis added in bold italics]

198 The concluding paragraph from this passage is important: so long as the civil procedural law continues on grounds of policy to award less than an actual indemnity for the winner's costs, it must continue to deem that award to be an actual indemnity, thereby barring, on grounds of finality, the winner from claiming damages for his unrecovered costs in subsequent civil proceedings. Otherwise, the resources of the civil justice system would be wasted by an infinite succession of parasitic litigation to recover damages for costs, all based on the loser's original wrongdoing.

199 All of this was *obiter dicta* because Devlin LJ was considering in *Berry* extra costs arising from prior *criminal* proceedings, not prior *civil* proceedings. On the facts of *Berry*, Devlin LJ concluded that recognising the plaintiff's claim for the unrecovered costs did not undermine any policy of the *criminal* procedural law. A criminal court awarding costs had a discretion at large which was not required to be exercised judicially in accordance with the indemnity principle. The criminal appeal court's earlier award of 15 guineas was therefore not awarded as an indemnity for the plaintiff's actual costs. The fiction of the civil procedural law – that awarded costs are *deemed* to be an actual indemnity – was therefore not needed in the criminal procedural law and not part of it. So there was no bar to a plaintiff claiming her unrecovered costs arising from prior *criminal* litigation in subsequent *civil* litigation, provided of course that she had a civil cause of action.

200 The exception to the general rule which *Berry* recognised and applied is clearly correct. There is no need in the criminal procedural law for any fiction that the earlier criminal proceedings and the later civil proceedings are considering the same question on costs in order to advance a policy of enhancing access to justice. Although *Berry* arose from a private prosecution, the typical criminal prosecution is a public prosecution and the typical criminal prosecutor therefore has a public duty to prosecute. If he does so in good faith, his public duty does not allow him to be deterred *ex ante* by the possibility of having to pay an actual indemnity to a criminal accused if his prosecution fails. And if a prosecutor – whether public or private – prosecutes maliciously, he ought to be deterred *ex ante* by that possibility. There is also no risk of uncontrolled successive parasitic litigation: no civil action can ensue without a viable cause of action under the civil law.

201 In *Berry*, as in *Quartz Hill*, the plaintiff's separate cause of action was a necessary but not a sufficient condition to sustain her claim. The plaintiff's action would have failed if the criminal procedural law had applied the indemnity principle applied in awarding her costs. Her claim succeeded

only because Devlin LJ held that costs were awarded in criminal procedure on different principles from those which applied in civil procedure. The case therefore came within the exception at [185(a)(ii)] above.

Ganesan Carlose & Partners v Lee Siew Chun

202 One of the few Singapore case to have considered the recoverability of costs as damages is the decision of the Court of Appeal in *Ganesan Carlose & Partners v Lee Siew Chun* [1995] 1 SLR(R) 358 ("*Ganesan Carlose*"). In that case, a son tricked his mother into mortgaging the family home to secure his company's indebtedness to a bank. The law firm which acted for her son's company facilitated the deceit through its negligence. The mother later discovered the deceit and sought to set aside the mortgage. She therefore sued, in a single action, her son's company, the bank and the law firm.

203 The mother's claim against the company ended with judgment in default of appearance. Her claim against the bank and the law firm went to trial. At trial, the judge dismissed her claim against the bank with costs. But he allowed her claim against the law firm in part. He ordered the law firm to pay damages to her equivalent to 50% of the losses arising from her son's deceit. He expressly included in these losses the party and party costs which the mother would have to pay to the bank for her failed claim against the bank. But he made no order as to the mother's own costs of her successful claim against the company or of her unsuccessful claim against the bank. He did, however, grant the parties express liberty to apply.

204 In the assessment of the damages payable by the law firm, the mother nevertheless sought to recover – as damages – her own costs of the claims against the company and the bank. Both the Assistant Registrar and, on appeal, the judge in chambers allowed the mother's claim. The Court of Appeal held that the mother could not recover her own costs as damages from the law firm. The mother and the law firm were parties to the same proceedings. The mother's *only* opportunity to recover her own costs from the law firm was through the trial judge's costs orders at the end of the liability phase. But the trial judge had made no order as to the mother's own costs. And the mother took no steps – even *after* the judge had determined liability – to invite him to make an order for her own costs under the provision for liberty to apply.

205 As Chao J (as he then was) said (at [16]):

> … we do not think it is open to the [mother] to reopen the question and claim as damages that part of costs which has not been expressly allowed by the court. And if the [mother] should think that there was something amiss in the order made by the trial judge she should have resorted to the liberty to apply clause. Having failed to do that, the [mother] cannot lump those costs under a general order for damages. Costs as between parties to the action is always a matter for the discretion of the court: O 59 rr 2(2) and 3 of the Rules of the Supreme Court.

206 Chao J's reasoning echoes the reasoning of Bowen LJ in *Quartz Hill* (see [191] above). Both judges expressed their reasons in terms which are independent of the precise quantification test which the procedural law applies: whether it is based on necessity or on reasonableness. The important fact for both judges was that the civil procedural law gives a civil court a specific discretion as to costs to be exercised judicially on specific criteria at a specific point in civil proceedings. That discretion encompasses both aspects of the indemnity principle: which party is liable to pay costs as well as upon which basis those costs are to be quantified. If the court makes no determination on costs at the appropriate time – either as a result of a considered decision not to do so or because a party failed to invite it to do so – that opportunity offered by the procedural law has been missed.

The substantive law will not allow the issue of costs to be reopened at a later date in the guise of a claim for damages.

207 *Ganesan Carlose* is authority binding on me for the following proposition: a party who succeeds against another party in the liability phase in an action must – *at that time* – secure an order for all such costs which are then within the court's power under the procedural law and cannot claim those costs under the substantive law in the assessment of damages phase in the same action. The fact that the decision in *Ganesan Carlose* involved a later phase *in the same action* rather than in a separate and later action is immaterial. The principle in *Ganesan Carlose* must *a fortiori* bar a plaintiff's claim in a *separate* action for costs as damages.

Same-party cases and third-party cases

208 If we assume an action today by P against D in which P claims compensation for all or the unrecovered residue of P's own costs which P incurred in earlier litigation, there are two possibilities. D may have been a party to the earlier litigation or D may not have been a party to the earlier litigation. For convenience, I will call the configuration where D *was* a party to the earlier proceedings a "same-party" case. I will call the configuration where D *was not* a party to the earlier litigation a "third-party" case. *Quartz Hill* and *Berry* were same-party cases. *Ganesan Carlose* can be analysed as a same-party case even though the issue about the recoverability of costs as damages arose in successive phases of a single action rather than in successive actions.

209 The orthodox position until recently has been that, although P generally *cannot* recover costs incurred in earlier litigation as damages in a same-party case, he *can* recover such costs as damages in a third-party case. The argument for these quite opposite results runs along the lines set out in [210] to [212] below. I will set those arguments out first before explaining why the distinction between a same-party case and a third-party case is too fragile and unprincipled to support this view.

210 It could be said that the recovery of costs as damages is barred in the same party case for the following reasons. In the typical same-party case, all the relevant policies of the procedural law are engaged and so the procedural law must prevail over the substantive law's aim of making whole the victim of a wrong. The procedural law's policy of enhancing access to justice is engaged. P and D have litigated their dispute to a conclusion. D lost and was ordered to pay P's costs as a by-product of the earlier litigation under the cost-shifting component of the indemnity principle. The court also exercised its discretion as to how those costs should be quantified – as standard costs or indemnity costs. That quantification is subject to all of the procedural law's patent and latent limits imposed to enhance access to justice for all. The procedural law deemed that award – whether on the standard basis or on the indemnity basis – to have indemnified the plaintiff. This is so even if it did not amount to an actual indemnity, as is virtually always the case. The policy of achieving finality in litigation is also engaged, both on the merits and on the issue of costs. On the merits, P has no cause of action against D merely because D lost the earlier litigation. That is so even if D was motivated by malice (see [158] above). If P was the *plaintiff* in the earlier litigation, P's claim against D in the later action for the costs of the earlier action as damages must therefore, of necessity, be founded again on D's original wrongdoing. But that original wrongdoing was already litigated to a conclusion in the earlier action. If P was the *defendant* in the earlier action, his position in the new action is even worse: he does not even have the original wrongdoing on which to found his second claim for costs and so, in the typical case, has no cause of action against D at all. On the issue of costs, too the policy of achieving finality in litigation is engaged. The earlier court's award of costs is deemed by a fiction of the procedural law to have *actually* indemnified P. P cannot in the second action ask the court to go behind that deemed indemnity and determine all over again whether P was in fact indemnified by that

award. And the new litigation – being only about costs – is on its face parasitic.

211 The foregoing analysis assumes that P sought and secured an award of costs in the earlier litigation. But the result must be the same if P had an opportunity to but failed to seek an order for costs in the first action, whether that failure was deliberate, careless or otherwise. P cannot be better off by declining to ask for an award of costs and instead commencing a separate action for costs. In a same-party case, therefore, the substantive law's objective of making the victim whole is opposed by the objectives of the procedural law. The general rule thus dictated in a same-party case bars recovery of costs as damages.

212 It could likewise be said that the recovery of costs as damages in the typical third-party case is permitted because none of the relevant policies of the procedural law are engaged. In those circumstances, the procedural law must give way to the substantive law's aim of awarding full compensation. P and D are litigating against each other for the first time. P's case against D must therefore, of necessity, be based on a wrong which arises independently of the earlier litigation: otherwise, it would fail *in limine*. D will be held liable to pay the costs of the earlier action as compensation only if he is found to be a wrongdoer, for the first time in the new action. An award of compensation will not undermine finality. D was not before the earlier court. P had no opportunity to invite the earlier court to consider D's liability under the procedural law to pay the costs of the earlier litigation. D is therefore not entitled to the benefit of any finality arising from the procedural law's policy-based limitation on liability for costs. Looking at D's particular position, D is adequately protected against P incurring excessive costs in the prior litigation by two things: (a) the substantive law's principles of causation, foreseeability, remoteness and mitigation when assessing compensation; and (b) the fact that in the earlier litigation, P had no assurance of securing subsequent reimbursement by D and so would ordinarily be expected to have limited his expenditure in those proceedings in his own rational self-interest. In a third-party case, therefore, the substantive law's objective of full compensation is typically unopposed by any objective of the procedural law. The general rule thus dictated in a third-party case favours recovery of costs as damages.

213 The next case I consider is a third-party case which exposes why this analysis – based as it is on a distinction between the same-party case and a third-party case – is conceptually flawed.

British Racing Drivers' Club Ltd v Hextall Erskine & Co (a Firm)

214 In *British Racing Drivers' Club Ltd & Anor v Hextall Erskine & Co (a Firm)* [1996] BCC 727 ("*British Racing*"), Carnwath J (as he then was) had to consider the rule permitting a party to recover costs as damages in a third-party case.

215 By the time of *British Racing*, the touchstone for the recoverability of costs under English procedural law was no longer necessity but was in all cases reasonableness. The change was effected by amendments to the English Rules of the Supreme Court ("the RSC") in 1986 which established the then-new standard basis and indemnity basis of taxation for costs payable as between party and party. Two new rules were inserted to give effect to this change: O 62 r 12(1) and r 12(2) of the RSC. Our O 59 r 27(2) and r 27(3) are taken virtually verbatim from these two rules. These 1986 amendments also introduced a new test for the recovery of costs as between solicitor and own client in O 62 r 15 of the RSC. Our O 59 r 28 is taken virtually verbatim from this rule. The question for Carnwath J in *British Racing* was whether these changes to English procedural law made any difference to the rule permitting recovery of costs as damages in third party cases.

216 The facts of *British Racing* were as follows. A law firm gave negligent advice to a racing club. To mitigate the loss caused by that negligent advice, the club had to commence litigation against

certain defendants. The law firm was not one of those defendants. That litigation was eventually settled on terms which included the club bearing its own costs. The club then commenced action against the law firm seeking to recover losses it had suffered by reason of the law firm's negligence. Those losses included the costs the club had incurred in the earlier litigation.

217 The law firm's negligence was obvious and it virtually admitted liability. So the only real issue for Carnwath J on the club's claim to recover its costs as damages was how to quantify the damages. Neither the club nor the law firm argued that the quantification should take place by the usual assessment of damages. The club's position was that it had proved the costs of the earlier litigation at trial. The defendant had not adduced any contrary evidence to show that those costs were unreasonable. The club therefore submitted that no quantification was needed and that the law firm should simply reimburse it in full for those costs. The club's alternative position was that the damages should be quantified by taxation of those costs on the indemnity basis. The law firm on the other hand, argued simply that those costs should be taxed on the standard basis.

218 Carnwath J took as his starting point the rule which applied in a same-party case. He cited (*British Racing* at 748) from *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188 ("*Lonrho*") "the established principle that a party cannot recover, in a separate action, costs which he could have but was not awarded at the trial of a civil action, or the difference between the costs he recovers from the other party and those he has to pay his own solicitor." Simply put, if the plaintiff *did not* seek or obtain an award of costs under the procedural law in the earlier litigation, he is precluded by the policy of achieving finality in litigation from re-opening that issue in separate proceedings. If he *did* seek and secure an award of costs under the procedural law in the earlier litigation, then the procedural law's assessment of his entitlement to costs is the limit under the substantive law of his entitlement to compensation for that loss.

219 Carnwath J acknowledged that the orthodox view permitted the plaintiff in a third-party case to recover in full the costs incurred in an earlier action by way of a separate action against a person who was not a party to that action, subject only to the usual limitations of the substantive law on the recovery of damages. But Carnwath J considered it anomalous that a plaintiff in a third-party case should be treated differently from a plaintiff in a same-party case. Thus, he said (at 749):

> ... litigation costs have traditionally been subject to special rules for policy reasons. Prior to the change in the taxation rules [in England in 1986], there was an established distinction between such costs incurred in proceedings between the same parties, and those incurred in proceedings against third parties. This was anomalous, given that similar policy considerations applied in each case. The most recent cases show that the position must be re-considered in the light of the changes to the taxation rules. This enables the anomaly to be resolved. Under the new dispensation, taxation on the standard basis is to be regarded as the equivalent to the solicitor and client basis referred to by McGregor [on Damages].

220 Carnwath J's decision in *British Racing* removed the distinction between the third-party case and the same-party case and applied the same rule to both. The result of Carnwath J's new approach, of course, is not to bar the plaintiff in a third-party case entirely from recovering the costs incurred in the earlier litigation as damages. It would be unjust to deprive the plaintiff in a third-party case of compensation entirely when the plaintiff had no earlier opportunity under the procedural law to establish *this* defendant's liability to pay costs to the plaintiff. But the result of his new approach is that the *measure* of the plaintiff's damages is subject to the limits of the procedural law just as in a same-party case. Further, that measure must be the procedural law's *default* measure. The court's discretion under the procedural law to choose between standard costs and indemnity costs does not turn on the gravity of the paying party's wrongdoing. Rather, it turns on the conduct of the paying

party in the litigation for which it is awarding costs. Since the defendant was not a party to the earlier litigation, there is no conduct of his in that *earlier* litigation which can form a basis to depart from the procedural law's default measure when quantifying the costs of the *earlier* proceedings. The result under Carnwath J's new approach is that the plaintiff in a third-party case is entitled to recover costs as damages from the defendant but is limited to the procedural law's default measure of those costs. Currently, that default measure is standard costs.

221 Carnwath J's new approach in *British Racing* has been met with hostility. For example, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at p 712) believes the new approach to be "flawed" and urges the English courts not to follow it. With diffidence, I agree with Carnwath J and disagree with McGregor.

222 The truth is that there is no distinction of principle between same-party cases and third-party cases. The procedural rules on joinder of causes of action and joinder of parties in O 15 and on joinder of third parties in O 16 are now drawn extremely widely. They advance the policy of suppressing multiplicity of proceedings and avoiding inconsistent findings of fact. The result is that virtually every third-party case could be litigated as a same-party case.

2 2 3 *Ganesan Carlose* is a case in point. It was litigated as a same-party case. The mother commenced a single action naming the law firm as the third defendant together with the bank as the second defendant and the company as the first defendant. But she could equally easily have sued the company and the bank in one action, seen how that action went, and then sued the law firm separately. She did not do so. That was merely a matter of litigation tactics and strategy. It is not a distinction of principle. That can be demonstrated by two thought experiments.

224 First, assume that at the end of the liability phase in *Ganesan Carlose*, the mother had, contrary to the facts, sought and secured an order against the law firm that it pay her own costs of her successful claim against the son's company and of her unsuccessful claim against the bank. The mere fact that the law firm had breached a duty of care to the mother would have been no grounds for awarding costs against the law firm on the indemnity basis. So, those costs would by default have been taxed on the standard basis. If the mother then commenced a second action against the law firm to recover the difference between the standard costs awarded to her in the first action and her own actual costs of the first action, that second action would have failed. It would be indistinguishable from *Quartz Hill*. The result would be that the mother's compensation for her own costs in the first action – caused by the law firm's negligence – would be limited to the standard costs which she had recovered in the first action.

225 Second, rewind to the very beginning of the litigation. Assume, contrary to the facts, that the mother sues the company and the bank but not the law firm. She succeeds against the company by default and loses against the bank at trial. She then commences a separate action against the law firm. In this second action, she claims as damages an actual indemnity for her own costs of the first action. The orthodox rule said to apply in third-party cases dictates that she should recover an actual indemnity under the substantive law, subject only to the principles of causation, foreseeability, remoteness and mitigation.

226 But should the substantive law permit the mother to increase the extent of the law firm's pecuniary liability simply by her tactical choice to sue the law firm separately? Put another way, should the substantive law let the extent of the law firm's obligation to compensate the mother depend on the happenstance of litigation rather than on the innate culpable quality of its acts and omissions? Should the substantive law encourage a plaintiff to sue defendants separately – contrary to the policy underlying the joinder and third-party rules – in order to enhance his entitlement to

recover compensation? Carnwath J's answer to all these questions is no: whether the claim is litigated as a same-party case or a third-party case should not in itself make a difference to the plaintiff's entitlement to damages or to a wrongdoer's liability to pay damages. That is my answer too.

2 2 7 *British Racing*, conversely, could quite easily have been litigated as a same-party case. Although the negligent law firm was not a *defendant* to the plaintiff's original action, the defendants to that action used the third-party procedure under the RSC to join the negligent law firm to the action as a *third party* to the original action. So, assume that that original action had gone to trial instead of being settled. At the conclusion of the trial, the court would have applied the indemnity principle to shift costs to follow the event and set the basis for quantifying costs as between plaintiff and defendants. If the plaintiff had won, the default position would be that the defendants would pay the plaintiff's own costs and that those costs would be assessed on the standard basis. If the defendant won against the law firm, it could then recover from the law firm the costs it had to pay the plaintiff. But the law firm's liability would be limited to the standard costs which the defendant was to pay to the plaintiff. Should the law firm's liability be greater simply because it is now being sued by the plaintiff directly? This is the point which troubled Carnwath J.

228 In the bulk of cases, therefore, the distinction between the same-party case and the third-party case is too fragile and unprincipled a basis to justify one rule applying in the former and the entirely opposite rule applying in the latter. Having said that, there is undoubtedly a class of cases where a different rule might apply because the plaintiff who seeks to recover costs as damages could not have asserted a cause of action against the defendant in the earlier proceedings. That class of cases would include cases where the plaintiff had no cause of action against the defendant at the time of the earlier litigation. An example is a claim for costs as damages in the tort of malicious prosecution arising either from criminal proceedings (as in *Berry*) or in the exceptional cases where it is available in respect of civil proceedings (as in *Quartz Hill*). Another class of cases would include cases where the plaintiff had no way of knowing that he had a cause of action against the defendant at the time of the earlier litigation. An example of this is a claim for the costs of earlier proceedings as damages in an action seeking to set aside a judgment obtained in those earlier proceedings by a fraud of the other party. Another class of cases is where the costs were incurred in proceedings in a forum other than the forum considering the claim for those costs as damages. That can arise where a party seeks to litigate in an inappropriate forum in breach of an exclusive jurisdiction clause or in breach of an arbitration clause. A final example is where the earlier proceedings did not involve the determination of a *lis* and therefore could not have joined the third-party to the earlier proceedings to make it a same-party case. But I need not explore these cases or the recoverability of costs as damages in these cases further.

229 Carnwath J's decision in *British Racing* was a decision based on policy and principle. It did not turn on the measure of recovery under the procedural law. But he was obviously comforted in arriving at his decision by dicta in Lonrho indicating that limiting a plaintiff in a third-party case to standard costs did not undercompensate the plaintiff. The 1986 amendments to the RSC replaced the test of *necessity* in the taxation of costs with the test of *reasonableness*. That meant that it could be argued that taxed costs were now quantified on broadly the same basis as the basis on which damages were assessed. The result was that a plaintiff in a same-party case who had received in the earlier action an award of costs on the standard basis received an award which was closer than ever to an actual indemnity. So too, a plaintiff in a third-party case whose claim for costs as damages was taxed on the standard basis in the second action.

230 There appears to be a wider margin between standard costs and indemnity costs and between indemnity costs and solicitor and own client costs in Singapore than in England. But, as I have shown, this margin exists to enhance access to justice. If there is no distinction in principle between a same-

party case and a third-party case, then the policy of enhancing access to justice applies equally to both and dictates that the procedural law's limits on recoverability of costs should prevail in both over the substantive law's aim of full compensation.

Union Discount Co Ltd v Zoller

231 Does it make a difference if the costs being claimed as damages were incurred in proceedings in a foreign jurisdiction? The English Court of Appeal considered this question in *Union Discount Co Ltd v Zoller and others* [2002] 1 WLR 1517 ("*Union Discount*"). The plaintiff and the defendant entered into a contract with an English exclusive jurisdiction clause. The plaintiff sued the defendant in England on the contract. The defendant reacted by suing the plaintiff in New York on the same contract. The plaintiff relied on the exclusive jurisdiction clause and succeeded in striking out the New York proceedings. The plaintiff did not, however, ask the New York court for an award of the costs of the New York action. The plaintiff then added, in the English proceedings, a claim for the costs it had incurred in striking out the New York proceedings. That claim was itself struck out at first instance in the English proceedings as disclosing no reasonable cause of action. The English Court of Appeal disagreed. It held that the plaintiff's failure to ask for costs in New York was no bar to its claim in England to recover those costs because an application for costs in the New York proceedings could not possibly have yielded any award of costs – whether on the indemnity principle or otherwise (at [11]).

232 Schiemann LJ delivered the judgment of the court in *Union Discount*. He set out the passage from *Berry* which I have cited at [197] above and then held (at [11]):

> … it is clear that Devlin LJ considered that, in a case such as the present, where there was in the earlier action no prospect of obtaining costs although there had been no fault on behalf of the successful party, there was no policy inhibition on granting him the amount of those costs as damages in a later action if he had available to him an appropriate cause of action.

233 The Court of Appeal also held (at [26]) that there was no *res judicata* in the narrow sense because the New York court had not ruled on the recoverability of the costs of the New York action. There was also no *res judicata* in the wider sense because the plaintiff's claim for costs as damages could not have been brought in the New York given that it was the English courts which had exclusive jurisdiction over the parties' disputes.

234 Thus, in *Union Discount*, Schiemann LJ said (at [32]):

> There remains the question whether there is a policy reason *for the benefit of society at large* which argues in favour of applying the usual rule in cases where the costs sought to be recovered as damages represent the cost of litigation abroad in breach of an exclusive jurisdiction clause. In the present case we can see none unless it be a desire to keep down litigation purely involving costs — often referred to as parasitic litigation. A rationale behind the reluctance to facilitate parasitic litigation is that the state's legal resources should be devoted to central rather than parasitic questions. While this seems attractive, one must note that the amount of costs (or damages in the form of costs) at stake can be very much more than many a sum which otherwise is allowed to be recovered as damages.
>
> [emphasis in original]

235 It is notable that in *Union Discount*, the plaintiff's litigation in England could not be said to be parasitic on other *English* litigation. So while the Court of Appeal explicitly acknowledged the interest

in suppressing parasitic litigation, it made clear that that interest alone is not capable of prevailing over the substantive law's policy of full compensation, particularly where the earlier litigation had taken place in another forum.

236 The plaintiff in *Union Discount* had a cause of action against the defendant which was independent of the subject-matter of the previous proceedings in New York. That was a necessary but not in itself a sufficient foundation for recovery. The plaintiff's cause of action succeeded only because – as in *Berry* – there had been no prospect of securing a costs order under the indemnity principle in the New York proceedings. It is because of that, and only because of that, that the plaintiff's failure to seek an award of costs in New York did not count against it in the English proceedings.

237 The Court of Appeal in *Union Discount* did not have to consider the *quantum* of the plaintiff's recovery of costs. The matter came before the Court of Appeal on a question of liability alone, arising from an appeal against a successful striking out application. But it is likely that the damages would be quantified by way of an assessment of damages under the substantive law, not by taxation under the procedural law. This makes sense. The recoverability in English proceedings of costs incurred in New York proceedings does not engage any aspect of policy arising from English procedural law. So it would be reasonable to expect that the specialised procedure established for quantifying costs incurred in English proceedings has no role to play in quantifying costs arising from litigation in another forum.

National Westminster Bank plc v Rabobank Nederlands

238 Like *Union Discount*, *National Westminster Bank plc v Rabobank Nederland* [2007] All ER (D) 186 (May) ("Rabobank No 1") and *National Westminster Bank plc v Rabobank Nederland* [2008] 1 All ER (Comm) 266 ("Rabobank No 3") was a same-party case where the previous litigation between the same parties was in a foreign jurisdiction – in this case California. The difference is that in the Rabobank litigation, the plaintiff sought and recovered some of its costs unlike the plaintiff in *Union Discount*. Did that make a difference?

239 In *Rabobank No 1* and *Rabobank No 3*, the facts were as follows. The defendant covenanted by deed not to sue the plaintiff. The deed was governed by English law. In breach of the covenant, the defendant sued the plaintiff in California. The plaintiff eventually secured the dismissal of the entirety of the California action (*Rabobank No 1* at [19]). California civil procedure empowered the court to award to a successful party by way of costs certain limited disbursements only (*Rabobank No 3* at [24]). But a successful party had no *prima facie* entitlement under California civil procedure to an indemnity, or deemed indemnity, in respect of costs (*Rabobank No 1* at [435]). The plaintiff had sought and secured a limited costs order in California but that had been struck out on appeal (*Rabobank No 1* at [437]). There remained a possibility that the California court could at some point in the future make an order, within its limited jurisdiction, for costs (*Rabobank No 1* at [440]). The plaintiff sued the defendant in England and sought to recover the costs it had incurred in defending the California proceedings as damages for breach of the covenant not to sue.

240 Sir Anthony Colman distilled Devlin LJ's analysis in *Berry* into six propositions in *Rabobank No 3* (at [13]):

> (i) In a civil action an order that a losing party should pay party and party costs is deemed in the manner of a presumption fully to compensate the winning party for the whole of his costs in spite of the fact that it may not actually do so.

(ii) If the court deprives the successful party of the whole or part of his costs, that is because he deserves not to be compensated because he has needlessly incurred such expenditure and therefore to that extent caused his own loss.

(iii) When at the close of a civil trial the court determines that the successful party should recover the whole or part or no part of his costs and whether or not on a party and party basis, its order is an adjudication upon the issue as to the loss suffered by the successful party by reason of legal costs and expenses.

(iv) The conceptual basis of the rule preventing subsequent claims for damages being deployed to make good unrecovered costs is expressed by Devlin LJ ([1961] 3 All ER 65 at 76, [1962] 1 QB 306 at 329):

> 'To be effective as an interposition, there must be a sort of *res judicata*, a decision in the first case in which costs are awarded on the very point that is in issue in the second case, ie, the quantification of the damage. In a civil case the judicial discretion is directed to quantifying the damage according to the conventional measure. In a criminal case, it is not: and the decision contained in a criminal award need not represent a decision on quantification at all.'

The practical need for such a rule was that in its absence 'every successful plaintiff might bring a second action against the same defendant in order to recover from him as damages resulting from his original wrongdoing the costs he failed to obtain on taxation.' …

(v) By contrast, in a criminal case the discretionary order that the prosecution should pay costs was not necessarily intended to achieve a full indemnity, whether actually or on a conventional basis, for, unlike an order for costs in a civil action, the discretion was not required to be exercised so as to achieve complete, or conventionally complete, compensation. As Devlin LJ put it… :'the decision contained in a criminal award need not represent a decision on quantification at all.'

(vi) Because the issue in the second case was not the same as the issue in the first case, since the issue in the first case was not that of the quantification of the damage attributable to incurred legal costs, the rule applicable to civil cases did not apply with regard to costs awards in criminal cases.

I accept these six propositions as correctly setting out the law in a same-party case where the costs were incurred in earlier proceedings in the same forum.

241 Colman J applied these principles distilled from *Berry* in (*Rabobank No 1* at [439]) to hold that the plaintiff was entitled to recover the costs of the California proceedings as damages. It did not matter that the plaintiff had sought an order for costs in California and failed because the California court did not, in any event, have the power to award costs on the indemnity principle. It also did not matter that the California court could in future make a limited costs order because appropriate steps could be taken to prevent double recovery. In Rabobank No 1, he held at [439]:

> I find nothing inconsistent between this conclusion and anything that was said in *Berry v.* British *Transport Commission* [1962] 1 QB 306… for in this case there is no question of duplication of a cause of action in order to recover by way of damages in one set of proceedings or jurisdiction what could not be or has not been recovered as costs in a previous set of proceedings founded on the same cause of action.

242 *Rabobank No 3* was the sequel once-removed to *Rabobank No 1*. In it, Sir Anthony Colman had to determine the measure of the plaintiff's damages arising from the wrongfully-brought California action. As in *British Racing*, it was not suggested by either party in *Rabobank No 3* that the plaintiff's costs should be assessed by an assessment of damages or by any procedure other than by taxation. The only issue for Sir Anthony Colman – as it was for Carnwath J in *British Racing* – was whether the taxation should be on the standard basis or on the indemnity basis. Under the CPR, the test of proportionality is part of the applicable English procedural law when assessing costs on the default standard basis under but not when assessing the costs on the indemnity basis (see Part 44.4(2) and 44.4(3) of the CPR). So the question for Sir Anthony Colman resolved into the question whether there was any rule of English public policy underlying the recovery of costs as damages which dictated that the plaintiff's damages, being in respect of costs, be limited not just by reasonableness but also by the principle of proportionality.

243 Sir Anthony Colman concluded that any rule of English public policy by which costs awarded in previous civil proceedings are deemed to indemnify a party for the actual costs of those proceedings applies only when those previous costs are awarded by an English court under English procedural law, including the indemnity principle and the principle of proportionality if applicable (*Rabobank No 3* at [25]). He further held that the introduction of the concept of proportionality in the test for standard costs meant that standard costs were no longer in principle or in practice a virtual indemnity for actual costs (at [26]). He therefore concluded that the costs of the California proceedings should be assessed on the indemnity basis (at [27]).

244 Sir Anthony Colman's decision in *Rabobank No 1* on liability is clearly sound. No aspect of the policy of English procedural law was engaged. English procedural law has no policy of enhancing access to justice in California. The procedural policy of achieving finality in litigation was not engaged because no court, whether in England or elsewhere, had yet considered the question of indemnifying the plaintiff against the costs of the California litigation. It is true that the plaintiff did seek costs from the California court. But that could not be held against the plaintiff because the California court had no power to award an indemnity or a deemed indemnity. Finally, the English litigation was not parasitic litigation: the defendant's liability in damages arose from a cause of action in breach of contract and included heads of loss other than the costs of the California proceedings. The only curiosity is that an English taxation of costs was adopted as the procedure to quantify costs incurred in a foreign forum rather than the usual assessment of damages.

245 For present purposes, though, the important point to note is that the independent cause of action which the plaintiff had against the defendant arising from the breach of the covenant not to sue was a necessary but not a sufficient condition for the plaintiff to recover the costs of the California proceedings. If, contrary to the facts in the *Rabobank* litigation, the earlier costs had been incurred in proceedings in England, it is clear that the claim for those costs as damages would have been barred.

Carroll v Kynaston

246 Can a plaintiff claiming unrecovered costs as damages succeed if the earlier litigation did not consider the issue of costs at all, as opposed to considering the issue and making no order as to costs (as in *Quartz Hill*)? The English Court of Appeal considered this question in *Carroll v Kynaston* [2011] QB 959 ("*Carroll*").

247 In *Carroll*, Mr Carroll and Ms Kynaston were litigants in person locked in a long-running and bitter action with claims and counterclaims. By the time of trial, all that was left to be tried was Ms Kynaston's counterclaim in defamation against Mr Carroll. Shortly before the counterclaim came on for

trial, the parties entered into a settlement agreement. A dispute then arose between the parties whether they had reached a settlement at all; and if so, whether either party had breached the terms of the settlement. So the action proceeded to trial before Field J for him to determine as a preliminary question whether the action had indeed been settled.

248 Immediately after hearing the parties' submissions, Field J delivered an *ex tempore* judgment in their presence. He accepted Mr Carroll's submission that he and Ms Kynaston had settled the action. He therefore granted a declaration to that effect. That declaration obviated a trial of the counterclaim and therefore disposed of the entire action before Field J. But it did not resolve the parties' dispute as to whether there had been a *breach* of the settlement agreement. So Field J went on in his *ex tempore* judgment to give the parties a detailed protocol as to how they were to assert and pursue their claims for breach of the settlement agreement, if necessary by commencing separate proceedings.

249 At that point, Field J came to the end of his *ex tempore* judgment. Utterly exasperated with the litigants, Field J rose to walk out of court. It appears that Mr Carroll also then rose to invite Field J to make an order for the costs of that hearing in his favour and against Ms Kynaston. Mr Carroll may even have said words to that effect. But it appears that Field J left without inviting any submissions on costs, without seeing Mr Carroll rise to his feet, without hearing any precatory words (if said) on costs, without hearing any submissions on costs and without making any order as to costs. Mr Carroll could have asked Field J's associate immediately to call the judge back to hear submissions on costs. There was no suggestion that Mr Carroll did that. Thereafter, Field J himself drew up the formal order of court. Like his *ex tempore* judgment, it made no mention of costs. Despite this, Mr Carroll did not write to Field J to invite him to vary his order to include an order for costs. Nor did Mr Carroll seek leave to appeal Field J's order on the issue of costs alone.

250 Instead, Mr Carroll commenced a new action against Ms Kynaston for breach of the settlement agreement, relying on Field J's protocol. In this new action, Mr Carroll sought to recover the costs he had incurred in securing Field J's declaration that the earlier litigation had been compromised as damages for Ms Kynaston's breach in trying to proceed with the trial of the counterclaim despite the settlement. Mr Carroll's new action came on for trial in due course before Sharp J. She dismissed Mr Carroll's claim. He appealed.

251 Before the Court of Appeal, Mr Carroll argued that his claim for costs fell outside the rule applied in *Quartz Hill* because (at [17]): (1) Field J's order specifically contemplated further proceedings between the parties for breach of the compromise agreement; (2) Mr Carroll was not given an opportunity to ask for his costs before the trial judge; and (3) Mr Carroll's current cause of action against Ms Kynaston was free-standing and independent of the cause of action litigated in the earlier action.

252 The Court of Appeal considered and rejected each of Mr Carroll's three arguments. On the first argument, Ward LJ said (at [19]):

> It is preposterous to think that Field J had in mind a claim for damages for breach of the compromise agreement when the measure of that alleged damage was the very costs that it was within his power to order or not as the case may be. There was no earthly reason why he would have given directions for a separate action to determine the costs of and incidental to his having to rule whether or not there was a compromise of the counterclaim in which case the counterclaim would be dismissed, or if not, the trial would proceed. He was making it perfectly plain that there was a binding agreement of settlement which brought the counterclaim to an end but he acknowledged, for example in para 7 of his judgment, that there may or may not be a

dispute over the meaning of the agreement.

253 The Court of Appeal rejected Mr Carroll's second argument as well. He had had an opportunity to seek costs from Field J. Even if Mr Carroll could not reasonably have exercised that opportunity in Field J's presence because of Field J's unexpected and exasperated express exit after the *ex tempore* judgment, Mr Carroll could have asked the judge's associate to invite Field J to return to court to hear his submission. He could have asked the judge to vary the order once it had been drawn up formally and perfected. He could have sought leave to appeal against Field J's omission to deal with costs. He did none of these things. Although Mr Carroll was a litigant in person, it was not unfair to hold that all of that precluded him from arguing that he had had no opportunity to seek an order for costs before Field J. As Ward LJ said (at [20]), Mr Carroll "may be a litigant in person but he is an experienced litigant in person and nothing we know about him suggests he is a shrinking violet unable to fight his corner".

254 The Court of Appeal rejected Mr Carroll's third argument as well. Although Mr Carroll did have a free-standing cause of action for breach of the compromise agreement and even though that was wholly distinct from the original causes of action underlying the compromised proceedings, that was of no assistance. As Ward LJ said (at [30]):

> As I have indicated, the instant case can be distinguished from [*Berry*]… because the costs there were costs awarded under the different regime operating in the criminal courts… Here the costs of the hearing before Field J could have been recovered if he had so ordered. If the [plaintiff] did not ask for the costs, then he failed to mitigate his loss and cannot recover them as damages in a subsequent action on that ground. His difficulty is compounded by the fact that the judge did deal with costs: he made no order as to the costs. As the citations from the judgments of Bowen, Devlin and Danckwerts LJJ [in *Quartz Hill* and in *Berry*] all make clear, that is the end of it: "If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action": 11 QBD 674, 690. "If he does not get his costs, it means either that it was not necessary for him to incur them or that there has been some fault or misconduct for which he is responsible": [1962] 1 QB 306, 325. "Consequently, if a successful party is, in the exercise of the judicial discretion in any particular case, refused costs, that is also an end of the matter": [1962] 1 QB 306, 336.

255 There are two ways of looking at *Carroll*. The first view is that Field J took a considered decision to deprive Mr Carroll of the costs which would ordinarily have followed the event but Field J failed to articulate that aspect of his decision in his *ex tempore* judgment or in the formal order he later drew up. Ward LJ's passage quote above appears to support that view. On that view, the result in *Carroll* is the straightforward application of the rule applied in *Quartz Hill*. The policy of the procedural law which is engaged is the policy which deems costs awarded (or in this case withheld) in earlier civil litigation on the indemnity principle to be a true indemnity.

256 The other view of *Carroll* is that Field J did not deal with costs at all. If this is the correct view, then there was no deemed indemnity in the litigation before Field J for the Court of Appeal to hold Mr Carroll to in the later litigation before Sharp J. But the Court of Appeal nevertheless held that his action before Sharp J failed entirely. On this view, the only policy of the procedural law which the Court of Appeal could have upheld was the policy in favour of achieving finality in litigation: *res judicata* in the wider sense.

257 Ward LJ's judgment in *Carroll* shows traces of this view also (at [31]):

> There must be finality in litigation… The claimant should not be entitled to recover more by way

of damages than he could have recovered by way of costs for reasons held good since *Cockburn v Edwards* 18 Ch D 449. The excess is an irrecoverable luxury. The claimant's true remedy was to appeal the order actually drawn by Field J. He did not do so. He cannot now do so. He cannot now get by the backdoor what he failed to secure by opening the front door.

258 On either view, the result is that a civil litigant who could have asked for costs in earlier litigation but failed to do so is in precisely the same position as a civil litigant who could have and did ask for costs in the earlier litigation. *Carroll v Kynaston* is therefore the more typical example (involving successive actions) of the principle applied in *Ganesan Carlose* (involving a single action).

The plaintiffs cannot recover their unrecovered costs

Court of Appeal's costs orders

259 I now return to the case before me. The Court of Appeal concluded its judgment in *Ng Eng Ghee (CA)* (at [212]) with the following invitation: "Parties are to write in within a week with their submissions on the appropriate costs to be awarded". I make two points about this invitation. First, the Court of Appeal extended this invitation only to *the parties* to CA119 and CA120. Mr Then and Ms Tan were entitled to appeal against Choo J's decision in *Ng Eng Ghee (HC)* but chose not to. They were therefore not parties before the Court of Appeal. It did not, therefore, direct its invitation to them. Nor did it direct its invitation to Mr Lo. He was in an even worse position than Ms Tan and Mr Then: he was not even entitled to appeal against Choo J's decision on OS5 because he discontinued those proceedings. Second, the Court of Appeal's invitation to the parties was an open-ended one to address costs generally. It did not qualify in any way the particular issues on costs on which it invited submissions. To be more specific, the invitation did not limit the parties to seek costs only against the other parties to CA119 and CA120.

260 In response to this invitation, on 8 April 2009, Mr Darmawan filed written submissions on behalf of three plaintiffs: himself and his wife and Ms Sadeli. In his submissions, Mr Darmawan asked the Court of Appeal to award these three plaintiffs indemnity costs against the consenting subsidiary proprietors and jointly and severally against HPPL for the following proceedings: [note: 48]

(a) Their application for leave to seek judicial review of the STB's decision to compress timelines in STB43 (OS1057); [note: 49]

(b) The first tranche of hearings in STB43 which ended in dismissal of the Collective Sale Application on 3 August 2007; [note: 50]

(c) The consenting subsidiary proprietors' appeal to the High Court against the first STB decision (OS1269) and these three plaintiffs' own cross-appeal against the STB decision to make no order as to costs (OS1270); [note: 51]

(d) The second tranche of hearings in STB43 which ended in the collective sale order on 7 December 2007; [note: 52]

(e) Their appeal as litigants in person to the High Court against the second STB decision (OS11); [note: 53] and

(f) Their appeal as litigants in person to the Court of Appeal against the decision of Choo J in OS11 (CA120).

These are substantially the same proceedings for which these three plaintiffs seek before me equitable compensation for their unrecovered costs.

261 Attached to Mr Darmawan's submissions dated 8 April 2009 was a letter addressed to the Court of Appeal also dated 8 April 2009 from Ms Tan and Mr Then. They wrote to the Court of Appeal as non-parties. In it, *they* asked for an award of costs in *their* favour for the proceedings set out in [260] above, save for CA120 to which they were not a party. It is significant that Mr Darmawan felt able to put Ms Tan's submissions on costs forward and Ms Tan felt able to make those submissions on costs despite not the Court of Appeal not having invited any submissions on costs from non-parties to the appeal.

262 On the same day, 8 April 2009, HEP put in its submissions on costs on behalf of its clients. Mr Lo also submitted a letter dated 8 April 2009 to the Court of Appeal asking for an award of costs for OS5. He too presumably felt the Court of Appeal's invitation was wide enough to permit him to put in this request.

263 On 9 April 2009, HPPL as interveners put in their written submissions on costs. On the same day, the consenting subsidiary proprietors put in their written submissions on costs.

264 On 11 May 2009, the Court of Appeal by letter invited the parties (that is, excluding Mr Lo, Mr Then and Ms Tan) to make submissions on the following specific questions relating to costs:

(a) Whether only one set of costs should be awarded where similar arguments/submissions were made by or on behalf of more than one party on the same side; and

(b) Whether costs ought to be awarded to objecting owners (such as Mr Lo, Mr Then and Ms Tan) who contested the collective sale application before the STB but did not appeal from the order made.

265 On 18 May 2009, Mr Darmawan filed further written submissions on behalf of himself, Ms Seteono and Ms Sadeli addressing these two issues. Attached to these submissions was a letter also dated 18 May 2009 from Ms Tan and Mr Then as non-parties addressed to the Court of Appeal setting out their submissions on these two issues. Again, I note that Mr Darmawan felt able to put to put Ms Tan's further submissions on costs forward to the Court of Appeal and that Ms Tan felt able to make those submissions despite not having been invited to do so.

266 In *Ng Eng Ghee (Costs)*, the Court of Appeal made the following holdings of principle:

(a) The Court of Appeal declined to award indemnity costs to any of the objecting subsidiary proprietors because the matters they had raised did not make a sufficiently compelling case for a departure from the usual award of costs on the standard basis (at [31]).

(b) The Court of Appeal held that it had the power to award costs in favour of Mr Then and Ms Tan even though they did not appeal against Choo J's decision in OS11 and were therefore not parties to CA120.

(c) Insofar as the plaintiffs were entitled to the costs of any particular set of proceedings, those costs would be discounted by 20% to account for the duplication of work with the objecting subsidiary proprietors represented by HEP, the legal relevance of the points taken and the cogency of the contentions advanced (at [28]).

(d) HPPL had engendered the continuation of the dispute by, amongst other things, commencing OS1238 seeking damages for the consenting subsidiary proprietors' alleged breach of contract (see [43] above) and were therefore jointly liable with the consenting subsidiary proprietors for the costs incurred by the objecting subsidiary proprietors after that date (at [37] – [39]).

267 The Court of Appeal then made the following costs orders in favour of the plaintiffs (summarised in *Ng Eng Ghee (Costs)* at [43]):

(a) The Court of Appeal declined to award any costs to the plaintiffs for the first tranche of the Collective Sale Application because the ground on which the STB dismissed the Collective Sale Application at the end of the first tranche – a defect in the consenting subsidiary proprietors' documentation – was not a ground which the plaintiffs had raised (at [29] – [30]).

(b) For the same reason, the Court of Appeal declined to award any costs to the plaintiffs for OS1269, the consenting subsidiary proprietors' appeal from the STB's decision in the first tranche (at [29] – [30]).

(c) The Court of Appeal ordered the consenting subsidiary proprietors to pay the plaintiffs 80% of one set of costs for the second tranche of the Collective Sale Application to be taxed on the basis of two counsel and to be shared equally by Mr Darmawan, Ms Seteono and Ms Sadeli on the one hand and Mr Then and Ms Tan on the other hand (at [28] and [43(c)] – [43(d)]).

(d) The Court of Appeal ordered the consenting subsidiary proprietors and HPPL jointly to pay 80% of one set of reasonable compensatory costs to Mr Darmawan and Ms Seteono and Ms Sadeli as litigants in person in OS11.

(e) The Court of Appeal ordered the consenting subsidiary proprietors and HPPL jointly to pay 80% of one set of reasonable compensatory costs to Mr Then and Ms Tan as litigants in person in OS11 (at [29] – [30]).

(f) The Court of Appeal ordered the consenting subsidiary proprietors and HPPL jointly to pay 80% of one set of reasonable compensatory costs to Mr Darmawan, Ms Seteono and Ms Sadeli as litigants in person in CA120.

268 The Court of Appeal could not, obviously deal with the costs of OS1057 (the plaintiffs' application for leave to seek judicial review of STB's decision to expedite first tranche of the Collective Sale Application) and the costs of OS1270 (the plaintiffs' appeal against STB's decision in the first tranche to make no order as to the costs of the first tranche) as they were outside the continuum of proceedings which originated in STB43 and culminated in CA120. The plaintiffs failed in OS1057. That, of necessity, means that OS1057 was unmeritorious litigation for which the plaintiffs did not deserve a compensatory order for costs. The plaintiffs incurred those costs because: (1) the STB set a compressed timeline for the first tranche of STB43 not as a result of anything done by the defendants or the consenting subsidiary proprietors but as a result of agitation by HPPL; and (b) the plaintiffs' decision to commence OS1057 was tactical and the application was unmeritorious, as indicated by Tan J's dismissal of it (see [141] – [142] above). I therefore hold that the plaintiffs' costs of OS1057 are too remote from the defendants' breaches of fiduciary duty.

269 OS1270 did not proceed to a determination and it is not clear what costs order was made. But it appears to have been subsumed both on the merits and on the issue of costs by Choo J's decision in OS1269.

Plaintiffs rely on the same cause of action

270 The plaintiffs' position is that their claim for costs as equitable compensation is not barred by the *Quartz Hill* line of cases for two reasons. First, the defendants were not parties to the Collective Sale Application which originated in STB43 and culminated in CA120. This is therefore not a same-party case. Second, the plaintiffs submit that they assert a cause of action in the actions before me which is separate and distinct from the cause of action underlying the Collective Sale Application.

271 It is true that the defendants were not parties to the Collective Sale Application, at least not directly and not in the capacity in which they are now sued. And it is true that the Collective Sale Application did not assert a cause of action for equitable compensation by the plaintiffs. But those are not to my mind the determinative factors given the unusual nature of collective sale proceedings. A collective sale application is an application under statute. It is not founded on wrongdoing. It does not assert any cause of action. It is brought by a limited number of plaintiffs on behalf of themselves and as representatives for all other consenting subsidiary proprietors. It has direct binding effect on all subsidiary proprietors through a combination of statute and contract. It is determined at first instance by a specialised tribunal acting inquisitorially and not by a civil court acting curially and adversarially. Any appeal to the High Court is only on a question of law. Civil litigation, on the other hand, springs from wrongdoing. It involves a plaintiff asserting a cause of action by which he invites a civil court to hold a defendant liable for breach of a civil obligation where the defendant disputes liability. Civil litigation has direct binding effect only on the parties to the litigation. A collective sale application is not civil litigation. It is *sui generis*.

272 The only question in the Collective Sale Application for the STB was whether the statutory prerequisites for granting a collective sale order were satisfied. It held in its second decision that they were satisfied. The High Court and the Court of Appeal had to determine whether the STB had erred in law. In the course of determining that, the Court of Appeal made findings that the First SC owed fiduciary duties to the subsidiary proprietors and had breached those duties.

273 Where a plaintiff seeks to recover damages for costs incurred in prior proceedings which are *sui generis*, what is determinative is not the procedural configuration of the prior proceedings but the substance of the matter. I therefore start with the use to which the plaintiffs seek to put CA120 in the actions before me. The plaintiffs' position is that CA120 established conclusively the defendants' breaches of fiduciary duties. I have agreed with them. It is further the plaintiffs' position that the only matters left for me to decide in light of CA120 are causation of loss and quantum of compensation. That is a crucial indication that the actions before me do not assert a cause of action which is wholly independent of the Collective Sale Application. Indeed, that indicates to me that the actions before me are wholly *dependent* on the Collective Sale Application. If the plaintiffs were in truth asserting a separate cause of action before me, it would be for me to determine all aspects of that cause of action: liability, causation and quantum. That was the position in each of the cases which I have analysed above in which a claim for costs as damages was asserted, even in those cases where it was asserted and failed.

274 Further, the unusual nature of a collective sale application means that none of the decided cases I have analysed above is an applicable analogy to guide the result in this case. I must therefore consider the policies underlying the special rules governing the recovery of compensation for costs to determine whether the plaintiffs are entitled to succeed.

Plaintiffs seek to recover what they failed to recover in CA120

275 My starting point is that the substance of the plaintiffs' claim in the actions before me is to

recover an indemnity for their costs. That is the same measure of compensation which they sought as costs from the Court of Appeal in CA120. But the Court of Appeal expressly rejected the plaintiffs' application for indemnity costs and held that they were entitled only to the default standard costs. And even then, the Court of Appeal awarded them only a specific proportion of those costs.

276 In the actions before me, the plaintiffs try again to recover an actual indemnity for their costs, after giving credit (as they must) for the costs they have recovered from the consenting subsidiary proprietors and HPPL pursuant to *Ng Eng Ghee (Costs)*. The defendants point out that what the plaintiffs seek to recover before me is exactly what they sought and failed to recover from the Court of Appeal in *Ng Eng Ghee (Costs)*. The plaintiffs admit this. The following extract from Mr Darmawan's cross-examination shows the plaintiffs' purpose: [note: 54]

Q: You got the costs order, you asked for indemnity costs, you didn't go get it, so now you decided how to go and get indemnity costs?

A: Yes.

Q: So if the Court of Appeal had accepted your arguments, and given you indemnity costs, we wouldn't be here today, am I right?

A: Yes. If I'm fully indemnified, I won't be here today.

…

Q: You knew what indemnity costs meant, am I right?

A: Indemnity means made whole, be made whole. No, a single – no loss. Indemnity. That, to me, is the meaning of "indemnity".

Q: So that is what you wanted the Court of Appeal to give you?

A: Yes.

Q: And you made this clear in your submission, am I right?

A: Yes.

Q: And they didn't give it to you, am I right?

A: No, they did not.

Q: And because they didn't give it to you, you went running off to Tan Kok Quan Partnership to see how you could get the balance, am I right?

A: Yes.

Q: If they had given it to you, we won't be here today, am I right?

A: Yes.

…

Q: Would I be correct to say that what sparked off this action is the decision of the Court of Appeal not to award you indemnity costs?

A: Particularly paragraph 19 of the costs judgment, yes. Yes, to your answer.

Q: So the whole idea of this action is to get indemnity costs, am I right?

A: Yes.

277 The plaintiffs are clearly therefore inviting me to determine the same question which the Court of Appeal in CA120 and Tan J in OS1057 has already dealt with: what sum of money will indemnify the plaintiffs for the costs which they incurred in those proceedings. The plaintiffs can pose that question for me to determine only if they can show that the Court of Appeal did not or could not apply the indemnity principle in awarding costs (*Berry*, *Union Discount*) or that the plaintiffs had no opportunity in CA120 to seek an indemnity for the costs of the collective sale litigation against the defendants (*British Racing*, *Rabobank*). If they did have that opportunity but failed to grasp it, their claim must fail (*Ganesan Carlose*, *Carroll*).

278 I hold that they had that opportunity and failed to grasp it.

Court of Appeal did apply the indemnity principle

279 It is clear from the Court of Appeal's reasoning in *Ng Eng Ghee (Costs)* that it applied the indemnity principle in arriving at its carefully calibrated decision as to costs in CA120. The plaintiffs do not and cannot suggest otherwise.

280 Although a collective sale application is not litigation in the true sense of the term, it is beyond argument that the power of the STB, and on appeal the High Court and the Court of Appeal, to award costs in STB proceedings rests on the indemnity principle. That must be so. In collective sale proceedings, just as in traditional litigation, the procedural law must balance the benefits of indemnifying successful applicants against the need to protect losing parties against unreasonable costs and the benefits of not deterring potential parties from seeking to vindicate their rights. Indeed, it could be said that the balance struck by the indemnity principle is all the more necessary in collective sale proceedings because an objecting party will be objecting in order to prevent the forced monetisation of his property rights in something so fundamental as his home and will be resisting the will of an overwhelming majority of consenting subsidiary proprietors who are sharing the costs of the collective sale proceedings and therefore much better able to withstand those costs.

281 The result is that the Court of Appeal, when it made its orders as to costs in CA120, awarded those costs as an indemnity as defined by the procedural law. The Court of Appeal considered the plaintiffs' submissions as to how those costs should be quantified – they submitted on the indemnity basis – and rejected those submissions. It exercised its discretion judicially to award costs on the default standard basis. Whatever the basis, and however the basis is defined, those costs were awarded under the procedural law on the application of the indemnity principle as an indemnity. Therefore, those costs are deemed by the procedural law, to be an indemnity.

282 The plaintiffs' case therefore falls outside the exception recognised in *Berry*. The plaintiffs are permitted in the proceedings before me to argue that that indemnity was not a true indemnity and to invite me to award the difference as equitable compensation only if they had no opportunity to seek those costs against the defendants in CA120.

Plaintiffs considered seeking costs against the defendants in CA120

Plaintiffs considered seeking costs against the defendants in CA120

283 The plaintiffs throughout the collective sale proceedings placed the blame for the defective collective sale process squarely at the feet of the defendants. The Court of Appeal in *Ng Eng Ghee (CA)* accepted that. So the defendants were squarely in the frame when the plaintiffs were making the submissions which led to *Ng Eng Ghee (Costs)*. In fact, the plaintiffs did advance a claim for costs against the defendants in *Ng Eng Ghee (Costs)* and recover against them, but only in their capacity as consenting subsidiary proprietors and not as members of the First SC.

284 But the plaintiffs went further than that. Mr Darmawan testified that he actually thought of asking the Court of Appeal in CA120 to award costs against the defendants personally when he responded to the Court of Appeal's invitation for submissions on costs. [note: 55] He changed his mind only after seeking legal advice. That legal advice, not from his current solicitors, was that he should "follow strictly what the Court of Appeal asks you". [note: 56]

285 But it is clear that the plaintiffs did not follow strictly what the Court of Appeal asked of them. The Court of Appeal did not invite submissions on costs from person who were not parties to CA119 and CA120. Yet Mr Then and Ms Tan made submissions. Mr Darmawan facilitated their submissions by attaching their submissions to his own submissions. The Court of Appeal did not invite submissions on whether the consenting subsidiary proprietors should pay indemnity costs. Yet the plaintiffs' submissions argued strenuously that they should pay indemnity costs. The Court of Appeal did not invite submission on whether HPPL, an intervener, should be liable jointly and severally with the consenting subsidiary proprietors for costs. [note: 57] Yet the plaintiffs' submissions argued strenuously that they should be.

286 The plaintiffs therefore had a clear opportunity in CA120 to seek an order for costs against the defendants personally.

Court of Appeal had the power to order costs against the defendants

287 Ms Tan practised as a litigation lawyer, albeit no longer. In her submissions on costs to the Court of Appeal, she submitted that she and her husband were entitled to costs despite not being parties to CA120. She rested her submission on *Aiden Shipping Co Pte Ltd v Interbulk Ltd* [1986] 2 WLR 1051 ("*Aiden*"). She argued that that case was authority for the proposition that the Court of Appeal could award costs in *favour* of non-parties, namely herself and her husband. The Court of Appeal accepted her submission but not on the basis of this case. It relied instead on O 59 r 4(2) and O 59 r 13 to award her and her husband costs (see *Ng Eng Ghee (Costs)* at [13] – [14]).

288 That is not surprising. *Aiden* is not an authority to support an award of costs *in favour* of non-parties. It is in fact the *locus classicus* on a court's discretion to award costs *against* non-parties. The dispute in *Aiden* arose from two sets of arbitration proceedings. The first set of proceedings was between the shipowners of a damaged vessel and the charterers under the charterparty. The second set of proceedings was between the charterers and the sub-charterers. The shipowners were not parties to the second set of proceedings. The shipowners' claim in the first set of proceedings was dismissed and Hirst J ordered that the shipowners pay the charterer's costs of the application *and* the charterers' costs of second set of proceedings between the charterers and sub-charterers. This decision was reversed by the Court of Appeal but restored by the House of Lords. The House of Lords' decision is significant because it overruled two English Court of Appeal decisions which held that an order for costs could only be made against a party to the proceedings in question. A Singapore court too has the power to order costs against non-parties: see *Chin Yoke Choong Bobby and Another v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907 ("*Chin Yoke Choong*") at [25] – [26] citing *Aiden*.

289 Mr Darmawan considered inviting the Court of Appeal to award costs against the defendants personally. Ms Tan had in her hands the legal basis on which to seek those costs against the defendants as non-parties to CA120. Doing so was an obvious point. Having failed to grasp that opportunity when it presented itself, they cannot now bring a separate action to recover those costs. That is the clear effect of *Ganesan Carlose* and *Carroll*.

Plaintiffs would be limited to standard costs in any event

290 Even if I am wrong and the defendants are to be treated as third parties to CA120 for the purposes of this action, the plaintiffs' claim also fails. If the actions before me are analysed as third-party cases, my analysis of the cases above shows that the consequence would be that the plaintiffs would be limited to costs to be taxed on the standard basis. Thus, just as Carnwath J in *British Racing*, I would not have simply awarded the plaintiffs compensation equivalent to the sums which they paid their own solicitors less the sums recovered under the Court of Appeal's costs orders in CA120. I would also not have ordered that the plaintiffs' damages be assessed by an Assistant Registrar. Where compensation is awarded for costs incurred in proceedings in Singapore, the appropriate procedure for quantifying those costs is taxation. And the appropriate basis for taxation – as I have said – is the standard basis.

291 But standard costs is precisely what the Court of Appeal and Tan J have already awarded the plaintiffs. So on this analysis too the plaintiffs' claims fail.

Paragraph 19 of Ng Eng Ghee (Costs)

292 The plaintiffs found their action on the following passage which appears in *Ng Eng Ghee (Costs)* at [19]:

> For these reasons, we are of the view that the non-appealing parties are entitled to recover costs for the Horizon Board proceedings (but only the Second Tranche…) and the High Court proceedings. In arriving at our decision, we have not placed any particular reliance on our finding that there was a lack of good faith in the *en bloc* sale. We have already noted that costs are generally compensatory and not punitive… Although the conduct of the paying party in the *proceedings* may have an impact on costs orders (especially where the paying party unnecessarily complicates or prolongs proceedings, or otherwise acts in a manner amounting to abuse of court processes), the lack of good faith in the *transaction* does not always call for exceptional treatment. ***It bears emphasis that our finding in relation to the lack of good faith centred on the behaviour of certain individuals who are not parties to these proceedings. All said and considered, it would be quite unfair to attribute their lack of good faith and/or diligence to the respondents for the purposes of assessing costs, thereby increasing their costs burden substantially.***
>
> [emphasis in italics in original; emphasis added in bold italics]

293 The plaintiffs submit that the words in bold italics above show that the Court of Appeal would have ordered the defendants to pay indemnity costs if they had been parties to the collective sale proceedings. They take that as a warrant for commencing these separate proceedings – to which the defendants are now parties – to recover against the defendants alone their unrecovered costs of the collective sale proceedings. I do not read this passage that way. The Court of Appeal here is explaining why it did not give the plaintiffs indemnity costs against the consenting subsidiary proprietors. There were two reasons for that. The first is the well-established principle that the court does not ordinarily award indemnity costs to punish a losing party for the wrongdoing which is the

subject-matter of the litigation but to compensate the winning party for the additional costs caused by the losing party's unreasonable conduct of the litigation. The second reason is that the defendants were not parties to CA120. I do not read this passage as an invitation or as a licence to the plaintiffs to sue the defendants.

294 It is to me preposterous (see [252] above) to suggest that the Court of Appeal would have concluded this long, drawn-out, bitter collective sale litigation which pitted neighbour against neighbour for well over two years by inviting and authorising the plaintiffs to commence fresh proceedings to reopen its orders on costs. If anything, this passage reinforces my belief that if the plaintiffs had made an application to the Court of Appeal on the authority of *Aiden* and *Chin Yoke Choong* to ask that the defendants pay the costs of the collective sale litigation on the indemnity basis, the Court of Appeal would have heard and determined that application on its merits. Having had that opportunity and not taken it, the plaintiffs cannot now seek to do so in these proceedings. There must be finality in litigation.

No equitable compensation for unrecovered costs

295 The Court of Appeal made a final decision on the exact issue which is now before me: how should the plaintiffs be indemnified for their costs of the Collective Sale Application. It is an abuse of process for the plaintiffs to invite me to decide this question afresh just as much as it is an abuse of process for the defendants to suggest that they were not in breach of their fiduciary duties.

Interest accrued on Mr Darmawan's overdraft facility

296 Mr Darmawan took out an overdraft facility to fund his legal fees. He incurred interest on this facility which he now claims as equitable compensation. Even if this facility was used solely used to fund his legal fees, it follows from my analysis above that if Mr Darmawan is not entitled to recover his unrecovered costs as equitable compensation, then *a fortiori* he is not entitled to recover the interest he incurred on this overdraft facility.

297 In any event, it appears from the evidence that the overdraft was not used exclusively to fund his legal fees. Mr Darmawan opened this overdraft account some time in April 2007, around the time that he decided to object to the collective sale. He testified initially that he opened this account to pay TKQP's legal fees. [note: 58] However, when it was pointed out to him that the bulk of his overdraft account was used for other purposes, he responded as follows: [note: 59]

> That particular entry, $313,000, for the purchase of my – of a unit at [another development] because I was afraid that if I have to be moved because of the sale of Horizon Towers, I better make sure I had a second abode.

298 This seems to indicate that this overdraft account was opened in connection with the collective sale but not specifically to pay legal fees arising out of the collective sale *proceedings*. It is not sufficient for Mr Darmawan to show that the overdraft account was in fact used to pay his solicitors' legal fees. He must show that but for the defendants' breach, he would not have incurred interest on this overdraft account. Mr Darmawan's argument answers a slightly different causal enquiry: his argument is that but for the *collective sale*, he would not have incurred interest on this overdraft account. The collective sale was set in motion without any breach of duty by the defendants. Mr Darmawan has not shown the necessary causal connection between the defendants' breaches and the interest he incurred in the overdraft account.

299 In any event, the loss incurred via interest on an overdraft is a different type of loss than

would have been foreseeable. A fiduciary who breaches his duties may foresee that an object of his duties would incur costs as a result. But it is not foreseeable that the object of his duties would incur interest on an overdraft to fund the legal battle.

300 Accordingly, I find that there is no basis for awarding Mr Darmawan equitable compensation for the interest incurred on his overdraft account.

Conclusion

301 I dismiss each plaintiff's claims in the consolidated action before me.

302 I will hear the parties on costs.

[note: 1] Statement of Claim dated 24 December 2009, para 38.1.

[note: 2] Plaintiffs' Closing Submissions dated 12 November 2012 at [206].

[note: 3] Affidavit of evidence in chief of Rudy Darmawan filed on 14 September 2012 at [79].

[note: 4] Plaintiffs' Closing Submissions dated 12 November 2012 at [206].

[note: 5] Affidavit of evidence in chief of Rudy Darmawan filed on 14 September 2012 at [74] and [79].

[note: 6] Plaintiffs' Closing Submissions dated 12 November 2012 at [206].

[note: 7] Affidavit of evidence in chief of Tan Kah Gee filed on 14 September 2012 at [32]

[note: 8] First defendant's closing submissions, 9 November 2012, p 74, [103].

[note: 9] Plaintiffs' Closing submissions at para 33 to 39.

[note: 10] Plaintiffs' Closing Submissions at para 38.

[note: 11] Plaintiffs' Closing Submissions para 62 to 69.

[note: 12] Statement of Claim, para 10.2, 10.3, 10.4, 13 and 14.

[note: 13] 3AB1090.

[note: 14] 3AB1084.

[note: 15] AS-29, Arjun Permanand Samtani's affidavit of evidence in chief.

[note: 16] Transcript 26 September 2012, page 122 line 20 to 23.

[note: 17] Para 112 of Tan Kah Gee's affidavit of evidence in chief and Tab 25-27 of exhibit TKG-13.

[note: 18] Para 107 of Tan Kah Gee's affidavit of evidence in chief.

[note: 19] AS-30, Arjun Permanand Samtani's affidavit of evidence in chief.

[note: 20] Notes of Evidence, 17 September 2012, p 84 line 14 to p 85 line 10.

[note: 21] Notes of Evidence, 17 September 2012, pp 84-85.

[note: 22] *Ibid.*, p 86, lines 20-25.

[note: 23] *Ibid.*, p 54, line 24 to p 55, line 4; p 68, lines 2-7

[note: 24] *Ibid.*, p 87, lines 1-5.

[note: 25] *Ibid.*, p 87, lines 12-13.

[note: 26] *Ibid.*, p 87, lines 17-19.

[note: 27] *Ibid.*, p 69, lines 17-18.

[note: 28] *Ibid.*, p 89, lines 5-13.

[note: 29] *Ibid.*, p 88, lines 14-25.

[note: 30] *Ibid.*, p 92, lines 1-6.

[note: 31] *Ibid.*, p 119, line 9.

[note: 32] *Ibid.*, p 118, lines 8-10.

[note: 33] Exhibit P2A, para 25.

[note: 34] Notes of Evidence, 21 September 2012, p 114 line 18 to p 115 line 4; p 116, lines 13-17.

[note: 35] *Ibid.*, p 77 line 13.

[note: 36] Notes of Evidence, 24 September 2012, p 95, lines 6, 11-21.

[note: 37] Plaintiffs' opening statement, para 44 and Notes of Evidence, 17 September 2012, p 54, lines 14-16.

[note: 38] Notes of Evidence, 18 September 2012, p 37, lines 5-12.

[note: 39] Notes of Evidence, 17 September 2012, p 139, lines 1-8.

[note: 40] Notes of Evidence, 24 September 2012, p 110, line 25 to p 111, line 12.

[note: 41] *Ibid.*, p 160, lines 7-8.

[note: 42] Notes of Evidence, 26 September 2012, p 65, lines 4-7.

[note: 43] *Ibid.*, p 66, lines 1-5 and 18-21.

[note: 44] Exhibit P2A, paras 15-16 of Rudy Darmawan's submissions on costs.

[note: 45] Exhibit P3, p 6 of Rudy Darmawan's further submissions on costs.

[note: 46] Exhibit P2A, para 10 of Jasmine Tan and Then Khek Koon's submissions on costs.

[note: 47] Exhibit P3, para 16 of Jasmine Tan and Then Khek Koon's further submissions on costs.

[note: 48] Exhibit P2A, para 4 of Jasmine Tan and Then Khek Khoon's submissions on costs.

[note: 49] Mr Rudy Darmawan's submission on costs dated 8 April 2009 at [23].

[note: 50] Mr Rudy Darmawan's submission on costs dated 8 April 2009 at [6(i)].

[note: 51] Mr Rudy Darmawan's submission on costs dated 8 April 2009 at [13(i)].

[note: 52] Mr Rudy Darmawan's submission on costs dated 8 April 2009 at [6(ii)].

[note: 53] Mr Rudy Darmawan's submission on costs dated 8 April 2009 at [13(ii)].

[note: 54] Notes of Evidence, 18 September 2012, p 18, lines 9-18 and p 19, line 12 to p 20 line 2; p 20, lines 14-21.

[note: 55] *Ibid.*, p 84, lines 9-16.

[note: 56] *Ibid.*, p 84, lines 15-25.

[note: 57] Exhibit P2A, para 13 of Rudy Darmawan's submissions on costs.

[note: 58] Notes of Evidence, 18 September 2012, p 170, lines 10-17.

[note: 59] *Ibid.*, p 171, lines 15-19.

Then Khek Koon and another v Arjun Permanand Samtani and another and other suits
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Proceedings	Costs breakdown		Sum paid ($)	Sum awarded by CA	Unrecovered costs ($)
STB43. First tranche of Collective Sale Application for collective sale order. STB's costs order: no order as to costs. OS1057. Plaintiffs' application for leave to seek judicial review of STB's decision to expedite first tranche of the Collective Sale Application. Tan J's costs order: no order as to costs. OS1269. Consenting Subsidiary Proprietors' appeal to High Court against STB's decision in first tranche to dismiss collective sale application. Choo Han Teck J's costs order: costs reserved. SUM 4254/2007/M and SUM 4336/2007/R: Applications by HPPL and group of consenting CSPs to intervene in OS 1269, which was opposed by plaintiffs and other objecting subsidiary proprietors. Choo J's costs order: costs reserved. OS1270: plaintiffs' appeal against STB's decision in first tranche to make no order as to costs for the first tranche. Costs order: not clear – appears to be subsumed by outcome in OS1269.	Costs paid to TKQP	S1084	$157,391.67	0	**$157,391.67**
		S1085	$155,291.67	0	**$155,291.67**
		S1086	$117,841.67	0	**$117,841.67**
STB43. Second tranche of the Collective Sale Application. STB's costs order: all costs of the collective sale application to be borne by all subsidiary proprietors (including the objecting subsidiary proprietors) *pro rata* in the proportion in which they will share the gross sale proceeds of the collective sale.	Costs paid to TKQP	S1084	$107,380.04	80% of standard costs paid in lump sum: **S1084**: $118,341.30 = $8,341.30 (P&P costs paid by HPPL) + $110,000.00 (settlement sum from CSPs) **S1085**: $186,028.84 = $16,028.84 (P&P costs paid by HPPL) + $170,000.00 (settlement sum from CSPs) **S1086**: $50,000 settlement sum from CSPs	**S1084**: $16,117.96 (134,459.25 – 118,341.30) **S1085**: $73,082.86 (259,111.70 – 186,028.84) **S1086**: *negative* $44,055.69
		S1085	$214,760.10		
		S1086	0		
	Costs of hearing transcript	S1084	$549.26		
		S1085	$549.26		
		S1086	$549.26		
OS11: appeal against 2nd STB decision allowing the Collective Sale Application. Choo J's order on costs: costs to be determined separately if parties unable to agree.	Filing costs for OS11 paid to M/s Phang & Co	S1084	$5,395.05		
		S1085	$5,395.05		
		S1086	$5,395.05		
	Reasonable compensation for litigants in person	S1084	$21,134.90		
		S1085	(see CA120)		
		S1086	0		
CA 120: appeal against the decision in OS11. CA's costs orders: see [267]	Filing costs for CA120 paid to HEP	S1084	0		
		S1085	$5,053.98		
		S1086	0		
	Costs incurred as Litigants-in-Person	S1084	0		
		S1085	$33,353.25		
		S1086	0		
	Total:	S1084	291,850.92	118,341.3	**$173.509.62**
		S1085	414,403.31	186,028.84	**$228,374.47**[60]
		S1086	123,785.98	50,000	**$73,785.98**

[60] This figure excludes $109,699.94 which Mr Darmawan claims against the defendants for interest incurred on an overdraft facility which he says was taken up to finance his legal fees in the Collective Sale Application.