Ngui Gek Lian Philomene and others *v* Chan Kiat and others (HSR International Realtors Pte Ltd, intervener)
[2013] SGHC 166

Case Number : Originating Summons No 71 of 2013

Decision Date : 03 September 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Lim Kheng Yan Molly SC, Koh Swee Hiong Sunanda and Lim Rui Cong Roy (Wong Tan & Molly Lim LLC) for the plaintiffs; Thio Ying Ying, Tan Yeow Hiang and Goh Wee Hsien Jason (Kelvin Chia Partnership) for the first and second defendants; Harbajan Singh s/o Karpal Singh (Daisy Yeo & Co) for the third, fifth, eighth, ninth, 15th, 16th and 17th defendants; Tan Gim Hai Adrian, Yeo Zhuquan Joseph and Robert Raj a/l Joseph (Drew & Napier LLC) for the fourth, sixth, seventh, tenth, 13th and 18th defendants; Adrian Wong Soon Peng, Gan Hiang Chye, Baker Andrea Taryn and Yan Yijun (Rajah & Tann LLP) for the intervener; The 11th and 12th defendants in person; Lee Liat Yeang and Chua Shang Chai (Rodyk & Davidson LLP) on watching brief for purchaser.

Parties : Ngui Gek Lian Philomene and others — Chan Kiat and others (HSR International Realtors Pte Ltd, intervener)

Land – Strata Titles – Collective Sales

3 September 2013 Judgment reserved.

Andrew Ang J:

Introduction

1 This is an application by three authorised representatives ("the Plaintiffs") of the Thomson View Condominium ("the Development") collective sale committee ("the CSC") for the sale of the Development to Wee Hur-Lucrum Pte Ltd ("the Purchaser") under s 84A(1) of the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) ("the LTSA"). The objecting subsidiary proprietors ("the Defendants") opposed the sale on the basis that it was not made in good faith within the meaning of s 84A(9)(*a*)(i)(A) of the LTSA.

2 Two novel issues were raised in this application. The first was a procedural matter relating to the effect of s 84A(4A) of the LTSA on the Defendants' ability to raise objections that had not been previously submitted to the Strata Titles Board ("STB"). The second was a substantive matter that went to the heart of the dispute. Essentially, the question was whether offers of secret payments made by the CSC's marketing agent to certain subsidiary proprietors amounted to bad faith in the transaction within the meaning of s 84A(9)(*a*)(i)(A) of the LTSA. These issues will be fully dealt with below.

The facts

3 The Development is a 99-year leasehold property with a site area of 50,196.9m^2 and 255 units of apartments, townhouses and shophouses. It is a mature estate that had 61 years left on its leasehold as at 23 July 2013. Since more than ten years had passed from the issuance of the

Development's certificate of statutory completion, the minimum statutory approval required for a collective sale under s 84A(1)(*b*) of the LTSA was 80% of respectively (a) the share values; and (b) the total area of all the lots in the Development ("the 80% consent threshold").

Obtaining the 80% consent threshold

4 On 13 June 2010, the CSC was appointed at an extraordinary general meeting ("EGM") of the Development's subsidiary proprietors ("the SPs"). The role of the CSC was to act on behalf of all the SPs for the collective sale of the Development. Subsequently, on 19 September 2010, HSR International Realtors Pte Ltd ("HSR") and Seah Ong & Partners LLP ("SOP") were appointed as the marketing agents and solicitors for the collective sale respectively.

5 On 31 October 2010, the SPs at an EGM unanimously approved the terms of the collective sale agreement ("the CSA") and the initial reserve price of $490m. As at 11 March 2011, SPs representing 58.5% of the Development's total share value had signed the CSA on these terms. This fell short of the 80% consent threshold required for a collective sale. In order to encourage more SPs to sign the CSA, the CSC revised the reserve price upwards three times to $520m, $550m and $580m on 18 March 2011, 27 March 2011 and 19 July 2011 respectively. The requisite 80% consent was eventually obtained on 17 October 2011.

The sale and marketing process

6 After the 80% consent threshold was satisfied, the CSC proceeded with the launch of the public tender. However, no bids for the Development were received during the first two public tenders from 15 November 2011 to 12 January 2012 and 22 April 2012 to 22 May 2012. On 10 August 2012, the adjacent land parcel at Bright Hill Drive was sold by the government for $291.5m ("the Bright Hill Drive GLS"). Soon after, the third public tender for the Development was launched on 21 August 2012.

7 During the third public tender on 29 August 2012, the proposed rail alignment and station locations of the Thomson MRT line were announced by the government ("the MRT Announcement"). One of the future MRT stations was to be located within a five-minute walk from the Development.

8 At the close of the third public tender on 4 September 2012, one formal bid and two expressions of interests were received by the CSC. The formal bid of $590m was submitted by the Purchaser. One of the expressions of interest was an offer of $520m while the other did not indicate an offer price. A valuation report by Chesterton Suntec International Pte Ltd ("Chesterton") valued the Development at $492m as at 4 September 2012. This figure was lower than the two previous valuations of $493m and $494m made by Chesterton on 12 January 2012 and 5 March 2012 respectively. Also, no mention was made of the Bright Hill Drive GLS or the MRT Announcement in the 4 September 2012 valuation report.

9 A day later, on 5 September 2012, the CSC awarded the tender to the Purchaser on terms that were amended after negotiations between the CSC and the Purchaser ("the Amended Tender Contract"). These amendments include Rider 11.2 which allowed the Purchaser to rescind the contract if the lease upgrading premium was more than $95m ("the LUP clause"). The period for accepting the Purchaser's offer was also amended from one month to three days ("the Acceptance clause").

The STB application

10 On 5 October 2012, the CSC applied to the STB for a collective sale order. On 24 October 2012, the Defendants filed objections before the STB. Subsequently on 14 January 2013, the STB issued a stop order and on 25 January 2013, the CSC filed the present application.

Discovery of letters offering payments to certain SPs

11 In a letter to the Plaintiffs' solicitor on 11 April 2013, solicitors for the fourth, sixth, seventh, tenth, 13th and 18th Defendants ("the D&N Defendants") requested for the disclosure of preferential treatment or incentive payments made (if any) by the CSC or HSR to any of the SPs. This request followed the press report of the decision in *N K Rajarh v Tan Eng Chuan* [2013] 3 SLR 103 ("*Harbour View*") where Belinda Ang J dismissed the collective sale application because incentive payments had been offered by a number of sale committee members through the marketing agent in bad faith. The Plaintiffs' solicitor replied on 16 April 2013 enclosing copies of the following documents evidencing HSR's arrangements to make payments to four SPs in return for an undertaking to sign the CSA ("the Incentive Payments"):

(a) A letter dated 20 September 2011 to Mdm Sauw Tjiauw Koe stating HSR's agreement to pay her an additional 10% of the final purchase price for her shop unit in exchange for her undertaking to sign the CSA in respect of her ten units (this worked out to be $277,721 based on the minimum reserve price of $580m).

(b) A letter dated 30 September 2011 to Mr Goh Mia Song and Mdm Lim Choe San stating HSR's agreement to pay them an additional $185,000 for their two units based on the minimum reserve price of $580m.

(c) A letter dated 12 October 2011 to Mr Tang Siew Kwong and Mdm Julie Tan Bee Leng stating HSR's agreement to pay them an estimated sum of $85,886 for their unit based on the minimum reserve price of $580m.

(d) An e-mail 3 October 2011 to Mr PJK Brouwer stating HSR's agreement to reimburse the travel expenses of his wife in the form of one business class return air ticket from Amsterdam or Dusseldorf to Singapore so that she can sign the CSA.

The issues

12 The following issues arise for determination:

(a) Did the CSC fail in its duties prescribed by law during the sale and marketing process of the Development?

(b) Did s 84A(4A) of the LTSA preclude the Defendants from raising an objection based on the Incentive Payments since this objection was not raised at the STB?

(c) Did the Incentive Payments amount to bad faith in the transaction?

(d) Did the apparent dispute over the quantum of HSR's commission prevent this court from approving the present sale application?

These issues will be discussed *seriatim*.

Did the CSC fail in its duties prescribed by law during the sale and marketing process of the

Development?

The duties owed by a sale committee

13 An application for a collective sale may be made by SPs representing not less than 80% of the total area and share value respectively of all the lots in a strata title plan if more than ten years have passed since the issue of the temporary occupation permit or certificate of statutory completion (s 84A(1)(*b*) of the LTSA). The LTSA imposes further requirements before such an application will be approved by the High Court or the STB. In particular, s 84A(9) of the LTSA states that:

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

14 The ambit of a sale committee's duties was thoroughly examined in *Ng Eng Ghee v Mamata Kapilev Dave (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Horizon Towers*"). In *Horizon Towers*, the Court of Appeal held that the duty of "good faith" under s 84A(9)(*a*)(i) of the LTSA required the sale committee to discharge its statutory, contractual and equitable functions and duties faithfully and conscientiously, and to hold an even hand between the consenting and objecting owners in selling their properties collectively (at [133]). In discussing a sale committee's duty of even-handedness (at [107] and [136]), it was also stated in clear terms that the *advisers* of a sale committee would owe a duty to avoid any possible conflict of interest:

> 107 As the SC [sale committee] is the agent of the subsidiary proprietors collectively, there is no point at which the SC may act solely in the interests of any group of subsidiary proprietors, whether they are consenting or objecting proprietors. When an SC is first appointed, it is with a view to achieving a collective sale *for the benefit of* all the subsidiary proprietors. At this stage, the interests of the subsidiary proprietors are not yet clearly differentiated. Thus, the SC's initial paramount responsibility is simply to obtain the requisite consent for the collective sale as well as appoint competent professional advisers. ***The SC's members and advisers also have the duty to avoid any possible conflict of interest*** (see [137]–[145] below). However, once the requisite consent is obtained and the interests of the objecting subsidiary proprietors become distinguishable from those of the consenting subsidiary proprietors, the SC's role becomes that of an impartial agent acting for both camps. In other words, the SC must hold an even hand between these interests. We shall elaborate on this below at [136].
>
> …
>
> Duty of even-handedness
>
> 136 The duty of even-handedness is a duty of impartiality that is implicit in Parliament's recognition of the need to safeguard the interests of the minority in a collective sale (see [3] and [106] above; see also the 1998 Second Reading (at [127] above) at col 604). An SC's position

may be likened to that of a trustee who has to hold an even hand between the interests of different classes of beneficiaries under a trust (*eg*, capital and income beneficiaries) (see Philip H Pettit, *Equity and the Law of Trusts* (Butterworths, 9th Ed, 2001) at p 405).

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

15 The Court of Appeal also observed that a sale committee must act as a prudent owner to obtain the best price reasonably obtainable for the entire development (*Horizon Towers* at [133]). A helpful summary of a sale committee's duties in respect of the sale price was provided in *Horizon Towers* at [168]:

> 168 … *The SC is expected to act in the same manner as a prudent owner would in order to secure the best price for the property obtainable in the prevailing circumstances*. In our view this includes doing the following:
>
> (a) acting with due diligence in appointing competent professional advisers;
>
> (b) marketing the property for a reasonable period of time to the largest number of potential purchasers in order to create the widest catchment of offers;
>
> (c) following up on all expressions of interest and offers, including carrying out sufficient investigations and due diligence to determine their genuineness (if any doubt exists);
>
> (d) creating competition (where reasonable) between interested purchasers;
>
> (e) obtaining independent expert advice on matters relevant to the decision to sell the property (including when and at what price to sell the property), such as an independent valuation, in particular:
>
> (i) prior to settling on the final sale price;
>
> (ii) when the market is in a state of flux;
>
> (iii) when there are divergent views within the SC; or
>
> (iv) where the property is of an unusual nature or has mixed uses, *eg*, it is not purely residential or purely commercial, but is a mix of many types of use;
>
> (f) waiting for the most propitious timing for the sale in order to obtain the best price;
>
> (g) disclosing any personal interests 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-existing interests) or well before the SC makes a decision to sell the property (in the case of post-appointment interests);
>
> (h) ensuring that it has been properly informed of all potential conflicts of interests that may affect the advice it receives from any of its professional advisers; and
>
> (i) seeking fresh instructions or guidance from the consenting subsidiary proprietors where it entertains a reasonable doubt that its original mandate no longer reflects the consensus of the consenting subsidiary proprietors (*eg*, due to a change in the prevailing circumstances).

[emphasis in original]

16 Lastly, the Court of Appeal observed that a sale committee cannot simply be absolved from its duties by delegating them to its professional advisers (*Horizon Towers* at [160]).

The Defendants' arguments

17 I have used the term "Defendants" in this section as a compendious reference to the submissions of Kelvin Chia Partnership, Drew & Napier LLC and Daisy Yeo & Co since the respective defendants have made slightly different submissions on the issues raised in this application.

18 First, it was argued by the Defendants that the Plaintiffs relied on a flawed valuation report. The 4 September 2012 valuation of $492m by Chesterton was too low in view of the rising market. This valuation report was also erroneous because it failed to consider the Bright Hill Drive GLS and the MRT Announcement.

19 Second, in addition, it was argued that the CSC breached its duty of conscientiousness by failing to review the reserve price. In the light of the rising market, the CSC should have reviewed the $580m reserve price because the SPs were concerned about the ability to purchase a replacement property in the vicinity and the reserve price had been increased in the past for the same reason. The CSC also failed to consult HSR on whether the reserve price should be reviewed after the MRT Announcement.

20 Third, the Defendants contended that the CSC failed to properly consider the feasibility of extending or deferring the third public tender. The MRT Announcement was significant because it might have caused the sale price of the Development to increase by up to 30%. The CSC should not have settled for the reserve price or market value of the property if there was a reasonable basis to believe that a better price might have been obtainable within a reasonable time frame in the future (*Horizon Towers* at [163]). Potential purchasers only had two working days after the MRT Announcement to decide whether to bid for the Development. Further, the CSC failed to consult experts as to whether potentially interested developers would have sufficient time to take the MRT Announcement into account. This failure to extend the deadline had the effect of excluding many developers from the pool of potential purchasers.

21 Fourth, it was alleged that the CSC acted in undue haste in proceeding with the sale of the Development to the Purchaser. They accepted the offer within 24 hours when there was no discernible benefit in doing so. The CSC could have called a vendors' meeting within two days and accepted the offer only after obtaining the consent of the SPs to the terms.

22 Fifth, the CSC allegedly failed to seek fresh instructions from the SPs when there was reasonable doubt as to its mandate. The LUP clause converted the binding sale and purchase agreement into what was effectively an option and the CSC had no mandate to enter into such an agreement. Also, the clause stipulating a three-month vacant possession period coupled with a $3,000 per day liquidated damages clause was materially less favourable and not in line with market practice.

The Plaintiffs' arguments

23 First, the Plaintiffs argued that the collective sale should be granted because they had fulfilled the statutory requirements of s 84A of the LTSA, complied with the terms of the CSA, acted honestly and in good faith in the sale process and discharged their equitable functions and duties faithfully and

conscientiously. They further argued that the Defendants' reliance on *Horizon Towers* was erroneous because the collective sale in that case was conducted before the 2007 amendments to s 84A of the LTSA.

24 Second, it was contended that the sale price was obtained through an open tender and this was the best price under the prevailing market conditions. Valuations were irrelevant because the sale to the Purchaser at $590m was not based on the valuation but on the consenting owners' reserve price of $580m. Even if the valuation report was erroneous, the CSC's reliance on the report was not dishonest or in bad faith.

25 Third, it was submitted that the CSC's acceptance of the Purchaser's tender within one day of the close of tender was not made in undue haste. It was within CSC's mandate to accept the tender within one month under cl 5.1(17) of the CSA. Calling for a vendor's meeting would not have made any practical difference because even if such a meeting were called no decision could have been voted upon as no voting power was given for such a meeting under the LTSA.

26 Fourth, the Purchaser's amendments to the tender contract did not affect the sale price of $590m and, as such, were irrelevant for this court's consideration under s 84A(9)(*a*)(i)(A) of the LTSA. The CSC was entitled to rely on SOP's advice that the amendments were (a) not materially less favourable and (b) in line with market practice. The LUP clause did not transform the contract into an option because the lease upgrading premium was a moving target which might fluctuate according to market conditions. In any case, this issue was academic since the Purchaser had since confirmed that it would proceed with the purchase.

My analysis

27 As a preliminary point, it should be noted that the principles laid down in *Horizon Towers* are applicable to the present case. Parliament has made it clear that the 2007 amendments to the LTSA were not intended to change the substantive law regarding the duties and liabilities of CSCs (*Singapore Parliamentary Debates*, *Official Report* (20 September 2007) vol 83 at col 2042 on the Second Reading of the Land Titles (Strata) (Amendment) Bill (Prof S Jayakumar, Deputy Prime Minister and Minister for Law)) ("the 2007 Debates"). As for the 2010 amendments to the LTSA, these amendments were only intended to refine the LTSA through, *inter alia*, the change in the STB's role (*Singapore Parliamentary Debates*, *Official Reports* (18 May 2010) vol 87 at col 375 on the Second Reading of the Land Titles (Strata) (Amendment) Bill (Mr K Shanmugam, Minister for Law)) and there was no intention to repeal the existing common law as developed in the decided cases. Hence, the principles laid down in *Horizon Towers* continue to stand as good law.

The "flawed" valuation report

28 In my view, the shortcomings of the 4 September 2012 valuation report do not lead to the conclusion that the CSC had breached its duty to obtain the best price for the Development. The issuance of the valuation report at the close of tender and the Purchaser's $590m bid were plainly two distinct events. Even if Chesterton had directed its mind to the MRT Announcement and the Bright Hill Drive GLS, there is no evidence to suggest that the valuation would have exceeded the Purchaser's $590m bid such as to cause the CSC to hold back acceptance of the bid. In this regard, I do not find the *ex post facto* valuations commissioned by the Defendants (*viz*, $728m and $622m by Robert Khan & Co Pte Ltd and Savills Valuation and Professional Services Pte Ltd respectively) particularly helpful and it would be apposite to repeat the observations made by V K Rajah JA in *Horizon Towers* at [44]:

> … It can be readily seen that the parties appear to have had little difficulty in locating "independent" valuers, after the sale had taken place, to support their irreconcilable stances on the appropriateness of the sale price. We need say no more.

29 Furthermore, I find that the CSC discharged its duty of conscientiousness by attempting to contact the Chesterton valuer, Mr Chng Shih Hian, about the 4 September 2012 valuation report although these attempts ultimately proved futile. Also, there was no evidence to suggest that CSC had been dishonest in accepting the 4 September 2012 valuation report.

Duty to review reserve price

30 After the Bright Hill Drive GLS on 10 August 2012, there were queries by the SPs as to whether the reserve price should be revised. A few days later on 15 August 2012, Mr Goh Hock Seng, the Head of Investment Sales at HSR ("Jeffrey Goh"), sent an e-mail to the CSC advising them that the reserve price of $580m should not be increased because the 80% threshold for the CSA had already been met and an increased reserve price would "turn off" prospective purchasers. He further advised that the sale of the Development by public tender and the valuation report at the close of the tender would mitigate the risk of the Development being sold at an undervalue.

31 In my opinion, the CSC was entitled to accept the advice given by HSR and there was no reason to conclude that the advice was obviously flawed. It was not clear to me how the CSC breached its duty of conscientiousness by accepting HSR's advice not to increase the reserve price. While property prices in the vicinity were indeed rising, the CSC was justified in maintaining the reserve price on HSR's advice so that there would be a greater possibility of competing bids. Moreover, the Defendants did not adduce any expert evidence to contradict HSR's advice not to increase the reserve price.

Failure to extend public tender

32 Unlike the other alleged failures of the CSC discussed above, it is my view that the CSC's failure to extend the public tender was a breach of their duty to obtain the best price for the Development. The MRT Announcement was undoubtedly a significant piece of news that came only six days before the close of the tender. In my view, the CSC should have consulted experts in deciding whether to extend the tender. This might have given potential bidders more time to absorb the MRT Announcement and obtain the necessary approvals in order to submit a bid. Indeed, the CSC was under an obligation to "market (through the property agent) the property for a reasonable period of time to the largest number of potential purchasers in order to create the widest catchment of offers" (*Horizon Towers* at [157]).

33 However, I am not satisfied that this breach is sufficient to taint the entire sale transaction with bad faith. There were other circumstances that mitigated the seriousness of the breach. In particular, HSR's investment report that was available to potential bidders before the MRT Announcement would have informed such bidders of a "[p]ossible MRT station outside Thomson View [that will be] ready in 2018". I also note that HSR's report included a map that suggested possible locations of the MRT station.

Undue haste in awarding the tender and the CSC's failure to seek fresh instructions from the SPs when there was reasonable doubt as to its mandate

34 The LUP clause and the Acceptance clause represented the two most significant changes in the Amended Tender Contract. Taking the latter clause first, the Defendants argued that the CSC had

acted with undue haste in accepting the offer from the Purchaser within 24 hours even though the CSC had three days to decide whether to do so. To the contrary, the Plaintiffs alleged that calling for a vendors' meeting would not have made any practical difference because even if such a meeting were called no decision could have been voted upon because no voting power was given for such a meeting under the LTSA.

35 In my view, the Plaintiffs' argument was flawed. Although it is generally true that no voting takes place at a vendors' meeting (see cl 14.2 of the CSA), voting is specifically required at a vendors' meeting to obtain the consent of vendors to accept an amended offer if the conditions attached to the amended tender contract are materially less favourable than the CSA terms and not in line with market practice (see cl 5.3.1(a) and (b) of the CSA).

36 Leaving aside the other changes to the Amended Tender Contract, the Acceptance clause *per se* cannot be said to be materially less favourable and not in line with market practice. The present facts are distinguishable from the situation in *Horizon Towers* where the sale committee was found to have acted with undue haste because they had accepted the purchaser's offer based on a self-imposed deadline (*Horizon Towers* at [185]). Here, there was no doubt that the three-day acceptance period was imposed by the Purchaser. I would add that the CSC was technically acting within the scope of its mandate when they accepted the tender within one day of the Purchaser's offer (cl 5.1(17) of the CSA).

37 However, when the Acceptance clause is viewed together with the LUP clause and the other amendments, it is abundantly clear to me that these amendments as a whole were materially less favourable than the CSA terms and not in line with market practice. I would therefore disagree with the advice given by SOP that there was no need to consult the SPs regarding the amendments in the Amended Tender Contract. The insertion of the LUP clause allowed the Purchaser to rescind the contract if the lease upgrading premium was more than $95m. In the circumstances, the lease upgrading premium was very likely to exceed $95m because:

(a) the lease upgrading premium was estimated to be $111.7m and $125.6m by Chesterton in its valuation reports;

(b) the lease upgrading premium already stood at $110m as at 11 March 2011; and

(c) the Chairperson of the CSC, Ngui Gek Lian Philomene's ("Ngui"), herself accepted that the $95m lease upgrading premium condition was "impossible to fulfil".

In that event, the Purchaser would have the option of walking away from the Amended Tender Contract if market conditions became unfavourable. On the other hand, if market conditions remained favourable, the Purchaser would simply stay put, waiving their right of rescission. Effectively therefore, the Amended Tender Contract was more an option to purchase than a binding sale agreement. Thus, the CSC should have convened a vendors' meeting to discuss whether to accept the LUP clause and obtain the consent from the vendors to accept the Amended Tender Contract. However, by agreeing to the Acceptance clause which obliged the CSC to accept the Purchaser's bid within three days, the CSC rendered itself unable to convene a vendor's meeting within time. It is for this reason that the CSC should not have accepted the Purchaser's Acceptance clause.

38 Be that as it may, I find that the CSC was not acting in bad faith. In accepting SOP's advice, the CSC honestly believed that there was no need to consult the SPs regarding the amendments to the tender contract since, according to such advice, the amendments were not materially less favourable and were in line with market practice (see cl 5.3.1(a) of the CSA). There was no reason

for the CSC to believe that the advice given by SOP was unreliable, biased or obviously erroneous (see [160] of *Horizon Towers*). In coming to my decision, I have also considered the fact that the CSC had asked for an extension of time to accept the Amended Tender Contract but their request was rejected by the Purchaser.

Conclusion

39 After carefully considering all the arguments and evidence in the round, I am of the view that the CSC's behaviour during the sale and marketing of the Development did not amount to bad faith in the sale transaction within the meaning of s 84A(9)(*a*)(i) of the LTSA. The circumstances of this case were fundamentally different from the factual matrix in *Horizon Towers* where the sale committee had committed multiple breaches of its duties (at [176]) including:

> (a) failing to act with due diligence and transparency in the process leading to the appointment of the property agent;
>
> (b) failing to proactively follow up on the Vineyard offer and the other expressions of interest referred to in Tan Kah Gee's e-mail of 12 January 2007;
>
> (c) failing to make use of the existence of the Vineyard offer as leverage in negotiations with [the purchaser];
>
> (d) failing to obtain advice from an independent property expert prior to the sale;
>
> (e) acting with undue haste in proceeding with the sale to [the purchaser] in a surging property market when there was no legal, or even moral obligation, to do so;
>
> (f) …
>
> (g) failing to consult (or even update) the consenting subsidiary proprietors despite the price surge in the property market since those subsidiary proprietors first gave the original SC its mandate.

This was not the case here. For the reasons I have given, the CSC's failure to extend the third public tender was, to my mind, a genuine error not arising from bad faith (see *Chua Choon Cheng v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 ("*Chua Choon Cheng*") at [17]). In my opinion, this error alone was not sufficient to taint the entire sale transaction with bad faith within the meaning of s 84A(9)(*a*)(i) of the LTSA.

Did s 84A(4A) of the LTSA preclude the Defendants from raising an objection based on the Incentive Payments since this objection was not raised at the STB?

40 Counsel for the Plaintiffs, Ms Molly Lim SC, argued during closing submissions that the Defendants were not entitled to raise objections based on the Incentive Payments because this had not been raised at the STB. The Defendants were only entitled to re-file their objections "stating the same grounds of objection to the High Court" pursuant to s 84A(4A) of the LTSA ("the Section") which provides:

> Where a section 84A stop order is issued under subsection (6A)(*b*) in respect of an application to a Board under subsection (1) for an order for the sale of all the lots and common property in a strata title plan, and an application is then made to the High Court under subsection (1) for an

order for the same sale of all the lots and common property in the same strata title plan, any person referred to in subsection (4)(*a*) or (*b*) who filed an objection to the Board (but no others) may re-file his objection to the sale, stating the same grounds of objection, to the High Court in the manner and within the time delimited by the Rules of Court.

The Plaintiffs also contended that the intent behind the Section was to avoid new or additional grounds from delaying the collective sale process.

41 In response, counsel for the Defendants raised the following arguments. First, the use of the word "may" in the Section shows that the Section was not restrictive. The Section did not stipulate that "an objector *shall* state the same grounds of objection and no other". Second, the objections filed by the fourth defendant at the STB included HSR's offer to pay $150 and this amounted to the same ground of objection as the Incentive Payments. Third, the Section should not be construed to prohibit the SPs from raising new objections founded on evidence which could not have been obtained with reasonable diligence before their objections were filed with the STB.

42 I am unable to accept the Defendants' first two arguments. The word "may" in the Section refers to the option that a subsidiary proprietor has in re-filing his objections (that was previously made to the STB) to the High Court. It does not refer to an option to bring *different* grounds of objection to the High Court. As for the Defendants' second argument, the objection pertaining to HSR's offer to pay $150 cannot be regarded as the same objection with respect to the Incentive Payments because the identity of the recipients and the quantum of the payments are plainly different. In any case, HSR's $150 offer was rejected by the fourth defendant and could not have constituted a legitimate objection at the STB.

43 Nevertheless, my view is that the Section does not preclude the Defendants from raising the issue of the Incentive Payments. While I accept that the intent behind the Section is to avoid new grounds of objection from delaying the collective sale process, this intention does not extend to shutting out legitimate grounds of objection *that could not have been known* to the objectors at that point in time. Taking the Plaintiffs' argument to its logical conclusion, this Section will, in a hypothetical case, prevent dissenting subsidiary proprietors from raising an objection based on secret bribes paid by members of a collective sale committee to certain subsidiary proprietors just because these bribes were discovered after objections were filed at the STB. Furthermore, the Plaintiffs' construction of the Section would create a moral hazard incentivising the fraudulent concealment of wrongdoing from dissenting subsidiary proprietors for the very purpose of preventing them from raising an objection thereto before the High Court. Plainly, the Legislature could not have intended the Section to have such effect.

44 On the present facts, the Defendants only knew of the Incentive Payments on 16 April 2013 after they received a reply to their request for information from the Plaintiffs' solicitor. It would have been impossible for the Defendants to file an objection thereto for purposes of the hearing before the STB because they only knew about them some time after they had filed their objections to the STB on 24 October 2012. It would be patently unfair to deny the Defendants the opportunity to raise this objection based on a literal interpretation of the Section.

45 Accordingly, I hold that the Section does not prevent dissenting subsidiary proprietors from raising a new ground of objection at the High Court if, through no fault of theirs, it became known to them only after they had filed objections to the STB. This interpretation of the Section ensures that dissenting subsidiary proprietors are not unfairly barred on a technicality from raising a new objection. At the same time, this interpretation does not make the collective sale process unduly onerous because it would still prevent new objections from being raised at the High Court if the grounds for

these objections were already known at the STB stage of proceedings. In my view, this interpretation strikes a fair balance between the competing policy objectives of the LTSA (see the 2007 Debates at col 2037) ([27] *supra*) as articulated by the Minister for Law:

> Mdm Deputy Speaker, I wish to thank all the Members who have spoken on the Bill. Basically, they have expressed support for the Bill, but if I could generalise, many of them wanted more safeguards, more provisions and more controls. I think this also reflected the feedback during the consultations. I would not dismiss the various suggestions that they have made as being without merit but, as I explained in my Second Reading speech, we have to craft the amendments in a way that *strikes a balance between trying to make the process more transparent, fairer and with suitable safeguards while, at the same time, not making it unduly unmanageable or too onerous to bring about an en bloc sale*. … [emphasis added]

Did the Incentive Payments amount to bad faith in the transaction?

46 Having concluded above that the issue of the Incentive Payments may be raised by the Defendants, I turn now to examine whether these payments constituted bad faith in the transaction.

47 The Plaintiffs argued that HSR had made the Incentive Payments in its own capacity as principal and not as agent for the CSC. The CSC was not privy to the said arrangements. Also, HSR had no ostensible authority to make the incentive payments on the CSC's behalf and there was no evidence to support the allegation that the CSC should have known of the Incentive Payments.

48 The Defendants, on the other hand, argued that HSR was an agent and fiduciary of the CSC in the collective sale process and was effectively able to affect the legal relations between the CSC and the SPs. According to them, this was demonstrated by HSR's communications to all SPs informing them of the increases in the reserve price and the apportionment of sale proceeds based on the increased reserve price. It was argued that, given these facts, HSR had actual or ostensible authority to offer the Incentive Payments to the SPs in order to obtain their consent to the collective sale. Thus, HSR placed themselves in a position of conflict by their improper offers of Incentive Payments without the knowledge and consent of the other SPs.

49 In my view, HSR, as advisers to the CSC, owed duties to the SPs as advisers to the CSC and these duties did not depend on the establishment of an agency relationship in law between HSR and the CSC. In particular, HSR had a duty to avoid any possible conflict of interest (*Horizon Towers* at [107]; see also *Harbour View* ([11] *supra*) at [22], upheld on appeal in Civil Appeal No 42 of 2013).

50 HSR made two submissions in an attempt to distinguish the case of *Horizon Towers*. First, they argued that the issue of the marketing agent's fiduciary duties was never a live issue in that case. Second, HSR submitted that "all [the statement in *Horizon Towers* at [107]] means is that the professionals engaged by the CSC should not participate in what is obviously a breach of duty on the part of the CSC which was what happened in the *Harbour View* case". In my judgment, HSR took an unduly narrow interpretation of the statement in *Horizon Towers* at [107] in its attempt to distinguish it. The Court of Appeal in *Horizon Towers* did not intend for its statement at [107] to be limited in this way. Although it was subsequently applied to the particular facts of *Harbour View*, it was logically fallacious for HSR to conclude that the statement could *only* apply in those narrow circumstances. On closer examination, the context of the statement made in *Horizon Towers* at [107] shows that a marketing agent has a duty to avoid any possible conflict of interest even before the requisite statutory consent for a collective sale is obtained.

51 In the present case, I find that HSR egregiously breached its duty to avoid any possible conflict

of interest. HSR placed itself in a position of conflict by offering the Incentive Payments to a select group of objecting SPs, thereby preferring the interests of this select group of SPs (and their own personal interest in a very substantial commission for a successful collective sale) over the interests of the other SPs who opposed the sale; there is genuine doubt whether the requisite 80% consent threshold would have been reached if the Incentive Payments had not been offered. The offer of the Incentive Payments also gave rise to another anomaly, namely, that consenting SPs owning similar units would receive unequal payments. Parenthetically, even within the select group of previously objecting SPs who received Incentive Payments, some were offered a higher Incentive Payment than the others as can be seen below:

Name of SPs	**Number of units held / Area of lot**	**Payment offered per unit (assuming sale at $580m)**
Sauw Tjiauw Koe	Ten (five 122m^2; one 173m^2; two 188m^2; and two 357m^2)	$27,721 (10% of shophouse's final purchase price)
Goh Mia Song & Lim Choe San	Two (188m^2 and 122m^2)	$92,500
Tang Siew Kwong & Julie Tan Bee Leng	One (357m^2)	$85,886 (estimated)
Brouwer Petrus Johannes Kornelis & Helmer w/o Brouwer Johanna Petra Maria	One (357m^2)	1 business class return ticket from Amsterdam or Dusseldorf to Singapore

52 Furthermore, HSR breached its duty of transparency by failing to disclose the Incentive Payments to the CSC or the other SPs. It seems to me that HSR had suppressed the fact of these Incentive Payments which only came to light more than a year after the offers had been made by HSR. When cross-examined by counsel for the D&N Defendants about HSR's failure to disclose the Incentive Payments, Jeffrey Goh attempted to justify his actions by explaining that HSR was only an independent contractor which had the right to make private arrangements:

Q: Is it common for marketing agents in collective sales to make incentive payments to subsidiary proprietors?

A: Er, it is allowable in the Strata Title Board Act and sometime, er, High Court also encourages such incentive payment. Er---

…

Q: Mr Goh, you also told the Court that the High Court encourages such payments.

A: I read in some cases on the case---er, on the cases that there are some that was encouraged---there were---that some of the Act, the---the---the people are encouraged to settle even when the case was acceptable by the Court, that's what I read before. Correct me if I'm wrong.

Q: Is this the type of advice that you give sales committees?

A: We are *an independent contractor*, Mr Tan, and we---we do our work based on the term of appointment, er, appointed to us by the sales committee who has the---the power under the

EOGM to appoint, er, our company as the marketing agent. So most of my work are confined to that terms of appointment. We are a principal company by ourself [*sic*]. We are not an employee of the site that we have been appointed, Your Honour.

…

Q: So after you do the deal with Mdm Koe, what's wrong with telling all the other owners?

A: *We do not want to have people coming back and ask for money* [*sic*] because it is not in our habit of giving money.

Q: And you say too many cooks would spoil the broth. Can you---

A: This is exactly what I mean.

Q: Can you explain to His Honour what you mean by this phrase that you do not want to involve the CSC or inform the SPs because "too many cooks would spoil the broth?"

A: Your Honour, we are a [*sic*] *independent contractor*. Whatever we do, we are not binding the CSC in their--- in their fiduciary duty. What we do, with good faith and for the sake of all, we felt that the owner who have signed the CSA deserve us to work harder to get the 80%. …

…

Q: So for Mr Goh's case, it was HSR's idea to keep the arrangement secret from the other SPs?

A: We don't, er, think it is necessary to---to share with anybody on, er, er, this incentive arrangement because like I say, it is coi---it cost us money and it hurts our earned commission.

Q: I'm asking you whether---

A: That is the reason.

Q: So---

A: That is the reason.

Q: ---so it seems like it is HSR's idea to keep it confidential?

A: *This is a private arrangement*, Mr Tan. We---we deserve the right in our action.

[emphasis added]

Even if Jeffrey Goh's actions had been well-intentioned, the use of mere labels will not allow HSR to act with impunity in breach of its duty of transparency and duty to avoid possible conflicts of interest. In reality, marketing agents, like HSR, operate in many ways as an extension of the sale committee and I find that the following observations in *Horizon Towers* at [113] apply with equal force to marketing agents:

… In the present case, the SC's power to sell the Property collectively is a strong power as it

may result in the objecting subsidiary proprietors losing their units without their consent (in exchange for compensation which may not be their preferred right). The objecting subsidiary proprietors (who may have objected to the appointment of the SC) are invariably placed in a vulnerable position as the SC usually comprises the very same consenting subsidiary proprietors whose objective is to sell the property contrary to the wishes of the objectors. There would naturally be an in-built inclination (or bias) on the part of an SC to sell rather than not to sell. *The need for the imposition of high standards of accountability and conduct upon an SC vis-à-vis not only the consenting, but also the objecting, subsidiary proprietors is therefore even more pressing than in the case of ordinary common law agency*. [emphasis added]

Indeed, the High Court recently held that a marketing agent's assistance and participation in an incentive payment arrangement that was in breach of a sale committee's fiduciary duties constituted bad faith in the transaction (see *Harbour View* at [38]).

53 This is not to say that the making of incentive payments *per se* to objecting owners constitutes bad faith under s 84A(9)(*a*)(i)(A) of the LTSA (see *Chua Choon Cheng* ([39] *supra*) at [91]). However, when these payments are made in breach of a payor's duties under the law, the court will not hesitate to dismiss the collective sale application on the ground of bad faith.

54 In addition to the above, lack of good faith on the present facts involved the method of distribution of the sale proceeds, within the meaning of s 84A(9)(*a*)(i)(B) of the LTSA. It might be asked how the method of distribution was tainted by bad faith when the sale proceeds would be distributed in accordance with the CSA, the Incentive Payments not being from the sale proceeds but borne by HSR. However, a closer analysis will show such a view to be fallacious. The Incentive Payments would not come from commission which HSR had already earned and which it was at liberty to use as it wished. HSR had the prospect of earning commission only if the 80% consent threshold was achieved. In order to achieve that 80% consent threshold, HSR promised the Incentive Payments to certain SPs who, but for the Incentive Payments, would not have signed the CSA. In so doing, HSR in effect promised to reduce its commission. The reduction of its commission would result in the net sale proceeds being increased *pro tanto*. However, the benefit of this reduction would not be shared by all SPs; the reduction would benefit only the few SPs who were promised the Incentive Payments. The ultimate outcome is that, without the consent of all the SPs who signed the CSA, the method of distributing the sale proceeds set out in the CSA would be surreptitiously departed from. Hence, there was bad faith in the transaction involving the method of distribution of the sale proceeds.

55 There is arguably an even more fundamental objection to the Plaintiffs' application for the court's order for collective sale of the Development. Section 84A(1)(*b*) of the LTSA provides:

> **Application for collective sale of parcel by majority of subsidiary proprietors who have made conditional sale and purchase agreement**
>
> 84A.— (1) An application for an order for the sale of all the lots and common property in a strata title plan may be made by —
>
> (a) …
>
> (b) the subsidiary proprietors of the lots with not less than 80% of the share values and not less than 80% of the total area of all the lots (excluding the area of any accessory lot) as shown in the subsidiary strata certificates of title where 10 years or more have passed since the date of the issue of the latest Temporary Occupation Permit on completion of any building (not being any common property) comprised in the strata title plan or, if no Temporary Occupation Permit was

issued, the date of the issue of the latest Certificate of Statutory Completion for any building (not being any common property) comprised in the strata title plan, whichever is the later,

who have *agreed* in writing to sell all the lots and common property in the strata title plan to a purchaser *under a sale and purchase agreement which specifies the proposed method of distributing the sale proceeds to all the subsidiary proprietors* (whether in cash or kind or both), subject to an order being made under subsection (6) or (7).

[emphasis added]

It will be observed that the provision assumes that the SPs forming the 80% consent threshold agreed to the *en bloc* sale under a sale and purchase agreement which specifies the proposed method of distributing the sale proceeds to all the SPs. For the reasons set out above in [54], the method of distributing the sale proceeds specified in the sale and purchase agreement was not agreed to by the SPs who were promised Incentive Payments. They agreed to a different method of distributing the sale proceeds. Those SPs should therefore not be counted amongst the 80% majority. Without them, the 80% consent threshold would not be reached. Therefore, the Plaintiffs were not even in a position to apply for the court's approval under s 84A(1)(*b*) of the LTSA.

Did the apparent dispute over the quantum of HSR's commission prevent this court from approving the present sale application?

56 Finally, I examine the objection raised by counsel for the D&N Defendants. During the cross-examination of Ngui and Jeffrey Goh, both Ngui and Jeffrey Goh came to different conclusions on the amount of commission payable to HSR for the collective sale. The formula for calculating HSR's commission is as follows:

Successful Sale Price	**Commission**
Up to 103% of Minimum Selling Price	0.488% of sale price
Above 103% of Minimum Selling Price	0.488% of sale price, plus 3% of the amount in excess of 103% of Minimum Selling Price

57 Different conclusions on the payable commission arose because Ngui was given the impression from HSR's representations that the minimum selling price would be the reserve price (*ie*, $580m) for the purposes of calculating the commission. Ngui therefore assumed that the applicable minimum selling price was $580m and the commission payable would consequently be $2,879,200 (0.488% x $590m). However, the minimum selling price in HSR's terms of appointment was actually $490m and this amount was not amended even though the reserve price was eventually revised to $580m. HSR thus applied the minimum selling price of $490m as stated in its terms of appointment and arrived at the figure of $5,438,200 (0.488% x $590m + 3% x $85.3m).

58 Counsel for the D&N Defendants argued that HSR's terms of appointment was part of the CSA and the Plaintiffs could not therefore seek an order for sale when the commission payable thereunder was disputed. Also, the failure to resolve this basic issue of the quantum of commission payable to HSR showed an utter lack of conscientiousness on the part of the CSC.

59 In my view, there are several difficulties with the Defendants' argument. This issue is irrelevant to the decision whether to allow the application for sale. It does not fall within one of the grounds for refusing the sale under ss 84A(7) or 84A(9) of the LTSA. More importantly, this issue of the quantum

of HSR's commission only arises *after* the sale application has been approved and does not have any bearing on whether the sale application should be approved in the first place. In any case, the apparent dispute between the CSC and HSR over the quantum of commission payable is only a *potential* one which may well be resolved after the sale application has been approved. On hindsight, the CSC could have been more diligent in ascertaining the exact amount of commission payable to HSR on each occasion the reserve price was revised upwards. However, this appears to be a genuine oversight (see [39] above) that does not bespeak bad faith.

Conclusion

60 For the above reasons, I dismiss the application. I will hear the parties on costs.