Ng Eng Ghee and Others v Mamata Kapildev Dave And Others (Horizon Partners Pte Ltd, intervener) and Another Appeal
[2009] SGCA 14

Case Number : CA 119/2008, 120/2008, OS 10/2008

Decision Date : 02 April 2009

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Harry Elias SC, Philip Fong, Justin Chia, Kylie Peh (Harry Elias Partnership) for the appellants in CA 119/2008; Rudy Darmawan (in person) for the appellants in CA 120/2008; C R Rajah SC, Karthigesu Anand Thiyagarajah, Burton Chen, Lalitha Rajah (Tan Rajah & Cheah) for the respondents; Ang Cheng Hock SC, Corina Song, William Ong, Loong Tse Chuan (Allen & Gledhill LLP) for the interveners

Parties : Ng Eng Ghee; Hendra Gunawan; Sulistiowati Kusumo; Ong Sioe Hong — Mamata Kapildev Dave And Others (Horizon Partners Pte Ltd, intervener)

Administrative Law – Functions and duties of Strata Titles Board – Meaning of determination by "mediation-arbitration" – Inquisitorial role of Strata Titles Board – Normal rules of evidence not applicable – Determination of "good faith" under s 84A(9)(a)(i) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) – Section 84A(9)(a)(i) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

Agency – Collective sales – Collective sale committee agent of all subsidiary proprietors – Fiduciary relationship arising from underlying agency relationship – Section 84A(1A) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

Civil Procedure – Appeals – Nature of appeal from Strata Titles Board – Strata Titles Board finding collective sale in good faith – Objecting subsidiary proprietors purporting to appeal on question of law – Test for questions of law – Whether Board made ex facie errors of law – Section 98(1) Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed)

Equity – Fiduciary relationships – Fiduciary duties of collective sale committee to subsidiary proprietors of strata development – Duties akin to trustee with power of sale – Duty of loyalty or fidelity – Duty of even-handedness – Duty to avoid any potential conflict of interest – Duty of full disclosure – Duty of conscientiousness – Duty to obtain best sale price – Whether exonerated from breach by reliance on legal advice

Land – Strata titles – Collective sales – Objecting subsidiary proprietors claiming lack of good faith under s 84A(9)(a)(i) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) – Meaning of "good faith" – Whether "good faith" after taking into account sale price meant only considering whether fair price – Relevant considerations in assessing whether sales committee had acted in good faith – Section 84A(9)(a)(i) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

Land – Strata titles – Collective sales – Sale committee members purchasing additional units in property prior to appointment to sales committee – Failing to disclose purchases prior to or after appointment – Marketing agent's fee payable by eventual purchaser – Market conditions changing – Sale committee selling property at reserve price in compliance with mandate – Sale committee selling property on marketing agent's advice without prior independent valuation – Whether sale committee breached duty of loyalty and fidelity – Whether collective sale tainted by undisclosed potential conflict of interests – Whether sale committee breached duty to act even-handedly between consenting and objecting subsidiary proprietors – Whether sale committee breached duty to obtain best sale price

Words and Phrases – "Good faith" – A protean concept – To be construed in its contextual setting

Words and Phrases – "Point of law" – Meaning of s 98(1) Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed)

2 April 2009 Judgment reserved.

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

Introduction

1 *En bloc* sales have often aroused heated debate and controversy ever since enabling legislation was first introduced in 1999. The ground-breaking legislation was intended to and has facilitated the collective sale of qualifying estates even in the absence of unanimous consent by all the subsidiary proprietors. Parliament's primary objective in enacting the collective sale scheme was to promote the rejuvenation of older estates as well as the optimal use of prime land to build more quality housing in land-scarce Singapore. To achieve this salutary objective, the scheme, *inter alia*, permits a majority of not less than 80% of consenting subsidiary proprietors to effect the collective sale of the entire qualifying estate inclusive of the units of objecting subsidiary proprietors.

2 In the last decade, however, periodic price surges in the property market have prompted some housing estates to carry out collective sales even in the absence of an immediate or urgent need for rejuvenation or upgrading. The lure of "windfall profits" has been a siren song for many (especially absent landlords and speculators), to the detriment of those who do not want to lose their homes at any price. As a result, bitter acrimony and strained relationships have often arisen between owners who want to sell and those who do not want to sell their units. The unedifying drama and intrigue that an *en bloc* sale can precipitate has been captured in vivid and unflattering detail in the press and even in a recent television soap opera.

3 Nevertheless, it cannot be gainsaid that, in establishing the statutory scheme, Parliament had carefully considered both the rights and financial interests of the objecting subsidiary proprietors. As a class, they have to be adequately protected from bullying and underhand tactics as well as any potentially collusive or improper conduct on the part of any of the majority owners. Thus, detailed modalities were put in place to ensure that the views of objecting owners are adequately ventilated and their objections independently appraised. In particular, a Strata Titles Board ("STB") is expressly empowered to review the entire sale process and to ensure that it has been carried out in good faith (the provision currently governing the constitution of STBs is s 89 of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed)). In assessing whether a sale transaction has been carried out in good faith, the STB must take into account, *inter alia*, the sale price for the lots and the common property in the qualifying estate (see s 84A(9)(*a*)(i)(A) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA")).

4 In the present appeals, a number of critical issues in relation to the collective sale process arise for scrutiny. One issue is the nature of the duties owed by a sale committee ("SC") to the subsidiary proprietors. Are these duties analogous to those of an ordinary property agent, a mortgagee exercising its power of sale or a trustee selling trust property? What is the extent of these duties: for example, does the SC have to obtain the best price for the property and what steps must it take to do so? Another issue is the meaning of "good faith" in s 84A(9)(*a*)(i) of the LTSA and what that obligation entails in relation to the sale transaction. In determining whether a transaction is in good faith, is a breach of duties by the SC relevant?

5 As this is a lengthy judgment, we set out the schematic layout of the judgment for ease of reference, which is as follows:

The background

6 Two appeals have been brought before us ("the present appeals"). Civil Appeal No 119 of 2008 ("CA 119/2008") was filed by the subsidiary proprietors of three units in the condominium development known as "Horizon Towers" ("the Property") who had objected to the application to an STB ("the Horizon Board") for the collective sale of the Property. Civil Appeal No 120 of 2008 ("CA 120/2008") was filed by the subsidiary proprietors of another two units in the Property, who had also objected to the collective sale. The present appeals are brought against the decision of the High Court judge ("the Judge") (see *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 ("the Judgment")) upholding the decision of the Horizon Board on 7 December 2007 (see *Mamata Kapildev Dave v Lo Pui Sang/Kuah Kim Choo* [2008] SGSTB 7 ("the HB decision")) to grant an order for the collective sale of the Property, which consists of two plots of land, 15 Leonie Hill Road Singapore 239194 and 29 Leonie Hill Singapore 239228.

7 The Property is a 99-year leasehold condominium with a total of 210 units. As will shortly become apparent, the history of the collective sale process for the Property is complex and convoluted. The main *dramatis personae* in the saga were: First Tree Properties Ltd ("First Tree"), the marketing agent for the sale of the Property; the SC which was appointed at an extraordinary general meeting ("EGM") on 23 April 2006 (see [11] below) to carry out the collective sale ("the original SC"); the original SC's solicitors advising on the process of the collective sale; and Hotel Properties Ltd ("HPL"), which made an informal offer to purchase the Property. This offer eventually led to the sale of the Property to Horizon Partners Pte Ltd ("HPPL"), the intervener in the present appeals. The names of a few key individuals recur in the various accounts of the collective sale process and we should perhaps state who they are, namely:

(a) Arjun Samtani, who was the chairman of the original SC;

(b) Wee Hian Siew, the secretary of the original SC;

(c) Tan Kah Gee, a member of the original SC;

(d) Henry Lim, a member of the original SC who claimed to have liaised with several potential buyers for the Property (see [27] and [205] below);

(e) Bharat Mandloi, the only member of the original SC who openly expressed serious reservations at an SC meeting (see [30]–[33] below) about the propriety of immediately entering

into the sale of the Property to HPL; and

(f) Alvin Er, the managing director of First Tree.

8 We should point out here that certain aspects of this labyrinthine narrative cannot be delineated clearly because the Horizon Board had ruled in the course of the proceedings before it that plainly relevant and admissible evidence (*viz*, pertaining to the legal advice the original SC had received from its solicitors) was privileged. As will be seen below, the ruling of the Horizon Board was wrong in law and contrary to its statutory functions and duties. Furthermore, Wee Hian Siew and Henry Lim were the only members of the original SC who testified on behalf of the respondents, the consenting subsidiary proprietors, during the proceedings before the Horizon Board. The objecting subsidiary proprietors' application dated 25 October 2007 to subpoena Arjun Samtani as a witness of fact was rejected on the overly legalistic basis that insufficient particulars of the proposed testimony were provided. We shall return to these points below (at [199], [191] and [56] respectively).

The preliminary steps

9 The chain of relevant events can be traced back to October 2005, when a collective sale of the Property was first mooted by Wee Hian Siew and Henry Lim. Arjun Samtani was the chairman of the management council ("MC") of the Property at the time. It appears that Arjun Samtani was heavily involved in the informal preparatory work for the collective sale. Wee Hian Siew testified before the Horizon Board that it was Arjun Samtani and two other members of the MC of the Property – Tan Kah Gee and Wee Hian Siew himself – who started the ball rolling in October 2005.[note: 1] It was clear to him well before the formation of the original SC that Arjun Samtani would seek to participate in its work.[note: 2] Subsequently, First Tree was invited to make presentations on the feasibility of a potential collective sale, beginning in February 2006. First Tree is a housing agent with a paid-up capital of $50,000. It has two shareholders, Alvin Er and his wife. Neither of them is a licensed valuer. The registered address of First Tree at the time of the Horizon Board's proceedings was Alvin Er's house although the actual business address was at the CPF Building in Bishan. Wee Hian Siew acknowledged in his testimony at the hearing before the Horizon Board that, as secretary to the original SC, he did not personally check on First Tree's track record.[note: 3] Neither was he aware of whether any of the other original SC members had done so.[note: 4] The first presentation was made on 4 February 2006 to Henry Lim and Wee Hian Siew; the second took place on 11 March 2006 to about 20 subsidiary proprietors of the Property; and the third on 25 March 2006 with some 40 to 50 subsidiary proprietors present. When the presentations were made, the only other successful *en bloc* sale that First Tree appeared to have had an involvement in was St Michael's Lodge, a development of less than 12 units.[note: 5] It is worth noting that, at the first presentation, First Tree proposed a reserve price of $450m. Alvin Er testified that this was revised to $500m at the third presentation, because property prices were then rising. In the course of the third presentation, on 25 March 2006, First Tree informed the subsidiary proprietors that high-end collective sale prices had already shot up by 40% in the previous six months. Pertinently, First Tree justified the revision of the reserve price as follows:[note: 6]

Because we firmly believe that base[d] on the following factors, we simply cannot ask for less!

- Recent Successful Collective Sales Comparison

- Excellent Prime Location

- Big Rare Land Site

- Right Timing

- Liquidity Are [*sic*] flooding in

- More Good News Are [*sic*] Coming

10 In March 2006, Arjun Samtani and Tan Kah Gee, unknown to the other original SC members and consenting subsidiary proprietors, took steps to purchase additional units in the Property. Tan Kah Gee moved first by signing an option dated 21 March 2006 for the purchase of an additional unit at the price of $1.2m. A loan was taken to purchase the unit. The sale and purchase was completed on 26 June 2006. As at 2 January 2009, the outstanding amount of the loan was $900,500.53. Shortly before First Tree's third presentation on 25 March 2006 (see [9] above), Arjun Samtani entered into an option dated 24 March 2006 to purchase an additional unit at the price of $1.35m. The option was exercised on 7 April 2006. He and his daughter also took a substantial loan of $1m to finance the purchase. The current outstanding sum has not been disclosed.

The launch of the formal collective sale process and the terms of the collective sale agreement

11 The formal collective sale process was launched at an EGM on 23 April 2006 ("the 23 April 2006 EGM"), when a resolution was passed appointing the SC for the purposes of the collective sale of the Property. The subsidiary proprietors of 133 units and 706 share values (65.67% of the total share values) in the Property were represented at the EGM. Alvin Er has testified that, after the third presentation on 25 March 2006 and prior to the 23 April 2006 EGM, Arjun Samtani had contacted him and told him to attend the EGM and make a presentation. At Arjun Samtani's request, a copy of the proposed presentation was sent to him alone and he gave the go-ahead (Alvin Er did not explain why Arjun Samtani had asked for a copy of the proposed presentation).[note: 7] At the 23 April 2006 EGM, First Tree informed the subsidiary proprietors that, based on the latest transaction prices at that time, the sale of the Property at a reserve price of $500m was estimated to result in an average premium of about 80% for each unit.

12 First Tree was formally appointed as the sole marketing agent for the Property by a letter of appointment dated 26 April 2006. The letter of appointment provided that First Tree's marketing fee for the collective sale of the Property, which should not in any event exceed 1% of the sale price, would be payable solely by the eventual purchaser. The relevant clause reads:[note: 8]

> Our fees for the Collective Sale of the property shall be payable solely by the successful Bidder, which shall in any event ... not exceed 1% of the sale price, if any. No fees or disbursements of any kind shall be payable by you.

We pause to observe that this was an unusual arrangement (see [192] below). The appointment was to be valid until six months after the date when the owners having an aggregate of at least 80% of the share values of the Property had signed a collective sale agreement, or 31 March 2007, whichever was earlier, subject to renewal at the discretion of the SC. A collective sale agreement dated 11 May 2006 ("the CSA")[note: 9] was circulated for signing by the subsidiary proprietors. By 20 July 2006, the subsidiary proprietors representing 80.65% of the share values of the Property had signed the CSA and thus First Tree's mandate was due to expire on 20 January 2007.

13 Under cl 3.1 of the CSA, those subsidiary proprietors who signed the CSA ("the consenting subsidiary proprietors") acknowledged and ratified the appointment of the following individuals to the original SC:

	Name	Unit		Appointment
(a)	Mr Arjun Samtani	#12-03, Tower	West	Chairman
(b)	Mr Wee Hian Siew	#14-03, Tower	West	Secretary
(c)	Mr Claude Reghenzani	#15-02, Tower	West	Member
(d)	Dr Chan Siew Chee	#07-04, Tower	East	Member
(e)	Mr Tan Kah Gee	#16-03, Tower	East	Member
(f)	Mr Bharat Mandloi	#12-04, Tower	East	Member
(g)	Mr Shahrukh Marfatia	#14-05, Tower	East	Member
(h)	Mr Henry Lim	#12-06, Tower	West	Member
(i)	Mr George Eapen	#15-03, Tower	West	Member

14 The ambit of the original SC's authority and discretionary powers under the CSA was conspicuously broad. Presumably, this was to facilitate the management of the collective sale process by the original SC and to avoid its having to convene an EGM for each and every decision that had to be made in the course of the process. Clauses 4.1 and 5 of the CSA, *inter alia,* provided that:

> 4.1 The Consenting Subsidiary Proprietors hereby agree that the [SC] shall have ***full discretion and authority*** with respect to the following matters:-
>
> (a) to determine the selling price of the individual units/ the Property subject to the provisions as stated in Clause 5 (Collective Agreement to Sell);
>
> (b) to carry on negotiations with all intended purchasers in conjunction with the Agents and to determine the terms of the sale by tender or private treaty in accordance with the terms herein, for and on behalf of the Consenting Subsidiary Proprietors;
>
> …
>
> (f) to carry out through the Agents the sale of the Property by way of a tender or such other usual method(s) employed in the sale of properties;

(g) to authorise and instruct the Solicitors and the Agents to accept any bids or offers that may be received from prospective purchasers in accordance with the terms therein;

…

(i) to approve the Contract and to enter into the Contract with the Purchaser and for this purpose, to sign the Contract on behalf of each of the Consenting Subsidiary Proprietors;

…

(t) to do all acts, deeds, matters and things whatsoever in connection with the Collective Sale and the Contract upon the advice of the Agents and/or the Solicitors.

5 COLLECTIVE AGREEMENT TO SELL

The Consenting Subsidiary Proprietors shall collectively sell their individual units together with all their rights, title and interest in the same ***to such purchaser as shall be determined by the [SC] at such price and on such terms and conditions as the [SC] deems fit*** PROVIDED THAT the selling price for the Property (net of payment, if any, for differential premium or development charge) shall not be less than Singapore Dollars Five Hundred Million (S$500,000,000) (hereinafter referred to as the *Reserve Price*).

[emphasis added in bold italics]

15 Clause 4.2 of the CSA provided that "[t]he [SC] shall notify the Consenting Subsidiary Proprietors from time to time as regards the progress of the Collective Sale". Interestingly, at the 23 April 2006 EGM, Arjun Samtani had informed the subsidiary proprietors that they would be given constant updates via notices or circulars, "preferably every 2 weeks".[note: 10] But, as will be seen below (at [23]), the original SC failed to provide updates to the subsidiary proprietors on the collective sale during the period from October 2006 to January 2007 when the sale was actually entered into.

16 Clause 6.1(c) of the CSA provided that, in the event that unanimous consent to the CSA was not obtained, the consenting subsidiary proprietors agreed as between themselves to:

appoint the following persons as their authorised representatives in connection with the aforesaid application to the Strata Titles Board:-

(i) Mr Arjun Samtani;

(ii) Mr Wee Hian Siew; and

(iii) Dr Chan Siew Chee,

(hereinafter collectively referred to as *Representatives*). The [SC] may by a majority in its discretion replace and/or substitute any one of the Representatives with any other person drawn from the [SC].

[emphasis in original]

17 Clause 6.2 provided that:

> The Representatives shall have full discretion and authority to:-
>
> (a) appoint valuers to carry out a valuation of the Property on the basis of a collective sale and to instruct such valuers to prepare report(s) on the distribution of the sale proceeds or on such other matters as may be necessary for the purpose of the Application or as may be required by the Strata Titles Board;
>
> (b) do all things necessary and to instruct the Agents and the Solicitors to do all things necessary:-
>
> (i) to comply with the requirements of the Act and in particular the Schedule thereto in respect of the Application; and
>
> (ii) to obtain the Strata Title[s] Board's approval to the Application.

18 Significantly, Arjun Samtani and Tan Kah Gee did not disclose that they had purchased additional units in the Property (see [10] above) to the other subsidiary proprietors or the other members of the original SC, either during the 23 April 2006 EGM or next to their names in cl 3.1 of the CSA (see [13] above) or indeed at any other material point of time prior to the issue of the option to purchase the Property on 22 January 2007 (see [42] below). The other subsidiary proprietors found out about the additional units in May 2007 only after the application to the Horizon Board for the collective sale of the Property had been filed, and Arjun Samtani's and Tan Kah Gee's e-mails dated 30 April 2007 and 2 May 2007 respectively to the original SC's solicitors disclosing their interests in additional units were unearthed in the course of the discovery process.

19 Arjun Samtani's involvement in the collective sale process continued with undiminished vigour. Indeed, it was he who chaired the 23 April 2006 EGM. At the same EGM, he also proposed (seconded by Tan Kah Gee) that the number of members of the original SC be fixed at nine. The other members of the original SC who testified before the Horizon Board agreed that, as their chairman, he acted in a leadership role for the collective sale process (see, *eg*, transcript of Wee Hian Siew's testimony before the Horizon Board on 6 November 2007 at pp 59–60). It was Arjun Samtani who called for and set the agenda for the SC meetings, as evidenced by e-mail correspondence between the original SC members (see *eg*, [26] below). On many occasions, directions and instructions were solely given by him on the conduct of the sale. Communications to the consenting subsidiary proprietors were signed off by him (see *eg*, [23] below). All important communications were channelled through or to him *qua* chairman of the SC. It would not be overstating the position to say that he played a crucial, if not dominant, role in initiating, implementing and finalising the collective sale.

The efforts to sell the Property between May 2006 and December 2006

20 The marketing efforts for the sale of the Property began in earnest in May 2006, when First Tree sent marketing information to some 44 local developers. A public tender for the Property was launched on 21 July 2006. It closed on 15 August 2006 with no bids. The original SC members and First Tree tried to follow up on expressions of interest from a handful of developers, but to no avail. Alvin Er informed the original SC at a meeting on 17 August 2006 that most of the developers had sought to quote below the reserve price. In particular, on that day itself, Wing Tai Holdings Limited had informed him that it was willing to meet but only if the original SC would allow negotiations for a price below $500m.

21 Faced with this situation, First Tree indicated at the 17 August 2006 meeting that it would be willing to be a co-broker with other property agents in the hope of obtaining an acceptable offer. Thus, some members of the original SC also approached other marketing agents such as DTZ Debenham Tie Leung ("DTZ") and Knight Frank to market the Property.

22 On 13 and 14 September 2006, First Tree contacted 22 local developers to inform them that the Property was available through private treaty. Efforts at contacting potential buyers continued but no firm offers ensued. Between September 2006 and December 2006, Tang Wei Leng from DTZ approached and sounded out numerous potential buyers, including Far East Organization, Lippo Realty, Frasers Centrepoint Homes and Capitaland. A site visit was arranged for Capitaland but it subsequently informed DTZ that it was not prepared to pay $500m for the Property.

23 The original SC initially provided regular updates to the subsidiary proprietors on the progress of the sale, *eg*, on 16 August 2006, 21 August 2006 and 21 September 2006.[note: 11] The last such communication signed by Arjun Samtani was dated 23 October 2006. Significantly, it acknowledged that the property market was rising and promised to keep the subsidiary proprietors updated:[note: 12]

> From a legal point of view, the CSA remains valid up until May 10th 2007. *The property market continues to be on the upswing*. In view of this, the SC feels that we should stay firm with our reserve price instead of seeking a lower mandate from the owners. …
>
> *As done in the past, we will continue to keep you updated with developments, if any*.
>
> [emphasis added]

Between November 2006 and early January 2007, the original SC did not meet as a committee. No updates were provided to the subsidiary proprietors. The next notification on 23 January 2007 announced that an option had been issued for the Property.

Changing market conditions and the SC meeting on 6 January 2007

24 Beginning in late December 2006, however, interest in purchasing the Property at or above the reserve price had begun to mount visibly, attesting to a corresponding price surge in the property market (see [38] below). On 23 December 2006, Alvin Er met with the top management of HPL. He informed HPL that the reserve price could not be revised below $500m. He was then informed that HPL was considering purchasing the Property, possibly in a joint venture with other parties, and that he would be informed once a decision had been made. According to Alvin Er, he immediately informed Arjun Samtani of what had transpired during this meeting with HPL.[note: 13] He did not inform any of the other original SC members.

25 On 3 January 2007, Henry Lim (an SC member, see [13] above) received through a contact, Keith Yeo, a letter of offer from a Malaysian law firm, M/s Shan & Su, which stated:[note: 14]

> The Chairman of Horizon Towers
> Sales Committee
> No. 15 Leonie Hill Road,
> Horizon Towers East,
> Singapore 239194
>
> Dear Sirs,

RE: PROPOSED PURCHASE OF HORIZON TOWERS

We act for Vineyard Holdings (H.K.) Ltd with respect to the above matter, wherein our client instructs us that it is desirous of purchasing Horizon Towers ("the Property") for the sum of S$510 million only, free of all liens and encumbrances, subject to terms and conditions to be agreed between the parties.

Kindly let us have the principle [*sic*] terms and conditions of the above sale for our clients['] due consideration.

We look forward to hearing from you the soonest.

Thank you.

Henry Lim forwarded this letter to the other original SC members and the original SC's solicitors for the collective sale process, on or around 4 January 2007.

26 On 4 January 2007, Alvin Er received a call from HPL. Its management wanted to meet up with the original SC to discuss the collective sale. Alvin Er contacted Arjun Samtani, who arranged for the meeting to take place later that day at 6.00pm.[note: 15] Some of the SC members, including Arjun Samtani, met with HPL's representatives at the SC's solicitor's office. HPL verbally indicated that it was willing to purchase the Property for $500m. No minutes of this meeting were taken.[note: 16] After this meeting, Arjun Samtani sent out an e-mail dated 5 January 2007 to the SC members, stating:[note: 17]

Friends,

To bring everyone up to speed, particularly George, Laurence and Dr Chan who could not attend. The "offer" was personally presented by the Ex Director of HPL. It consists of a net price of 500 million. They want 30 days time to work out with a mid east party (a jv?) and will give us a D/D of 5 million. If they do not take up the offer within 30 days we can [keep] the interest on the 5 m (1%).

Message given to them is a NO.

Next Steps.

FOR SC To work asap on the couple of interested parties (Henry, Alvin). We have time till Mon eve.

For HPL, To come back with better terms by Tue am.

Let us all meet in my place on Sat [6 January 2007] at 6 45 pm after the MC meeting.

27 On the same day, Henry Lim informed Keith Yeo about the HPL offer and informed him that if Vineyard was serious about its offer, it should immediately place a $50m deposit as proof of its intent. HPL was, on the other hand, not similarly requested to affirm its commitment. In the proceedings before the Horizon Board (see [46] and [48] below), Henry Lim testified that he contacted Keith Yeo a few more times up till 16 January 2007, but received no response from Keith Yeo or any other person on behalf of Vineyard.

28 On 6 January 2007, a crucial SC meeting ("the 6 January 2007 SC meeting") took place. The original SC discussed the issue of whether it should raise the sale price for the Property and reviewed HPL's offer as well as other potential offers. We now set out the minutes of the 6 January 2007 SC meeting as recorded by a solicitor of the original SC in full:[note: 18]

1. Sale Price/Reserve Price

On the question of whether the SC should raise the sale price, D&N advised that the SC has the duty to get the best price, taking all facts into consideration.

In doing so, the decision must be supported by logic and proper advice from the property experts, if the SC does not have the expertise.

SC members have to exercise due care skill and honesty in arriving at its decision.

D&N further advised that where the reserve price has been met, (i) it would be more difficult for the subsidiary proprietors to challenge the sale unless it is clear from the circumstances that the SC could have gotten a better price but did not do so, and (ii) whether the circumstances are such that the SC could have obtained a better price is a matter for the SC to decide.

2. HPL's Potential Offer

Alvin updated the SC that on 23.12.06, he met Ong Beng Seng, who told him that HPL cannot go in alone because project would cost almost S$1 billion.

Terms subsequently discussed between the parties were as follows:-

(a) Right of first refusal for 21 calendar days.

(b) SC can talk to other parties but cannot sign contract with such other parties unless HPL decides not to proceed (ie after 21 days).

(c) If after 21 calendar days, HPL does not decide to proceed, $0.5m to be forfeited.

(d) [Purchase price] still $500m – Alvin confirmed no room to negotiate.

HPL wants letter from SC setting out the main terms before they will make offer.

3. Review of Other Potential Offers

(a) HK buyer through Morgan Stanley – Morgan Stanley wants commission from deal, but does not want buyer to be informed. SC decided against pursuing this potential offer at this stage as:

(1) it appears messy;

(2) not likely to get confirmation by Monday;

(3) sale price also at $500m only.

(b) Henry updated the SC on the following:-

(1) DTZ's clients – will try to get above $500m. But no indication of offer price and no suggestion that an offer will ever be made. On top of the aforesaid, they want cap on [differential premium].

(2) Mrs Phang's contacts – indication of price from $490m to $500m, but no offer despite Henry chasing on several occasions.

(3) KL party – a small time lawyer acting for a HK developer (whom none of the people at the table have heard of), indicating that they may be willing to pay $510m gross, but nothing has happened to date.

(4) CBRE – developer needs time. No indication of who they are, how much time they need and no indication of what price might be.

4. In view of the fact that HPL seems most earnest and that there are no firm offers nor indication of timing as to when any firm offer (if at all) can be expected from the others, the SC decided that it should go with HPL (except Bharat, who abstained).

SC decided that [First Tree] (instead of the SC) will give letter to HPL on Tuesday morning, if no other bids materialise.

5. Action Items

(a) Notwithstanding that the SC has chosen to go with HPL on Tuesday, Henry is nonetheless to follow up on all potential offers to see if there can be anything better by Monday evening.

(b) D&N to draft letter for [First Tree] to send out on Tuesday morning, if there are no other offers by Monday evening.

29 The brevity of the minutes is striking, given that the meeting itself took an hour and a half, and that several other important issues were apparently extensively discussed. It has now emerged that important concerns and reservations voiced by at least one of the original SC members, Bharat Mandloi, have been surprisingly papered over and not minuted. Bharat Mandloi testified on 2 August 2007 before the Horizon Board about what was discussed at the 6 January 2007 SC meeting. The crux of his evidence (which has largely been corroborated) has given us cause for real concern.

30 It was recorded in the minutes of the 6 January 2007 SC meeting that Bharat Mandloi had abstained from voting on the sale to HPL. In truth, he had left the 6 January 2007 SC meeting before the voting took place.[note: 19] He explained that the circumstances prompting him to abruptly walk out of the meeting were as follows:[note: 20]

On 4th January, I was told by the chairman of the sales committee that we have an offer and the buyer is backed by a Middle Eastern partner and we should meet on the 4th evening at Drew & Napier [the SC's solicitors] office and the buyer or the developer prefers to discuss all the terms and conditions in person. We met on the 4th. The discussion went on. On the 5th, I sent out an email to all the SC members expressing my concern on two fundamental issues. …

…

… *I basically raised two points. One was that the en bloc premium which we were indicated has*

disappeared almost, if not fully. And the second obviously was the point that the whole purpose of en bloc when it is given as a concept to people is that when you sell the property en bloc, you get enough money to buy an equal in replacement; at the same time you have a surplus cash gain.

…

I abstained [from voting at the 6 January 2007 SC meeting] because after all the discussion went around on should we proceed with HPL discussion at this price or not. I was of the strong opinion that we should not primarily because if the premium is gone, the mandate which has been given to us to sell at this price is kind of morally nullified because we are not getting the premium …

31 The most troubling aspect of his testimony is as follows:[note: 21]

A ... [T]he chairman of the SC proposed that "Look, we have had enough discussion, we do not have any other solution" and at that point also, of course, there was an option available to go back to the CSPs [consenting subsidiary proprietors] because one of the points was that HPL had asked for 30 days which they brought down to 21 days for getting the approval. If the buyer could ask for 21 or 30 days of timeframe to get their management approval or internal approval while we could not go to the CSPs and call them on a week's notice or 10 days' notice and seek ratification of the mandate especially when---

Chairman [of the Horizon Board]: Did you ask this question?

A *I think this was discussed all along and everybody in the room was clear that if we go back to the CSPs, we are not going to get the mandate. In fact, I still remember somebody said if we go back to CSPs, this en bloc process is as good as dead.*

[emphasis added]

32 He added on cross-examination:[note: 22]

A No. I think that was not at one time, a couple of times it was discussed and it was 100 per cent clear to everybody that if you ever go back to CSP, to take a fresh mandate as on that date.

Chairman: No. When you say "clear to everybody", it was actually orally said.

A It was discussed. Yes, yes, yes, Yes, sir.

Chairman: Okay. It is not---

A Because that option was ruled out, that is where I think--- –

Chairman: No, no. We just want to know whether it was your perception or whether it was actually---

A No, it was clearly discussed and in my opinion everybody had the same conclusion.

33 Subsequently, Bharat Mandloi reaffirmed his evidence:[note: 23]

Q Now, you said that everyone in the sales committee were of the view that if they went back to the subsidiary proprietors for approval of this sale at 500 million, none of them would approve it,

correct?

A They would not get the mandate.

34 Wee Hian Siew, in his testimony, initially limply asserted that he could not recollect what Bharat Mandloi had asserted at the meeting but, when pressed, reluctantly conceded that he did not dispute Bharat Mandloi's evidence:[note: 24]

Q. … And [Bharat] suggested to the committee that the committee should go back to the owners to get a fresh mandate from the owners.

A. Possible, yes.

Q. *Right. And Arjun and other people, in response to him, said that if the committee is to go back to the owners, you will not get 80 per cent majority anymore.* [emphasis added]

A. 80 per cent majority.

Q. You will not get a mandate in that sense.

A. Sure.

Q. That is what the response to Mr Bharat was.

A. Yes.

Q. That is the case?

A. I -- okay, I am quite sure this can happen. This can be said, yes.

Q. You are quite sure that this can be said?

A. Yes.

Q. So you do not dispute in that sense what Bharat is saying?

A. Right.

Subsequently Wee Hian Siew reverted to his stance that he could not recall what Bharat Mandloi had said at the 6 January 2007 SC meeting, but acknowledged that he therefore was in no position to challenge Bharat Mandloi's testimony that he had raised the issue of the eroded premium and the option of going back to the consenting subsidiary proprietors (see [30]–[33] above).[note: 25]

35 Henry Lim also agreed during cross-examination that the option of going back to the consenting subsidiary proprietors had been raised at the 6 January 2007 SC meeting. He testified:[note: 26]

Q. … You are now saying that you had raised with Drew & Napier the option of going back to the CSPs for a fresh mandate. Is that what you are saying?

A. No, it is not a fresh mandate. We are saying that --

Q. Or to ask for their views?

A. Yes. To go back to the CSPs.

Q. So you raised this issue with Drew & Napier?

A. I cannot remember who but I know it has been raised, you know.

Q. Raised with whom? With the lawyers or amongst yourselves?

A. *Raised with the lawyers because on the 6th of January, the lawyers are present.*

Q, *And we do not see this question being addressed in the minutes, anywhere in the discussion in the minutes. Right?*

A. *Yes, it was not there*.

Q. *So the [SC] was concerned as to whether the CSPs would approve of the deal. Is that your testimony? …*

A. *Yes.*

Q. *Concerned enough to raise that issue with the solicitors. Is that your testimony?*

A. *Yes.*

Q. *Right. And you were concerned -- the sales committee was concerned because there was a serious doubt in your mind as to whether the CSPs would endorse the deal? Right? What else can the concern be?*

A. *Yes.*

Q. Right. And that concern was because of the erosion of premium. Would you agree?

A. Yes.

Q. And that concern was also because the prognosis for the market was healthy. Would you agree?

A. Yes.

…

[Counsel]: …

And is this not exactly what Mr Mandloi has raised that one should go back to the CSPs for a decision on whether to proceed with the HPL offer?

A. Yes.

Q. Thank you. Thank you very much. And was it not the response from Mr Samtani, Mr Reghenzani and Dr Chan that we should not do this because we would not get approval?

A. No, not that I am aware of.

Q. So you went ahead with the deal, right?

A. Yes.

Q. So how did you handle Mr Bharat's point about going back to the CSPs?

A. We raised that point to our lawyer --

Q. All right.

A. -- concerned.

Q. You see the difficulty with that Mr Er is that then everything gets --

THE CHAIRMAN: No, no, Mr Lim.

Q. I am sorry, Mr Lim. *Is that everything gets clothed by privilege and we can never test that story.* And it becomes a very convenient way to camouflage the truth from your perspective. And I would suggest to you -- in fact I will put to you since evidence is on record that Mr Mandloi's -- well, you have agreed on that, *the response to Mr Mandloi's proposal was that we should not or we would [not] go back to the CSPs because the CSPs will disapprove of the deal.* You can agree or disagree? I will leave it to submissions.

A. *I have no comment.*

Q. *No, I want an answer. Do you agree or disagree?*

[Counsel]: Sir, I am wrapping up, Sir.

THE CHAIRMAN: *Mr Lim, can you answer the question or not? If you cannot then counsel will make a submission on that.*

A. *I cannot answer that.*

THE CHAIRMAN: Okay. You just make a submission on that.

[Counsel]: *Yes, Sir.*

And in fact this was the position taken by Mr Samtani, Mr Reghenzani and Dr Chan who were the people pushing for the deal. Agree or disagree?

A. *I have no comment.*

Q. *No comment. And in fact, one of the three said that if they went back to the CSPs, this deal is as good as dead. Agree or disagree?*

A. *I have no comment.*

[emphasis added]

36 Bharat Mandloi's evidence certainly had the grudging support of both Wee Hian Siew and Henry Lim. Henry Lim's tired refrain of "no comment", when repeatedly pressed for a direct answer, speaks for itself. We find it puzzling that the Horizon Board chose not to deal with Bharat Mandloi's account of the 6 January 2007 SC meeting in its decision at all, not even to dismiss it as irrelevant. In our view, Bharat Mandloi's account of what transpired ought to be accepted as credible. Furthermore, it is certainly relevant and highly significant for it incontrovertibly shows that, by the time of the 6 January 2007 SC meeting, the original SC was fully apprised of the dramatic changes in the property market. Nevertheless, the original SC brusquely decided against going back to the consenting subsidiary proprietors for reaffirmation of their mandate to sell at $500m or to ascertain their wishes on how the SC ought to proceed.

The decision of the original SC to sell the Property to HPL

37 As 6 January 2007 was a Saturday, Henry Lim effectively had one working day to follow up with the other potential offers. He was apparently unsuccessful as, on 8 January 2007, First Tree promptly sent a letter to HPL ("the 8 January 2007 letter"), stating:[note: 27]

> Subject to the terms of the contract to be agreed on between the parties, we are instructed by the [SC] for the collective sale of the Property to set out the following main terms:-
>
> 1. The purchase price shall be S$500,000,000/-;
>
> 2. Agent's commission (being 0.5% of the purchase price), development charge and differential premium to be borne by you;
>
> 3. Option fee at 1% of the purchase price, S$500,000/- to be forfeited if the Option is not exercised on or before the expiry of 21 days from the date of the Option ("Option exercise period"); and
>
> 4. During the Option exercise period, the [SC] will not be prohibited from soliciting offers from other interested parties, save that a contract can only be signed with any such interested party if you do not exercise the Option on or before the expiry of the Option exercise period.
>
> If you are prepared to make an offer, kindly let us have your letter of offer and your cheque for 1% of the Purchase price (ie S$5,000,000/-) in favour of "Drew & Napier LLC", which will be held by Drew & Napier LLC in escrow pending the finalization of the terms of the Option.

38 There can be little doubt that the move towards quickly wrapping up the deal with HPL took place against the background of a pronounced, widely-known and well-publicised price surge in the property market. Kalpana Rashlwala, "Developers revive interest in unsold collective sale sites", *The Business Times* (11 January 2007) ("the 11 January 2007 BT article") reported that a neighbouring condominium, Grangeford Apartments ("Grangeford"), was raising its reserve price by 25% to $350m. The report stated:[note: 28]

> The *continuing surge* in the high-end residential sector and record prices for prime housing sites are reviving developers' interest in collective sales sites that were not sold last year, players say.
>
> …
>
> A case in point is leasehold Horizon Towers in the Leonie Hill area. Its owners are asking $500

million, which works out to about $820 psf per plot ratio including a payment the successful bidder will have to make to the state to upgrade the lease to 99 years.

This looked expensive for a leasehold site when the tender closed in August last year. 'But now it's like just half the unit land price for Parisian,' said a consultant. 'All of a sudden, Horizon Towers doesn't look that expensive for bidders with deep pockets.'

Industry sources say a joint venture, involving a local developer and a fund, recently placed an offer that meets the $500 million asking price. Lawyers representing Horizon Towers' owners are said to be evaluating the terms and conditions set by the potential buyer and if these can be agreed on, the site is likely to be awarded.

In the meantime, though, other developers may be considering whether it is worth making a fresh offer for the sprawling 204,742 sq ft site, which has a remaining lease of about 71 years.

Apparently, the owners of Grangeford – another 99-year leasehold property in the vicinity – are said to be raising their reserve price about 25 per cent to $350 million from $280 million last year. And as a result of this, many more owners are now coming forward to sign the collective sale agreement.

'It is much more difficult to get the minimum 80 per cent approval level from owners these days, and it may be necessary perhaps to revise upwards the reserve price during the signing process to persuade at least 80 per cent of owners to join in – because of all the positive media coverage on the property market recovery,' says CB Richard Ellis executive director Jeremy Lake, whose firm is marketing Grangeford. Property consultants told BT it is not just collective sales sites in the Orchard Road area that are seeing a revival in interest.

[emphasis added]

Alvin Er prevaricated as to whether he had drawn this article to the attention of the original SC but nevertheless unequivocally conceded that the original SC was aware of its contents.[note: 29] Wee Hian Siew acknowledged having come across the article when he read *The Business Times*.[note: 30] Henry Lim claimed that Alvin Er had not forwarded the article, at least, to him.[note: 31] The momentum of this surge in property prices is also dramatically attested to by a letter dated 2 March 2007 (barely two months later), in which the marketing agent of Grangeford, CB Richard Ellis, informed Grangeford's subsidiary proprietors that it had decided to raise the reserve price to $470m (*ie*, by $120m) in response to an expression of keen interest by HPL to purchase Grangeford.[note: 32]

39 As a court of law, we should not, however, rely in this matter on subsequent events to ascertain or divine the knowledge and beliefs of the original SC members at the material period of time in January 2007. It is therefore crucial for us to examine what was known to them and expressed by them on record. We have already concluded above that Bharat Mandloi's evidence (which was not challenged by either Wee Hian Siew or Henry Lim) showed that the original SC was aware of the surge in prices in the property market at the latest by the time of the 6 January 2007 SC meeting (see [36] above). It is also highly pertinent that soon after the 6 January 2007 SC meeting, Tan Kah Gee e-mailed Arjun Samtani and the other SC members on 12 January 2007, stating:[note: 33]

Hi Arjun

Hope you're having a good time in London.

I suppose you're aware that we have neither received HPL's firm bid (which they promised to deliver 3 days ago Tuesday) nor any bid from any other developers (*although more developers have expressed interest*), to date.

As per our Saturday meeting, it is clear that there's a division in opinion among the SC members. I for one feel that the terms from HPL is not attractive (I was subsequently told that there were 3 cases in the market that developers ended up not exercising their options, so there's a real risk, and the option money forfeited were 1% each, not 0.1%). I also feel that *we should fetch more than $500MM given the current market condition, although that has not yet been supported by another firm bid from another developer. I had voted with the SC on Saturday to maintain unanimity and due to the strong advice put forward by David Ang [the solicitor from D&N], despite my discomfort.*

If we're still going ahead to give the option to HPL (upon them reverting to us), I strongly suggest that we do the following *for the protection of the SC:*

(1) Receive in writing from David, in a letter or in the meeting minute, that he had advised that we accept the HPL bid as it meets our CSA mandate and that we are opened to challenges on our skills, expertise, judgement, vested interest if we hold out for a better bid which does not come. He also advised that we can not be challenged by any party (including non consenting SP) that we have sold it too cheap at $500MM [because] it meets the reserve price and there's no other bidder (*although I still have a concern as to whether we should handle all expression[s] of interest properly*).

(2) Receive from [First Tree] that there's no other bid and in their opinion HPL makes the best deal and they recommend that SC accepts it.

(3) To ask Henry to write (or email) to all parties which he has corresponded with to keep in writing that [none] of them has yet to give us a firm bid.

I think that the above due diligence, *in writing*, is the minimum we have to have before we give any options to HPL.

[emphasis added]

This e-mail is significant for a number of reasons. First, the reference to the division of opinion among the original SC members and Tan Kah Gee's own discomfort with the decision to sell to HPL at the 6 January 2007 SC meeting is further evidence that the original SC was apprised of the upswing in the property market at the latest by 6 January 2007. Secondly, the reference to expressions of interest from more developers suggested that, if the SC had waited a bit longer, it might have been able to obtain a better price (see also [179] below). Thirdly, why was Tan Kah Gee voicing concerns as to "whether we *should* handle all expression[s] of interest *properly*" [emphasis added]? A reasonable inference from this is that he did not believe that the original SC had, despite the "unanimity" of the decision taken earlier on 6 January 2007, acted "*properly*" as he was of the view that the Property "*should fetch more than $500MM given the current market condition*" [emphasis added]. Fourthly, it seems that, as far as Tan Kah Gee was concerned, he voted in favour of the sale to maintain "unanimity" and because of the "strong advice" received from the SC's solicitors. It is not clear if the "division in opinion" he referred to is confined to Bharat Mandloi's objection to the sale to HPL (see [30]–[33] above) as no individuals are identified. Regrettably, the minutes of the 6 January 2007 SC meeting are bereft of details. We have not seen any response to this e-mail but there is on record an e-mail from Arjun Samtani to Alvin Er sent soon after, on 13 January 2007, asking him to *carefully*

maintain records (see [41] and [43] below).

40 It bears emphasis that there was no concluded deal with HPL at this point of time when the original SC, or at least the active members of the SC, were fully aware of a fast rising property market. HPL's response to the 8 January 2007 letter from First Tree only came on 15 January 2007 ("the 15 January 2007 offer"), in the form of an offer by a member of the HPL group (Alkaff Mansion Pte Ltd) to purchase the Property at $500m, the minimum reserve price that had been set some eight months ago at the 23 April 2006 EGM.

41 On 16 January 2007, First Tree sent a letter to the original SC, stating that as at 5.30pm on that day, "there are no other offers and no firm indication of any other offer in the near future except from Alkaff Mansion Pte Ltd", and recommending that the SC accept the 15 January 2007 offer. [note: 34] This the SC did on 16 January 2007 itself. It is also worth noting that, apart from the 4 January 2007 meeting between HPL and some of the original SC members (see [26] above), the original SC members apparently left it entirely up to Alvin Er to deal directly with the representatives from HPL and with Arjun Samtani. We should also point out that the SC members must have been aware that First Tree's mandate was due to end on 20 January 2007. If no sale was concluded by then, no commission would be due to it. The mandate was eventually extended on 20 January 2007 until 28 February 2007 for the purpose of seeing through the HPL sale. We shall revisit this point again later, at [192] below.

42 Subsequently, on 22 January 2007, the original SC issued an option to purchase to HPPL, exercisable by 4.00pm on 12 February 2007. HPPL exercised the option to purchase on 11 February 2007, thus converting the option to purchase into a sale and purchase agreement between HPPL and the subsidiary proprietors of the Property ("the S&P"). By cl 4 of the option to purchase, the sale of the Property was made conditional upon an order of the STB for the collective sale of the Property (under s 84A of the LTSA) in accordance with the provisions of the S&P.

43 It should be noted that, before HPPL exercised the option to purchase on 11 February 2007, Henry Lim sent an e-mail dated 2 February 2007 to the original SC members and Alvin Er, entitled "Developers/contacts in touch with me on Horizon Towers". [note: 35] The list contained some 26 names (including HPL) but not Vineyard, Shan & Su or Keith Yeo (see [39] above).

44 It is also noteworthy that the original SC did not seek an independent valuation of the property prior to the sale even though it was expressly authorised by the CSA to do so (see cl 6.2(a) of the CSA, at [17] above). It is pertinent that the solicitors had advised the SC during the 6 January 2007 meeting that the "*decision [to sell] must be supported by logic and proper advice from the property experts if the SC does not have the expertise*" [emphasis added] (see [28] above). This caution was apparently forgotten by all concerned. Indeed, it was only much later that the original SC obtained a valuation dated 16 March 2007 from Chesterton International Property Consultants Ltd which purported to value the Property (as at 16 March 2007) at $485m. Subsequently, a valuation report dated 7 May 2007 was obtained from Jones Lang LaSalle, which valued the Property (as at 22 January 2007) at $496m. Finally, a third valuation report dated 1 November 2007 from CB Richard Ellis purported to value the Property at $485.5m (as at 22 January 2007) and $492.6m (as at 12 February 2007). For the sake of completeness, we should mention that the appellants had also obtained valuation reports for the Property: a report dated 18 July 2007 from SC Lim Pte Ltd which valued the Property (as at 22 January 2007) at $582m (relying on comparable sales) and $613m (considering a rising market); a report dated 18 July 2007 from HBA Group Property Consultants Pte Ltd which valued the Property (as at 22 January 2007) at $650m; and a report dated 20 July 2007 from Steven Loh Consulting Pte Ltd which valued the Property (as at 22 January 2007) at $645m. 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.

45 On 25 March 2007, an EGM ("the 25 March 2007 EGM") was held to consider the collective sale of the Property under the CSA, the option to purchase and the S&P. At this EGM, several subsidiary proprietors who had signed the CSA voiced their deep unhappiness about the sale to HPPL at the reserve price of $500m. In particular, vociferous complaints were made and vigorous objections raised about the lack of communication and updates from the original SC on the progress of the sale process ever since the 23 October 2006 notification (see [23] above), the absence of a proper valuation report prior to the sale and the failure to seek a fresh mandate given that the property market had risen sharply and that the earlier anticipated premium had all but evaporated.

The application to the Horizon Board

46 On 20 April 2007, the three authorised SC members (Arjun Samtani, Wee Hian Siew and Chan Siew Chee) filed an application to the Horizon Board for the collective sale of the Property. The application to the Horizon Board was dismissed on 3 August 2007 ("the Horizon Board's 3 August 2007 decision") on the technical ground that it did not contain documents required under a Schedule to the LTSA. On 11 August 2007, the S&P expired without any extension being granted by the consenting subsidiary proprietors. It appears, at this stage, given the changes in market conditions, many of the consenting subsidiary proprietors were not at all keen in proceeding with the sale. HPPL, on the other hand, insisted that they exercise their best endeavours to complete the sale.

47 By the first week of September 2007, the composition of the original SC had been entirely transformed with the resignation of all its members (see [13] above) between 27 June 2007 and 7 September 2007. On 23 August 2007, HPPL commenced legal proceedings by way of Originating Summons No 1238 of 2007 against the then members of the SC in their own capacity as well as on behalf of and as representing all the other consenting subsidiary proprietors, as well as the original SC members. It sought a declaration that these defendants were in breach of the option to purchase, *inter alia*, by failing to do everything in their power to obtain a collective sale order from the STB. HPPL sought an order that the defendants do everything in their power to obtain that order and, further or alternatively, for substantial damages for breach of contract. (That action is still pending.) In response to this unexpected development, subsequently, three consenting subsidiary proprietors filed an appeal to the High Court by way of Originating Summons No 1269 of 2007 against the Horizon Board's 3 August 2007 decision not to order the collective sale. At an EGM on 20 September 2007, a wholly new SC was appointed and the S&P was extended for the purpose of obtaining a collective sale order. The new SC revealed that it agreed to this extension out of "goodwill", in the hope that HPPL would reciprocate by dropping Originating Summons No 1238 of 2007 so long as the new SC acted in good faith to try and obtain a collective sale order.[note: 36] HPPL, however, was not agreeable to this but instead requested the Registry to adjourn those proceedings *sine die* to await the outcome of the present appeal.

48 On 11 October 2007, after hearing the appeal in Originating Summons No 1269 of 2007, the High Court set aside the Horizon Board's 3 August 2007 decision and remitted the matter to the Horizon Board. The second tranche of hearings before the Horizon Board commenced on 16 October 2007.

The parties' submissions

49 Essentially, the application for collective sale was challenged by objecting subsidiary proprietors on the basis that the transaction was not in good faith after taking into account the sale

price (s 84A(9)(*a*)(i)(A) of the LTSA). Counsel for a number of the objectors submitted that the original SC, when exercising the power under the CSA of selling all the units in the Property, was acting as agent for all the subsidiary proprietors and that it was in the position of a mortgagee exercising its power of sale. One of the objectors said that, unlike a mortgagee, the original SC had no interest in the other subsidiary proprietors' property and, thus, he would place the duty of the SC as higher than that of a mortgagee.

50 The objectors criticised the original SC's handling of the offer from Vineyard (see [25] and [27] above). They argued that the original SC had acted with undue haste in selling the Property to HPPL in the circumstances that it did.

51 It was also submitted that the ownership of additional units by two original SC members (see [10] above) placed them in a position of conflict. A third person who bought an additional unit during the collective sale process was William Kwok. He was not a member of the original SC and only became an SC member on 25 February 2007. It was alleged that the conflicting personal interests of these three SC members had brought about the hurried sale of the Property.

52 The objectors also tendered expert valuation reports to show that the Property had been sold at too low a price (see [44] above).

53 The other objections (*viz*, on constitutional and jurisdictional points, ss 84A(1) and 84A(3) of the LTSA, as well as bad faith after taking into account the method of distribution of the sale proceeds) are not relevant for the purposes of the present appeals.

54 The objectors applied on 25 October 2007 for Arjun Samtani to be subpoenaed as a witness of fact. As we have mentioned earlier (at [8]), the Horizon Board did not accede to this request.

55 The applicants for collective sale essentially submitted that the original SC had acted in good faith in accepting HPL's offer, given the history of the unsuccessful marketing of the Property up until December 2006. They said that the original SC had relied on its solicitors' advice in deciding not to pursue the Vineyard offer and to sell the Property to HPL instead. However, the applicants insisted that the details of the original SC's solicitors' advice should not be disclosed as they were protected by legal privilege. It was also argued that Henry Lim had asked Vineyard through Keith Yeo for further information and to give a deposit of $50m if it was serious about purchasing the Property. Since this was not forthcoming, the original SC decided to give HPPL the option to purchase instead.

The Horizon Board's decision

56 As mentioned (at [6] above), the Horizon Board's order directing the collective sale of the Property was granted on 7 December 2007. We have already pointed out that the Horizon Board rejected the objectors' application to subpoena Arjun Samtani on the technical basis that they had failed to provide sufficient particulars of the proposed testimony that the applicants for the collective sale were entitled to (see [8] above). Having regard to our views on the duties and functions of an STB (see [170]–[175] below), we pause to observe at this juncture that it is regrettable that the Horizon Board took an overly legalistic approach to the issue of subpoenaing Arjun Samtani to testify. 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 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.

57 In the HB decision ([6] *supra*), the Horizon Board classified the issues which it had to address under five headings as follows (at [7] of the HB decision):

1. Constitutional Point;

2. Jurisdictional Point;

3. Section 84A(1) Point: which would generally include your 80% requirement and the content of the S&P;

4. Section 84A(3) Point: which is basically concerning matters that are not in compliance with the Schedule [to the LTSA] …;

5. Section 84A(9) [Point] which basically involved the transaction not [being] in good faith:

   (a) Sale Price

   (b) Method of distribution

   (c) The relationship between the Purchaser and the Vendor

Of these issues, only the last issue (the s 84A(9) point) is relevant for the purpose of the present appeals.

58 On the last issue, the Horizon Board began by stating that, while it was possible that the original SC was an agent owing certain fiduciary duties to the rest of the consenting subsidiary proprietors, the Horizon Board was concerned only with the issue of good faith *vis-à-vis* the sale transaction and any breach of fiduciary duties had to be assessed in the light of this requirement (see the HB decision at [54]). The Horizon Board did not even begin to address the issue of whether the original SC owed fiduciary duties to the objecting subsidiary owners.

59 The Horizon Board noted the comparison of an SC's duties to those of a mortgagee exercising its power of sale, *viz*, to act in good faith and to take reasonable steps to obtain the best price available at the time of the sale (or, *per* Salmon LJ in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 ("*Cuckmere*") at 966, "the true market value"). However, it rejected this comparison, stating that "there is no express statutory duty on the SC other than this: they need only ensure that the sale transaction is in good faith", since the SC members' "interest as owners would mean that they would be inclined to try to obtain the best price available" (at [58] of the HB decision). The logic of this reasoning of the Horizon Board is debatable. To "incline to try" is not the same as actually trying. In fact, as will be seen later (at [188] below), the evidence shows that far from trying to obtain the best price, certain members of the original SC were not even inclined to try. Furthermore, it should be emphasised that, since s 84A(9)(*a*)(i)(A) requires the STB to take into account the sale price for the lots and the common property in the development as a factor in determining good faith, it is difficult to understand why a duty to obtain the best price is not part of the duties of an SC.

60 The Horizon Board viewed "good faith" as involving "notions of honesty, fairness and absence

of unconscionable and perhaps even reckless behaviour" (at [60] of the HB decision). The Horizon Board then considered two areas in determining whether the transaction was in good faith – *first, the steps taken in relation to the sale; and second, the comparison between the sale price and the true value of the property* (at [61] of the HB decision).

61 In relation to the first area, the Horizon Board noted that Vineyard had not responded to Henry Lim's request, through Keith Yeo, for further information and the deposit of $50m (see [27] above) as proof of Vineyard's seriousness about purchasing the Property (see the HB decision at [64]). Furthermore, the original SC had taken the advice of its solicitors as to the appropriateness of accepting HPL's offer to pay $500m for the Property. Thus, the Horizon Board concluded (at [65] of the HB decision):

> While [the SC's] attitude towards Vineyard's interest at $510 million might be said to be robust and cavalier, in the circumstances, the Board is of the view that it was a judgment call of the SC and not a decision made 'not in good faith'.

62 The Horizon Board added that, at the time of HPL's offer in early January 2007, the sale price of $500m was a *fair price.* The property market was then relatively less bullish than it became later. By selling at $500m, the original SC had fulfilled its mandate to sell at a price not below the reserve price (see cl 5 of the CSA, at [14] above and the HB decision at [68]).

63 The Horizon Board was aware that altogether three members of the SC had at different times purchased units in the Property after the collective sale process had commenced (see [10] and [51] above). However, it was of the view that *no conflict of interest had been proved*, relying once again on the reasoning that, as owners of units in the Property, the original SC members would be interested in getting the best price available. The Horizon Board said (at [73] of the HB decision):

> The Board does not accept that the respondents have proved that the three SC members who had purchased more units when they did were *ipso facto* in a conflict position. When they bought the extra units, they may well have been motivated by the prospect of a collective sale yielding good profits, a money-making venture. They may have used 'insider' knowledge and took a risk in purchasing the extra units at that time. This motive would lead them to seek the best price that could be had at that time rather than accepting a price that was not reflective of the true market value. But this in itself does not mean that they were in a position of conflict with the other CSPs. Whether they were living in the units, and they were indeed living in their original units, or renting them out they were owners who had agreed to sell in a collective sale and would be interested in getting the best price available. *The conflict if any has to be proved and the Board is of the view that the respondents so alleging have not done this.* [emphasis added]

64 Finally, given the history of attempts to advertise and promote the sale, the Horizon Board found that the sale to HPPL was not hurried (see the HB decision at [69] and [74]).

65 In respect of the second area of inquiry (*viz*, the comparison between the sale price and the true value of the Property), the Horizon Board considered the expert valuation reports tendered by the objectors to the collective sale, which gave market values of the Property as at 22 January 2007 which were higher than $500m (see [44] above). The Horizon Board rejected these valuation reports on the basis that they referred to sale transactions after 22 January 2007 in establishing the open market value of the Property as at 22 January 2007, and that they did not give due consideration to the exceptionally large land area of the Property that had made the Property out of the reach of most developers in Singapore in January 2007 (see the HB decision at [81]–[101]).

66 The Horizon Board pointed out that the fact that there were no offers for the Property despite the efforts to market it showed that, up till November 2006, the reserve price was above the market value of the Property (see the HB decision at [102]). Although it accepted that the market had begun to move when interest was shown at the price of $500m, it found that the sale price to HPPL was "not too low" in the light of the likely price range of the Property in December 2006 as indicated by the only other expression of interest of $510m from Vineyard (at [103] of the HB decision).

67 The Horizon Board also considered the question of whether the transaction was not in good faith having regard to the adopted method of distribution of the sale proceeds which was to divide 50% of the sale proceeds based on the strata area of the respective units and the other 50% in proportion to their respective share value (see s 84A(9)(*a*)(i)(B) of the LTSA which requires an STB to take into account the method of distributing the proceeds of sale). It noted that this method of distribution was an acceptable compromise which helped to even out the difference in strata areas and share values where there were big discrepancies in both among the various units. Therefore, it found that the transaction was in good faith in so far as the method of distribution of the sale proceeds was concerned (see the HB decision at [110]–[112]). This point is no longer relevant.

68 Finally, the Horizon Board considered whether the transaction was not in good faith having regard to the relationship between the purchaser and any subsidiary proprietor (see s 84A(9)(*a*)(i)(C) of the LTSA). This issue is irrelevant for the purpose of the present appeals.

The appeal to the High Court

69 Several of the objecting subsidiary proprietors filed appeals to the High Court against the Horizon Board's decision. There were three appeals, by way of Originating Summonses Nos 5, 10 and 11 of 2008 (respectively "OS 5/2008", "OS 10/2008" and "OS 11/2008").

The appellants' submissions

70 In OS 10/2008 Mr KS Rajah SC, on behalf of the objectors, made submissions pertaining to constitutional and jurisdictional issues which are no longer live in the present appeals. Accordingly, we shall not consider them. The main issue in the High Court which concerns us today is that of good faith in relation to the transaction. Mr Harry Elias SC ("Mr Elias"), counsel for the same objectors, submitted that the sale of the Property to HPPL was not in good faith, firstly because the SC had deliberately concealed from the consenting subsidiary proprietors the higher offer of $510m from Vineyard, and secondly in the light of the method of distribution of the sale proceeds. Mr Rudy Darmawan, a minority owner who acted in person in OS 11/2008 and is one of the appellants in the present appeals ("Mr Darmawan"), submitted that First Tree had acted in conflict of interest. According to him, First Tree was not motivated to find the highest bidder or follow up on the offer from Vineyard because its preoccupation was with fixing its own commission (which was to be paid by the purchaser) rather than securing the highest bid for the Property. Miss Jasmine Tan (another minority owner who acted in person in OS 11/2008) made similar submissions to Mr Darmawan's on First Tree's conflict of interest. She also argued that the Horizon Board had erred in treating the SC's solicitors' legal advice as privileged and that it had attempted to avoid the airing and inclusion of relevant facts through a technicality in refusing to subpoena Arjun Samtani (see [8] and [56] above).

The Judge's decision

71 On Mr Elias's first submission, the Judge was of the view that the appellants had not discharged the burden of proving bad faith. He pointed out that the Horizon Board had made a finding

of fact that the original SC had acted on its own initiative in deciding to pursue HPL's proposal after receiving and relying on legal advice. He also pointed out that the appellants' case in respect of the Vineyard offer was essentially concerned with the question of whether the purchase price was fair, upon which the Horizon Board had also made a finding of fact. The Judge concluded that the High Court would not interfere with these findings on questions of fact on which there was no right of appeal under the Building Maintenance and Strata Management Act 2004 (Act 47 of 2004) ("BMSMA") (see the Judgment ([6] *supra*) at [14]).

72 On the method of distribution of the sale proceeds, the Judge stated that it could not be said that there was a lack of good faith in the selection of the method of distribution or that the method was wrong just because it was the only method considered or the method resulted in some subsidiary proprietors getting more sale proceeds than others. He emphasised that, even if the Horizon Board was wrong in concluding that the chosen method was appropriate, that was an error of fact and not an error of law that could be taken on appeal (see the Judgment at [15]).

73 Significantly, the Judge was of the view that the legitimate scope of an STB's inquiry into whether a transaction was in good faith, after taking into account the sale price under s 84A(9)(*a*)(i)(A) of the LTSA (see [3] above), was a narrow one. He stated (at [16] of the Judgment):

> It was the [Horizon Board's] duty to focus its attention on the question whether the purchase price was fair, and it was for the [Horizon Board] to decide on the facts of each case whether the contract was done in good faith in the sense set out in the LTSA. It was entitled to approve the sale even though there might have been, as in this case, another potential purchaser who had offered a higher price if it thinks that HPPL's price was fair and the circumstances justified it. …Whether it was the right time to sell, or that the SC ought to have made a little more effort to persuade the purchaser to offer more are not crucial matters that obliges the [Horizon Board] to withhold approval.

74 The Judge acknowledged that "it appears that there may have been intrigue in the course of the *en bloc* sale from the day the SC was created to the proceedings before the [Horizon Board]" (*ibid*). However, he was of the view that the Horizon Board was not the appropriate forum for considering the conduct of the original SC. He stated that if the original SC had deliberately or negligently ignored the Vineyard offer, thereby causing financial loss to the appellants, their recourse was through litigation in the courts (at [17] of the Judgment). For all these reasons, the Judge dismissed the appeals in OS 5/2008, OS 10/2008 and OS 11/2008.

The present appeals

The parties' submissions

75 Having set out the background to the case, we now turn to the parties' submissions in the present appeals.

The appellants' submissions

76 Counsel for the appellants in CA 119/2008, Mr Elias, submitted at the outset that the present appeals were on a point of law (in accordance with s 98(1) of the BMSMA), *viz*, whether the Horizon Board had erred in law by finding that the sale to HPPL was in good faith, as no person acting judicially and properly instructed as to the relevant law would have come to such a determination (citing *Edwards v Bairstow* [1956] AC 14).

77 Mr Elias next argued that the Horizon Board was not limited to considering the sale price in determining whether a given transaction was in good faith, relying on the use of the word "transaction" in s 84A(9) of the LTSA and the parliamentary debates on the enactment legislation which state that an STB must consider all the circumstances of the case (see [127] below). He tendered a list of conduct which purportedly amounted to a lack of good faith on the part of the original SC. We set out the list as follows:

1. Non-disclosure in discovery of letters of 28 Dec 2006 and 3 Jan 2007 [from Vineyard].

2. The existence of the letters of 28 Dec 2006 and 3 Jan 2007 only came about during the cross-examination of Henry Lim by Mr Michael Hwang SC on the 4th last day of the resumed [Horizon Board] hearing in November 2007. Further, there was no mention of Vineyard's higher offer in the joint affidavit of the SC members filed in the [Horizon Board] proceedings.

3. Non-circulation of 3 Jan 2007 written offer to any of the subsidiary proprietors notwithstanding rising market prices and objections of some subsidiary proprietors of the erosion of the premium.

4. No earnest discussion with Vineyard at any time notwithstanding that:

   a. the Vineyard offer was regarded as firm;

   b. the SC had from 28 Dec 2006 to 22 Jan 2007 to consider and communicate it.

5. No search on Vineyard was done at any time.

6. Dismissal of the Vineyard offer which was described by the [Horizon Board] as "*robust and cavalier*". "*Cavalier*" means carefree and nonchalant, high-handed, free-and-easy, off-hand, unceremonious.

7. Imposing a $50 mil deposit to be paid by Vineyard over a weekend, from 6 Jan 2007 to 8 Jan 2007. The [Horizon Board] held that this was "*considerably onerous as contrasted with the deposit of a mere $5 million required of HPL*".

8. Not following through on M/s Shan & Su's letters of 28 Dec 2006 and 3 Jan 2007 in not providing the terms and conditions to Vineyard.

9. Not seeking legal advice in considering Vineyard's offer.

10. Deliberate suppression of Vineyard's higher offer in minutes of SC meeting on 6 Jan 2007. Notably, the word "gross" was used to describe the Vineyard offer notwithstanding the fact that it was not present in M/s Shan & Su's letter of 3 Jan 2007 and that this was before Henry Lim was asked to follow-up on the Vineyard offer. The usage of the word "gross" was calculated to undermine and disregard the Vineyard offer.

11. Deliberate suppression of Vineyard's higher offer in Henry Lim's email dated 2 Feb 2007 to the SC listing 25 potential developers/buyers he had contacted (who, apart from [HPPL], had not even made any offer).

12. Suppression by Alvin Er of Vineyard's offer in his letter of 16 Jan 2007 to the SC that there were "*no other offers and no firm indication of any other offer in the near future*" even

though he was well aware of the higher Vineyard offer.

13. Not revealing Vineyard's higher offer at the 2nd EOGM on 25 March 2007. It was stated at the meeting that there was no indication that the price could not have gone beyond S$500 mil:

> "*they [SC] were also keeping their ears to the ground with Alvin's help […] At no point in time was there, I believe, any indication given or have they heard, or through Alvin as well, that the price could have gone beyond $500 mil […]*"

14. The legal advice aspect:

a. The [Horizon Board] and the learned Judge in the Court below relied on Henry Lim's evidence in cross-examination that the SC relied on legal advice in not pursuing the Vineyard offer earnestly.

b. Drew & Napier's letter dated 16 Jan 2008 shows that this was not the case and that Henry Lim had lied. The discrepancies between Henry Lim's evidence and Drew & Napier's letter dated 16 Jan 2008 are set out at Page 10 at Paragraph 24 of the Appellants' Skeletal Arguments filed on 29 Jan 2009.

15. The learned Judge in the Court below accepted that Vineyard had offered a higher price.

[emphasis in original]

78 The 28 December 2006 letter referred to was allegedly the first letter from Vineyard expressing interest in purchasing the Property, but as no such letter was discovered throughout the entire proceedings before the Horizon Board and the Judge, we shall assume that it does not exist.

79 As for the "Drew & Napier letter" dated 16 January 2008, this was a letter sent by the original SC's solicitors, Drew & Napier LLC ("D&N"), to M/s Phang & Co, who represented some of the objecting subsidiary proprietors in the Horizon Board proceedings, in response to allegations made against D&N in a draft affidavit for OS 5/2008 ("the 16 January 2008 D&N letter").[note: 37] In this letter, D&N clarified the content of their legal advice to the original SC, stating, *inter alia*, that, contrary to the assertions in the draft affidavit, they had, firstly, never been instructed to do any due diligence on Vineyard or contact Shan & Su; and, secondly, they had never advised the original SC that it could be sued if it did not sell the Property to HPL, whereas it would be difficult to challenge the sale if the original SC sold to HPL at a price which met the reserve price.

80 Mr Darmawan, appearing in person for the appellants in CA 120/2008, emphasised Bharat Mandloi's evidence that the original SC had refused to seek affirmation of the sale to HPL from the consenting subsidiary proprietors because that would mean that the sale would be "as good as dead" (see [31] above). He submitted that the fact that the original SC had proceeded with the sale to HPL despite its awareness of the consenting subsidiary proprietors' unhappiness was a clear manifestation of bad faith. He further submitted that there had been a breach of the fundamental purpose of the sale of the Property, which was to achieve the best sale price, one with the healthy premium which First Tree had represented to the subsidiary proprietors would result from the collective sale. Mr Darmawan contended that the original SC had also breached cl 4.1(b) of the CSA (see [14] above) by its failure to follow up on the Vineyard offer and, even if there had been a follow-up, the failure to involve First Tree in such a follow-up breached the requirement in cl 4.1(b) for negotiations with all intended purchasers to be carried out "in conjunction with the Agents".

81 Finally, Mr Darmawan submitted that, because the original SC members had purchased additional units in the Property with bank financing, they were under financial pressure to sell the Property and were thus acting in a conflict of interest. This was a further instance of bad faith.

The respondents' submissions

82 Counsel for the respondents in the present appeals, Mr Chelva Rajah SC ("Mr Rajah"), submitted that the original SC had never concealed Vineyard's offer. The existence of an offer of $510m was disclosed in the minutes of the 6 January 2007 SC meeting (albeit Vineyard was not referred to by name).

83 Mr Rajah submitted that the original SC had (through Henry Lim) followed up on the offer from Vineyard by asking for a deposit as proof of the seriousness of its intent to purchase the Property, but Vineyard had never responded to that request or even attempted to negotiate the terms of the deposit. He submitted that, under these circumstances, the original SC had acted in good faith by choosing to accept the firm offer of a more reputable purchaser.

84 It was also submitted that the 16 January 2008 D&N letter reaffirmed that the original SC had been advised that it was up to it to use its judgment and exercise due honesty, care and skill in arriving at its decision on the sale of the Property. The only contradiction raised in rebuttal by the 16 January 2008 D&N letter was that D&N had not been instructed to conduct due diligence on Shan & Su (contrary to what Henry Lim had claimed before the Horizon Board). This did not materially affect the finding of the Horizon Board that the original SC had relied on its solicitor's advice in deciding to take up the HPL offer (see [55] above).

85 Mr Rajah submitted that First Tree had not made any misrepresentation that the 80% premium would be obtained as its presentation at the 23 April 2006 EGM to the subsidiary proprietors had made it clear that the 80% premium was an estimate based on the latest transacted prices for individual units at that time. He also pointed out that the reserve price in cl 5 of the CSA was not arrived at on the basis of the 80% premium.

86 He pointed out that the Horizon Board had considered and rejected the reports tendered by the objecting subsidiary proprietors which purported to value the Property at prices which were higher than $500m. Thus, the appellants had failed to substantiate their contention that the price of $500m was too low.

The intervener's submissions

87 Counsel for the intervener, Mr Ang Cheng Hock SC ("Mr Ang"), made substantially the same submissions as those of the respondents. In addition, he emphasised that the original SC's conduct must be evaluated in the light of the events leading up to January 2007. He pointed out that, at that time, $500m was a record price for a 99-year leasehold strata title property, and that, prior to January 2007, a whole host of developers had been approached, to no avail. The only real and viable prospect was HPL's offer. Under these circumstances, he submitted that the original SC had acted in good faith by choosing to sell to HPL, rather than holding out for a response from Vineyard.

88 Mr Ang also contended that the role of an STB in applications for a collective sale was very circumscribed. According to him, it was never envisaged that contentious legal arguments pertaining to misrepresentation, breach of duties and suchlike would be put before an STB. Rather, an STB should only consider the factors set out in ss 84A(7) and 84A(9) of the LTSA in its determination of whether the transaction was in good faith.

The nature of an appeal from an STB decision to the High Court

89 Before moving on to the substantive issues in the present appeals, we will first consider the nature of an appeal to the High Court from a decision of an STB on a collective sale application. Section 98(1) of the BMSMA states that:

> No appeal shall lie to the High Court against an order made by a Board under this Part or the Land Titles (Strata) Act (Cap. 158) except on a point of law.

90 In *Halsbury's Laws of England* vol 1(1) (Butterworths, 4th Ed Reissue, 1989) ("*Halsbury's*") at para 70 (since replaced by the 2001 edition but the statement of law remains largely similar: see para 77 of the 2001 edition), it is stated that:

> Errors of law include *misinterpretation of a statute* or any other legal document *or a rule of common law*; *asking oneself and answering the wrong question*, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or *rejecting admissible and relevant evidence*; exercising a discretion on the basis of incorrect legal principles; *giving reasons which disclose faulty legal reasoning* or which are inadequate to fulfil an express duty to give reasons, and *misdirecting oneself as to the burden of proof*. [emphasis added]

91 In Singapore, it has been accepted in several High Court cases that errors of law, as condensed in this passage from *Halsbury's*, constitute *ex facie* errors of law which would in turn raise points of law subject to appeal under s 98(1) of the BMSMA. In *Dynamic Investments Pte Ltd v Lee Chee Kian Silas* [2008] 1 SLR 729 ("*Dynamic Investments*"), the court stated (at [11(b)]) that guidance as to the meaning of "point of law" could be found in this passage from *Halsbury's* and from Lord Radcliffe's statement in *Edwards v Bairstow* ([76] *supra*) (see [93] below), then concluded (at [14]) that:

> The Board's holding that it was not satisfied that the transaction was not in good faith (regard being had to the method of distributing the proceeds of sale) was a decision on the facts of the case and could not be challenged *unless there was an error of law either* ex facie *(as to which there was none) or such as was described in* Edwards v Bairstow. [emphasis added]

92 This approach was endorsed in *Liu Chee Ming v Loo-Lim Shirley* [2008] 2 SLR 764 ("*Liu Chee Ming*") at [16]:

> In the present appeal before me, the statement in *Halsbury's* was again cited by the appellants without contest by the respondents. Nevertheless, I take this opportunity to say that I agree with Ang J on the wider meaning for a point of law in an appeal from a decision of the Board but it must be remembered that the statement in *Halsbury's* should not be taken to allow an appellant to raise issues of fact. That is why Ang J held in *Dynamic* [*Investments*] at [14] that a decision on the facts of the case could not be challenged *unless there was an error of law either* ex facie *or such as was described in* Edwards v Bairstow. [emphasis added]

93 We should briefly explain the reference to *Edwards v Bairstow*. In that case, two men had embarked on a joint venture to purchase a complete spinning plant, agreeing between themselves not to hold it but to make a quick resale. The Commissioners of Income Tax determined that the given transaction was not an "adventure in the nature of trade" taxable under the Income Tax Act 1918 (c 40) (UK) and therefore not subject to tax. The Crown appealed against this determination. The Court of Appeal dismissed the appeal on the ground that the determination was not erroneous in point

of law and, accordingly, it was not open to interference by the court. The House of Lords took the opposite approach. Lord Radcliffe stated (at 35–36):

> I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, *it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.* It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. [emphasis added]

94 Lord Radcliffe noted that the two men had put their money into buying the machinery with no intention of using it as machinery or even holding their purchase at all. They had planned to sell the machinery even before they bought it and did in due course sell it for profit. On these facts, he found that the transaction was inescapably an adventure in the nature of trade and upheld the Crown's appeal.

95 The proposition in *Edwards v Bairstow*, that a determination may be challenged on a point of law (in addition to an error of law *ex facie* that bears upon the ultimate determination) if the facts were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal (see [93] above), has now been consistently approved at the High Court level, such as in *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR 522 ("*Ng Swee Lang*") at [27], *Dynamic Investments* ([91] *supra*) at [16] and *Liu Chee Ming* at [16].

96 On the other hand, there have been earlier local cases on appeals against arbitral awards which articulated a different and, in some senses, narrower view of appeals on a "question of law". In *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2)* [2004] 2 SLR 494 ("*Northern Elevator*"), the appeal was against the grant of leave to one of the parties to appeal against an arbitral award. Section 28(2) of the 1985 Arbitration Act (Cap 10, 1985 Rev Ed) (which the parties in *Northern Elevator* had agreed would govern the arbitration proceedings) read: "[A]n appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement".

97 The Court of Appeal distinguished between a "question of law" and an "error of law", stating that the former conferred jurisdiction on a court to grant leave to appeal against an arbitration award, while the latter in itself did not (at [17]). At [18], it approved G P Selvam J's reasoning in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749 at [7]:

> A question of law means a *point of law in controversy* which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. … If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. [emphasis added]

98 The Court of Appeal in *Northern Elevator* concluded (at [19]):

> To our mind, a "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, *that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.* [emphasis added]

99 The wording of s 28(2) of the 1985 Arbitration Act is quite similar to s 98(1) of the BMSMA. Although the body of s 98(1) of the BMSMA refers to a "point of law", rather than a "question of law", nothing turns on this as the heading of s 98(1) is "Appeal to High Court on question of law". Thus, it may be said with some force that the narrower view taken in the arbitration cases cited in [96] and [97] above should also apply in cases of collective sales. However, the context in which an appeal on legal issues is statutorily permitted is also important. The definition of "questions" or "points of law" in each context may be wider or narrower depending on the underlying policy considerations.

100 It can persuasively be said that the policy considerations undergirding the arbitration scheme, where party autonomy is the primary consideration, are quite different from those of the collective sale scheme under the LTSA, where a qualifying majority of owners is allowed to override the wishes of the minority owners. In the case of the former, a limited right of review by the courts of arbitral decisions accords with the legitimate expectations of the *contracting* parties as regards finality. In our view, therefore, the High Court has rightly declined to apply the approach in the arbitration cases in the context of appeals against STB decisions. In the High Court decision of *Ng Swee Lang* ([95] *supra*), the court rejected the narrower approach in the arbitration cases, citing, *inter alia*, the different policy considerations in the context of private arbitrations, which were underpinned by the principle of party autonomy, as compared with a hearing before an STB under the LTSA. It astutely observed (at [24]):

> Statutory tribunals such as the [Strata Titles] Board performed important functions of the Government, which would generally affect the wider public interest, as compared to private arbitrations. There had to be a greater degree of supervision over such tribunals by the courts.

101 We agree that *ex facie* errors of law would entitle a party to appeal under s 98(1) of the BMSMA. Such an approach affords the court greater oversight over administrative and other inferior tribunals, and thus accords better protection to private rights. In this respect, we find much force in the following observations from a leading academic treatise, Sir William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004) at pp 947–948:

> The courts ought … to guard against any artificial narrowing of the right of appeal on a point of law, which is clearly intended to be a wide and beneficial remedy. …
>
> The extension in recent years of the right of appeal on questions of law has, as already noted, done much to assist the integration of the tribunal system with the general machinery of justice. Judicial policy ought to reinforce this beneficial trend.

102 In our view, however, it is not necessary in the present case to rely on the proposition in *Edwards v Bairstow* ([76] *supra*) to determine whether the present appeals are on points of law. They undoubtedly are. For example, in order for the Horizon Board to determine the critical issue of whether the collective sale was entered into in good faith under s 84A(9)(*a*)(i) of the LTSA, it had to construe the meaning of "good faith" in that provision. The question of what a statutory term means is clearly an issue of law and a misinterpretation of the term would constitute an *ex facie* error of law open to appeal under s 98(1) of the BMSMA (see [89] above). The Horizon Board also had to consider

whether the original SC had discharged its legal duties to the subsidiary proprietors. This required the Horizon Board to formulate its view of the duties of an SC – again an issue of law on which an error would be open to appeal. Further, an STB will also make an error of law when, after receiving and assessing the evidence, it misconceives the factual issue that must be ultimately decided (see Mark Aronson, Bruce Dyer & Matthew Groves*, Judicial Review of Administrative Action* (Lawbook Co, 4th Ed, 2009) ("*Judicial Review*") at p 201). At an even more fundamental level, an STB must correctly apply the appropriate burden of proof in deciding whether a collective sale was in good faith. A misapprehension as to the burden of proof is also an *ex facie* error of law against which an appeal may lie. *Judicial Review* pointedly states (at p 201):

> Strictly speaking, there is no legal burden of proof in proceedings brought before administrative tribunals. That is specially so where the tribunal's proceedings are not adversarial, but it may also be the case wherever the rules of evidence do not apply. However, the absence of a strict burden of proof does not necessarily entail an absence of any legal standard of persuasion which a decision-maker must reach before making a particular decision. … *A decision-maker who applies a more exacting standard will have committed an error of law.* [emphasis added]

The main legal issues

103 We now set out what we consider are the main legal issues raised in the present appeals. They arise from the unique relationship between an SC and the subsidiary proprietors, both consenting and objecting, not only under the LTSA itself but also under the common law and equity. The issues essentially revolve around the following questions:

(a) What is the nature of the relationship between an SC and the subsidiary proprietors?

(b) What duties does an SC owe to the subsidiary proprietors?

(c) What are the duties of an STB in reviewing a collective sale?

We shall address each of these in turn.

The relationship between an SC and subsidiary proprietors

104 In our view, the SC is the agent of the subsidiary proprietors collectively in relation to the collective sale of their strata units. At the point when an SC is appointed to carry out the collective sale (*inter alia*, obtaining consent to the collective sale agreement; advertising, negotiating and finalising the terms of the collective sale with potential purchasers; and completing the sale), there is no question of it being appointed to represent the consenting subsidiary proprietors only, since at that point the process of signing up to the collective sale agreement has not yet begun. The SC therefore carries out the collective sale process on behalf of all the subsidiary proprietors collectively and has the power to affect the legal relations of all the subsidiary proprietors with third parties. The common law requirement of express or implied assent by the principal (see [114] below) is not relevant in the context of a statutory scheme, the very purpose of which is to allow the sale of the strata development against the wishes of the objecting subsidiary proprietors.

105 Section 84(1A) of the LTSA constitutes statutory confirmation of an SC's status as agent for all subsidiary proprietors collectively, although we are mindful that s 84A(1A) as well as the present incarnations of the Second and Third Schedules to the LTSA were introduced only in 2007 as part of the amendments to the LTSA ("the 2007 amendments"). This was after the appointment of the original SC in the present appeals, and thus these provisions do not apply directly to the original SC.

Section 84A(1A) provides:

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

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

106 The Minister explained the rationale for the 2007 amendments at the second reading of the Land Titles (Strata) (Amendment) Bill 2007 (Bill 32 of 2007) ("the 2007 Second Reading") (see *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at cols 1994–1995 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law)):

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

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

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

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

The SC as a fiduciary

108 A fiduciary relationship between an SC and the subsidiary proprietors arises from the underlying agency relationship. In law, fiduciary relationships exist in a plethora of situations. Other commonly recognised fiduciaries include employees, partners, directors and solicitors. Typically, common law agency relationships are also fiduciary in nature. F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) ("*Bowstead & Reynolds*") succinctly states at para 1-001:

> Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.

109 The law relating to the fiduciary obligations of agents is a specialised body of law with jurisprudential roots in equity and connections to the rules of equity applicable to express trustees (see *Bowstead & Reynolds* at para 6-001, p 164). These fiduciary obligations operate independently of contract (*ibid*). As Lord Mustill incisively noted in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98: "[T]he essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself." We will return to this point at [166] below.

110 The *raison d'être* of fiduciary obligations is that an agent who has undertaken to act in the interests of another person (the principal) should not be permitted to act against his principal's interest. Indeed, a distinguishing characteristic of recognised fiduciary relationships (see [108] above) is the peculiar vulnerability of a party to be affected by an abuse of a power or duty that has been entrusted to another. Paul D Finn in his celebrated pioneering work, *Fiduciary Obligations* (The Law Book Company Limited, 1977) perhaps best summarises it (at paras 465–466):

> **465.** A somewhat cynical view of human nature is the foundation of this jurisdiction assumed over "fiduciaries". Lord Herschell's observations in *Bray* v. *Ford* [[1896] AC 44 at 51–52] are, perhaps, the best known expression of this.
>
> > It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based upon the consideration that, human nature being what it is, there is danger of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.
>
> This view has echoed down the centuries. The possibility that a trustee might act to favour his own interests at the expense of his beneficiaries was one of the reasons early given for denying him remuneration for his services: his position gave him "undue advantage … to distress a cestui que trust". In the often quoted – and misquoted – decision of *Keech* v. *Sandford* [(1726) Sel Ca t King 61; 25 ER 223], where a trustee renewed for his own benefit a lease which he was unable to renew for his beneficiary, it was held that he must hold the lease for his beneficiary for if a trustee on the refusal to renew might have a lease for himself, few renewals would be made for the benefit of beneficiaries.
>
> **466.** Consequently the courts have held fiduciaries "… to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour most sensitive, is then the standard of behaviour". But if the level of conduct of fiduciaries is thus kept "at a level higher than that trodden by the crowd" when will a person have this standard exacted for him? Who is a

fiduciary for the purposes of this rule?

111 Finn further observes in *Fiduciary Obligations* that it does not even matter if the relationship is entirely gratuitous (at para 467):

> He is, simply, someone who undertakes to act for or on behalf of another in some particular matter or matters. That undertaking may be of a general character. It may be specific and limited. It is immaterial whether the undertaking is or is not in the form of a contract. *It is immaterial that the undertaking is gratuitous*. And the undertaking may be officiously assumed without request. [emphasis added]

112 *Bowstead & Reynolds* makes a similar point (at para 6-034, p 182):

> This is not a situation like the more usual one regulated by the law in which the parties are in an adverse commercial relationship, for example a simple hire of services. Agency services are services of a special kind. Even when no such power to affect legal relations was conferred, as in the "incomplete agency" case of the canvassing agent, the relationship of the parties still imports an undertaking by one to act in the interests of the other rather than his own, and this likewise, though to a lesser extent, justifies the law's intervention.

113 An agent may affect the rights of his principal in various degrees of detriment to the principal. Obviously, as a matter of principle and policy, an agent who has the potential power to cause greater damage to his principal's interest should be held to a higher degree of accountability. 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.

114 *Bowstead & Reynolds* emphatically advocates a similar approach (at para 6-034, p 183):

> Even where the relationship is contractual (as it normally will be), the matter is too important to be left entirely to the agreement of the parties and the interpretation of that agreement. This is an area where the unequal standing of contracting parties has for more than a century been recognised as requiring relief. The relief is principally given by the application of fiduciary duties … A too casual failure to recognise the requirements of a fiduciary position, and sometimes a short-sighted assumption that all relevant duties are prescribed in a contract, can be and has been responsible for serious misbehaviour in the financial markets and elsewhere, as is shown by many litigated cases in the last quarter century.

115 The express powers, duties and obligations of an SC are in practice ordinarily set out in the document appointing the SC as the agent for the subsidiary proprietors. However, in the present case, the general meeting of the MC which appointed the SC also included in the CSA certain clauses which made the SC the agent *only* of the consenting subsidiary proprietors for the purpose of negotiating and finalising the collective sale pursuant to cl 3.7 of the CSA. Clause 3.7 states:

> The [SC] shall be the *agents* of the Consenting Subsidiary Proprietors *for the purpose of negotiating and finalising the Collective Sale*. The Consenting Subsidiary Proprietors shall jointly and severally indemnify and keep the [SC] fully indemnified against all costs, expenses, damages and claims whatsoever (including legal fees on a full indemnity basis) that may be incurred in carrying out or arising from any of the acts or matters authorised herein. [emphasis added]

116 What this clause means is that as soon as the qualifying majority of owners have signed the collective sale agreement, the SC has to act only on behalf of (and presumably only in the interests of) the majority owners. This point was not raised or argued in the proceedings below or in this court, and accordingly it will have to be left to another day for consideration as to whether such a clause in a CSA may be null and void as being repugnant to the duty of the SC to act in the interests of all subsidiary proprietors in a collective sale (see [105] above).

117 However, because the SC was required under the CSA to discharge certain responsibilities, it is necessary for this court to have regard to the CSA in assessing the conduct of the SC to determine whether it has acted in good faith. Particular consideration has also to be given to the interests of the objecting subsidiary proprietors because, as we have pointed out (at [109] above), an SC's fiduciary obligations to all the subsidiary proprietors arise independently of its contractual obligations.

A "trustee" of the power of sale

118 Various analogies have been drawn to illuminate the nature of the relationship between an SC and the subsidiary proprietors. One analogy which has been considered is that of the relationship between a property owner and a property agent.[note: 38] While this analogy is superficially attractive, there is a critical difference. An SC acts as agent on behalf of all the subsidiary proprietors collectively (see [104] above). Unlike a typical property agent which has only one principal, an SC has for principals a large number of subsidiary proprietors divided into two main groups if they cannot agree to sell their properties collectively. As mentioned above (at [107]), the SC cannot simply carry out the letter of its instructions from the consenting principals and disregard the interests of the objecting principals altogether. For these reasons, its duties are more onerous than those of an ordinary property agent. An SC has to hold an even hand between the interests of two groups of contending principals (see [136] below), with the SC members being part of one group or the other.

119 Moving on to another analogy, in *Thevathasan Gnanasundram v Khaw Seng Ghee* [2000] SGSTB 4 ("*Thevathasan*"), the STB stated (at [24]) that the approach taken by the courts in determining whether a mortgagee had breached its duty to act in good faith in exercising its power of sale was a useful guide in assessing whether a collective sale was in good faith, having regard to (or in terms of) the price. The courts have repeatedly recognised that the mortgagee is "not a trustee of the power of sale" (see, for example, *Cuckmere* ([59] *supra*) at 965 and 969, *Bishop v Bonham* [1988] 1 WLR 742 at 753 *per* Slade LJ and *Raja v Austin Gray* [2003] 1 EGLR 91 at [55(1)] *per* Peter Gibson LJ). The mortgagee's power of sale is "given [to] him for his own benefit to enable him to obtain repayment of his loan" (*Cuckmere* at 969 *per* Cross LJ). It is a well-established principle that, although the mortgagee undoubtedly must pay "some regard" to the interests of the mortgagor (*ibid*) in exercising the power of sale, "[i]f the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests" (*Cuckmere* at 965 *per* Salmon LJ). Thus, the mortgagee's duties are, *inter alia*, as follows:

> (a) It has a duty to behave reasonably in exercising its power of sale, (*McHugh v Union Bank of Canada* [1913] AC 299 at 311 *per* Lord Moulton) and should not cheat the mortgagor (*Cuckmere* at 966 *per* Salmon LJ). It should not sell the property for an extraneous or an improper purpose and thereby sacrifice the interests of the mortgagor.

(b) It has a duty to take reasonable steps to obtain the true market value of the mortgaged property at the date on which it decides to sell the property (*Cuckmere* at 968–969 *per* Salmon LJ).

120 With respect to the duty to realise the true value of the mortgaged property, it is a well-established rule that the mortgagee, when its power of sale has arisen, may sell *whenever* it likes in order to realise its security (see *Cuckmere* at 965 and 969, *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997 at [15] *per* Lightman J and *Tai Sea Nyong v Overseas Union Bank Ltd* [2002] 4 SLR 811 at [50]), regardless of market conditions, although there are certain limited qualifications to this right (see *The Bank of East Asia Ltd v Tan Chin Mong Holdings (S) Pte Ltd* [2001] 2 SLR 193 at [30]–[34]). A mortgagee is "not obliged to wait on a rising market or for a market to recover" (*per* Lloyd J in *Bank of Cyprus (London) Ltd v Gill* [1979] 2 Lloyd's Rep 508 at 511). A mortgagor has no redress even though more might have been obtained for the property if the sale had been postponed (*per* Lindley J in *Farrar v Farrars, Limited* (1888) 40 Ch D 395 at 411, approved by the Privy Council in *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 at 1354–1355).

121 In the Horizon Board's decision, the panel was more circumspect about the SC as mortgagee analogy (see [59] above). We agree with this circumspection as the SC, as an agent, has a more onerous duty than a mortgagee in relation to the power of sale. In our view, given that the SC owes fiduciary duties *qua* agent (see [108] above) to the owners of the units in a strata development collectively, the SC has obligations that are akin to those of a trustee with a power of sale.

122 This analogy is again not perfect in that the SC is not vested with legal title to the other subsidiary proprietors' units (whereas a trustee is typically vested with legal title to the trust property). However, the fact that a trustee ordinarily has legal title, but the SC does not, to the property which they have the power to sell, is not relevant to the nature of their duties to the beneficiaries of the trust or to the subsidiary proprietors, as the case may be. Pertinently, in the early development of the duties of a mortgagee in exercising the power of sale, the courts recognised that the character of trustee only constructively belonged to the mortgagee "in a secondary point of view, and under certain circumstances, and for a particular purpose" (*Cholmondeley v Clinton* (1820) 2 Jac & W 1 at 183; 37 ER 527 at 593). In *Robertson v Norris* (1858) 1 Giff 421; 65 ER 983, Sir John Stuart VC explained (at 424; 984):

> Lord Eldon [in *Cholmondeley v Clinton*] says that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of that power [of sale]. That expression is to be understood in this sense, that, the power being given to enable him to recover the mortgage money, this Court requires that he shall exercise the power of sale in a provident way, with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale.

123 The current state of the law in relation to the duties of a mortgagee to the mortgagor and the surety (where there is one) has been criticised by a local academic (see Wee Meng Seng, "Duties of a Mortgagee and a Receiver: Where Singapore Should and Should Not Follow English Law" (2008) 20 SAcLJ 559). The criticism is that English law (and Singapore law to the extent that it has followed English law) has gone far beyond what is necessary to protect a mortgagee's legitimate interests as a secured creditor. It is not necessary for this court to revisit this area of the law in this appeal. The present case is one where, in so far as the SC is concerned, it represents the interests of all subsidiary proprietors and therefore it must exercise the power of sale granted to it in the same way as a trustee of his power of sale. The SC is a neutral agent, even though its members are, to an extent, entitled to have regard to their own personal interests in the collective sale. Similarly, a trustee may also be a beneficiary of the trust property but, in selling it under his power of sale, he must act in the interest of the whole body of beneficiaries.

124 In our view, in the context of the collective sale regime under the LTSA, the SC's duties *qua* agent, fiduciary and trustee of the power of sale include, *inter alia*: (a) the duty of loyalty or fidelity; (b) the duty of even-handedness; (c) the duty to avoid any conflict of interest; (d) the duty to make full disclosure of relevant information; and (e) the duty to act with conscientiousness (see [134]–[169] below for a fuller discussion). Some of these duties may be classified as prescriptive or proscriptive in character (see H A J Ford *et al*, *Principles of the Law of Trusts* (Thomson Lawbook Co, Looseleaf Ed, 1996, September 2007 release) at p 9[4]).

125 However, whatever the general law duties (common law as well as those in equity) may be, the primary statutory duty that is imposed on the SC under the LTSA is that of good faith. In the 2007 Second Reading (see [106] above), the Minister said at col 2042:

> It is not our intention, in these amendments, to change the substantive law regarding [an SC's] potential duties or liability, whether under common law, or as Ms Irene Ng asked about lawyers, whether under the law governing advocates and solicitors. *It is not the intention of these provisions to change the substantive law concerning these matters. Whatever the legal position is, it will remain the same.* [emphasis added]

We will examine what is "good faith in the transaction" under s 84A(9)(*a*)(i) of the LTSA.

"Good faith" in the transaction

126 Section 84A(9)(*a*)(i) of the LTSA states that:

> (9) The Board shall not approve an application made under subsection (1) —
>
> (*a*) if the Board 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 …
>
> [emphasis added]

127 In the course of the second reading of the Land Titles (Strata) (Amendment) Bill 1998 (Bill 28 of 1998) ("the 1998 Second Reading") (see *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69) at col 604 (Assoc Prof Ho Peng Kee, Minister of State for Law)), it was declared that an STB's role was to determine that the proposed sale was in good faith by considering, *inter alia*, "*all the circumstances of the case*" [emphasis added]. However, in his third reading of the Land Titles (Strata) (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (4 May 1999) vol 70 at col 1328 (Prof S Jayakumar, Minister for Law)), the Minister informed Parliament that the Select Committee had considered the issue of whether the guidelines in the Bill should be made clearer. The Select Committee had agreed with the view expressed on the need to spell out in greater detail the factors which an STB would take into account. No further reference was made to "all the

circumstances of the case".

128 Section 84A(9)(*a*)(i) of the LTSA currently requires the STB to take into account only three circumstances to determine whether a given transaction is in good faith: (a) the sale price (s 84A(9)(*a*)(i)(A)); (b) the method of distributing the proceeds of sale (s 84A(9)(*a*)(i)(B)); and (c) the relationship of the purchaser to any of the subsidiary proprietors (s 84A(9)(*a*)(i)(C)). In the present appeals, we are concerned only with the sale price.

129 The legislation does not specify precisely what it is about the sale price the STB should take into account. In the present case, the Horizon Board examined the various steps taken by the SC in implementing the collective sale, including the sale price itself, as part of the requirement of good faith. Ultimately, the Horizon Board held that the price was fair, having regard to the circumstances (the length of time the Property was unsold, the lack of bidders, the valuations supporting the fairness of the price, its finding that the SC did not act in bad faith even though some members had purchased additional units in order to profit from the sale, and so on). In other words, the Horizon Board found that the price of $500m obtained for the Property was fair in what it considered to be the relevant prevailing circumstances.

130 We agree with the Horizon Board's approach. It is no different from Mr Elias's submission that the word "transaction" in s 84(A)(9)(*a*)(i) of the LTSA is wider than the word "sale" or "agreement for sale". It embraces the entire sale process, including the marketing, the negotiations and the finalisation of that sale price (all of which steps ought to be evaluated in the context of prevailing market conditions), culminating in the eventual sale of the property.

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 SC are subject to the general law (common law and equity) to the extent that they have not been supplanted by the LTSA. 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 general 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 general law.

132 In *Dynamic Investments* ([91] *supra*), the High Court reviewed several English cases involving the meaning of "good faith" in specific statutory contexts (*eg*, *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48 ("*Woolgar*")) 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]). In *Street v Derbyshire Unemployed Workers' Centre* [2004] 4 All ER 839 ("*Street v Derbyshire*") at [42], Auld LJ pointed out that "motive, or honesty of motive was all" (with reference to *Woolgar*). However, the meaning of good faith is always contextual. In *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 152 ALR 127, Finn J (the author of *Fiduciary Obligations* ([110] *supra*)) penetratingly noted at 130 that:

> *The significance of the statutory context in which the formula is used is in the illumination it gives as to what is that required state of affairs. It has correctly been observed that the term "good faith" (or its now less fashionable Latin equivalent "bona fide") is a protean one having longstanding usage in a variety of statutory and, for that matter, common law contexts.* …

> The burden of the formula can vary significantly given the purpose it is intended to serve in a given setting. In one context it can focus inquiry upon a person's reason for action (eg as with the good faith duty of company directors); in another, to a person's state of knowledge when a particular event occurs.
>
> [emphasis added]

Similarly, in *Street v Derbyshire* (at [41]), Auld LJ pragmatically acknowledged that:

> Shorn of context, the words 'in good faith' have a core meaning of honesty. *Introduce context, and it calls for further elaboration.* … The term is to be found in many statutory and common law contexts, and *because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another.* [emphasis added]

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 general law and, now, under s 84A(1A)), and whose power of sale is analogous to that of a trustee of a power of sale. Thus, in our view, the duty of good faith under s 84A(9)(*a*)(i) requires the SC to discharge its statutory, contractual and equitable functions and duties faithfully and conscientiously, and to hold an even hand between the consenting and the objecting owners in selling their properties collectively. *In particular, an SC must act as a prudent owner to obtain the best price reasonably obtainable for the entire development*. We will elaborate on these duties below (at [134]–[169]). The issue before this court is whether the Horizon Board 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 the Property.

The duties of an SC

134 Having regard to our earlier analysis, the duties of an SC include (but are not limited to): (a) the duty of loyalty or fidelity; (b) the duty of even-handedness; (c) the duty to avoid any conflict of interest; (d) the duty to make full disclosure of relevant information; and (e) the duty to act with conscientiousness. As, under s 84A(9)(*a*)(i) of the LTSA, the price of the collective sale is an ingredient of good faith in the transaction, the SC must act with conscientiousness to obtain the best price reasonably obtainable for the property – in short, to behave as a prudent owner would. We will now give our views on what these duties entail.

Duty of loyalty or fidelity

135 Millett J has provided an authoritative statement on the duty of loyalty or fidelity in *Bristol and West Building Society v Mothew* [1998] Ch 1 as follows (at 18):

> *The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.* This core liability has several facets. *A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.* This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

…

> The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.
>
> [emphasis added]

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).

Duty to avoid any potential conflict of interest

137 The duty to avoid conflicts of interest is a facet of the duty of fidelity. It is "an inflexible rule of a Court of Equity" (see *Bray v Ford* [1896] AC 44 at 51) that a fiduciary may not place himself in a position or enter into a transaction in which his personal interest may conflict with his duty to his principal, unless his principal, with full knowledge of all the material circumstances and of the nature and extent of the fiduciary's interest, consents. This general rule has, in its specific applications, given rise to several recognised sub-rules (which are not relevant for our purposes today), for example: the rule against dealing with the principal (see *Fiduciary Obligations* ([110] *supra*) at paras 516–521); the rule against obtaining financial benefits beyond one's authorised remuneration (see *Fiduciary Obligations* at paras 475–515); and the rule against acquiring a benefit to the exclusion of one's beneficiary (*eg*, *Keech v Sandford* (1726) Sel Ca t King 61; 25 ER 223 and see *Fiduciary Obligations* at para 535).

138 It is important to note that these proscriptive duties are targeted against *potential* (not merely actual) conflict. A fiduciary should not even contemplate procuring a personal advantage, let alone secure one. The law has thus focused essentially on whether the performance of a duty by the fiduciary may be influenced or tainted by a conflict of interest. As it is virtually impossible to know what considerations have gone into an act or a decision of the fiduciary, the law sensibly does not require proof of an actual conflict of interest where such an allegation is made (see [142] below). The law only requires that there is a reasonable perception of a conflict of interest arising, since it is impossible to conduct an inquiry into the subjective motives which influenced a fiduciary's conduct to determine whether a genuine conflict of interest occurred.

139 This rule proscribing potential conflicts of duty and interest has a storied pedigree. In *Aberdeen Rail Co v Blaikie Brothers* [1843–60] All ER Rep 249 at 252, Lord Cranworth LC stated in clear terms that:

> [I]t is a rule of universal application, that no one having [fiduciary] duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting *or which possibly may conflict* with the interests of those whom he is bound to protect. [emphasis added]

Lord Cranworth LC's reasoning has been approved in many subsequent decisions of unimpeachable authority, *eg*, *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 138 and *Boardman v Phipps* [1967] 2 AC 46 at 111.

140 In *Boardman v Phipps*, there was an apparent divergence of views in the House of Lords as to the degree of likelihood of a conflict of interest required to render a fiduciary liable to account. The view of the majority was that the remoteness of the possibility of a genuine conflict of interest was irrelevant to the liability of a fiduciary. Lord Hodson observed (at 111):

> No doubt it was but a *remote possibility* that Mr. Boardman [the solicitor] would ever be asked by the trustees to advise on the desirability of an application to the court in order that the trustees might avail themselves of the information obtained. Nevertheless, even if the *possibility of conflict* is present between personal interest and the fiduciary position the rule of equity must be applied. [emphasis added]

141 Lord Upjohn, in a strong dissent, referred to the words "possibly may conflict" in Lord Cranworth LC's speech (see [139] above) and stated (at 124):

> The phrase "possibly may conflict" requires consideration. In my view it means that the *reasonable man* looking at the relevant facts and circumstances of the particular case would think that there was a *real sensible possibility of conflict*; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict. [emphasis added]

142 In recent times, Lord Upjohn's "real sensible possibility" test appears to have found some favour in the lower English courts (see, for example, *Re Bhullar Bros Ltd* [2003] BCC 711 and *Kingsley IT Consulting Ltd v McIntosh* [2006] BCC 875), although the test of mere possibility favoured by the majority is still recognised as the prevailing view (see, for example, Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 4th Ed, 2006) ("*Pearce & Stevens*") at p 802). The position is not yet settled in Singapore. In the present appeals, it does not in the ultimate analysis matter which test is applied. The point is that the Horizon Board had applied the wrong test by looking for proof of actual conflict (see [200] below). It is therefore not necessary for us to decide this issue although we accept that it is certainly arguable that the stricter approach taken by the majority in *Boardman v Phipps* is preferable for three reasons.

143 The first is the need to extinguish all possibility of temptation and to deter fiduciaries who may be tempted to abuse their positions. In an article, Matthew Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 LQR 452, the author describes the fiduciary duty of *loyalty* as a "prophylactic" duty (at 453, 468–469) and states (at 464):

> The policy underlying the fiduciary conflict principle is to discourage fiduciaries from acting in situations that carry a *heightened risk of breach* of non-fiduciary duties. [emphasis added]

Similarly, in *Guinness Plc v Saunders* [1990] 2 AC 663 at 701, Lord Goff of Chieveley emphasised that the court must not act in a manner which would provide any encouragement to trustees to put themselves in a position where their duties would conflict with their personal interests.

144 Another reason is the difficulty of inquiring into a person's state of mind or motives, and therefore of ascertaining whether an actual conflict of interest has occurred. *Pearce & Stevens* persuasively suggests (at p 784):

> If a trustee does act in circumstances where it could be suggested that he had abused his position to gain a personal benefit, it may be impossible to weigh his true motives: ie whether he was in fact allowing his own interests to prevail over those of the beneficiaries. As Lord Eldon LC observed in *Ex p James* [(1803) 8 Ves 337 at 345; 32 ER 385 at 388], 'no court is equal to the examination and ascertainment' of these facts. Because of the practical impossibility of discovering a fiduciary's true motives, equity has taken the very strict view that a fiduciary is liable to account for any profits he makes whenever there was *an objective possibility of a conflict between his interests and his duty*. [emphasis added]

And later (at p 802):

> [I]t has already been noted that it is impossible to conduct an inquiry into the subjective motives which influenced a fiduciary's conduct to determine whether a genuine conflict of interest occurred. The court can only look to the objective reality of external appearances, and the mere possibility of such a conflict triggers a remedial response in favour of the principal. This ensures that a situation can never arise where the fiduciary does in fact profit from a breach of his duty.

145 The third reason is similar but subtly different. It is the difficulty of detecting actual conflicts of interest given the ease with which fiduciaries may conceal them. As Prof Robert Flannigan rather aptly puts it in "The Strict Character of Fiduciary Liability" [2006] NZ Law Rev 209 at 210–211:

> Even given monitoring and market controls, fiduciaries invariably are in a position to manipulate the appearance of relations and transactions. Particularly where they are sophisticated, fiduciaries are able to structure and document intentions, events, and opportunities so as to erect a façade of regularity. Where they do so effectively, ex ante or ex post, others will not perceive or comprehend the operation of their self-interest. We know that opportunistic motive can be disguised as dedication, sacrifice, or fidelity. We know that circumstances of limited access may be shaped to imply virtue where in truth there is avarice and duplicity. We know that fiduciaries can arrange to receive benefits remotely or tacitly. We know, in other words, that corrupt motive can be made *undetectable*. That is the particular facility of fiduciaries. The nature of their functional limited access provides both the opportunity and the means to covertly engage their self-interest. It is that capacity for fabrication and colouration that drives consensus to a strict liability. In a real sense , we are prey to fiduciary appetites for unauthorised gain. To a duplicitous fiduciary, the grant of access amounts to an invitation to mould a personal benefit. We have concluded that we will not entertain or accept apologia for a conflict or a benefit because we recognise that we are unable to decipher the pretence or illusion of manipulatedrelations. [emphasis in original]

Duty of full disclosure

146 Finn has summarised the duty of full disclosure succinctly in (*Fiduciary Obligations* ([110] *supra*) at paras 99–100):

> The object of the conflict rule, for present purposes, is to prevent the possibility of a fiduciary being swayed in his decision making by the presence of an *undisclosed* personal interest in a decision taken. Generally, if such an interest is there his decision is, without more, open to challenge and in addition the fiduciary exposes himself to potentially large personal liabilities – liabilities both for gains made by himself and for losses suffered by his beneficiaries. Where a conflict is alleged the court is in no way concerned with the fairness of the decision or with whether the fiduciary has in fact attempted to act in his beneficiaries' interest. The judicial inquiry is limited simply to finding a personal interest undisclosed to his beneficiaries and a conflict

of that interest with his duties. So where a company director buys from or sells to his company without disclosing his interest in the transaction, the transaction is automatically voidable no matter how fair its terms, no matter how much it may appear to be in the company's interests.

But while harsh where it operates the conflict rule has its limits. For it to apply to a particular decision several preconditions must be met. First the fiduciary must not have an express authority to benefit himself. Secondly any conflict of duty and interest which does occur must be of the fiduciary's own making. Thirdly the offensive personal interest must be undisclosed to his beneficiaries at the time when the decision is taken. …

[emphasis in original]

147 The fiduciary must disclose the personal interest as soon as a possible conflict arises, or as soon after as practicable. An "interest" may be constituted by "the presence of some personal concern of possible significant pecuniary value in a decision taken, or transaction effected, by a fiduciary" (*Fiduciary Obligations* at para 472). It may be an interest which is not yet fully realised (*ibid*):

The pecuniary dimension of the fiduciary's concern may take the form of an actual, *prospective*, or *possible* profit to be made in, or as a result of, the decision he takes or the transaction he effects. Or it may take the form of an actual, *prospective*, or *possible* saving, or a diminution of a personal liability. [emphasis added]

148 In an adversarial trial, the burden of proving full disclosure lies on the fiduciary (*Dunne v English* (1874) LR 18 Eq 524). Mere disclosure that he has an interest or the informal making of statements that might put a principal on enquiry is not sufficient. It is also not enough to prove that had the fiduciary asked for permission, it would have been given (*Murad v Al-Saraj* [2005] EWCA Civ 959). In an application before an STB, the burden should not be any less on the SC. It entails full disclosure to *the objecting owners as well as the STB.*

149 Since the 2007 amendments (see [105] above), the LTSA now specifically requires persons standing for election to an SC to disclose particular conflicts of interest. Paragraph 2 of the Third Schedule to the LTSA states:

Disclosure of interests

2 . A person standing for election as a member of a collective sale committee who has any direct or indirect interest in any property developer, property consultant, marketing agent or legal firm, being an interest that could conflict with the proper performance of his functions as a member of a collective sale committee (should he be elected) shall, as soon as practicable after the relevant facts have come to his knowledge, disclose the nature of that interest at a general meeting.

150 This provision mandates the disclosure of a particular type of conflict of interest at a particular stage of the collective sale process (*viz*, the formation of an SC). In our view, it has certain important implications. It shows that Parliament is aware that a conflict of interest, if not disclosed to the subsidiary proprietors, may affect the good faith of the actions or decisions of the SC member who is in such a position of conflict. Disclosure is therefore mandatory so that, if the person in the position of conflict is elected as a member of the SC by the subsidiary proprietors, they are deemed to have taken into account the potential conflict of interest and are deemed to be prepared nevertheless to be bound by any decision the SC member may make on their behalf.

151 The statutory requirement of disclosure does not spell out the legal consequences of a failure to comply with it. However, since it is a statutory requirement, non-compliance with it has to have some legal effect on any decision made by the SC member who is in a position of conflict in relation to the sale. In our view, any non-disclosure of a conflict of interest of the type specified in this provision may affect the requirement of good faith in the transaction, especially if the SC member has played a decisive, influential or leading role in an SC's decision to enter into the transaction. Each case of a failure to disclose a conflict of interest must be examined closely to determine the significance and consequences of the breach in relation to the transaction as a whole.

152 Finally, this provision, in our view, cannot and does not exhaust the situations in which an SC member has to disclose any conflicts of interest. It is not intended to abrogate the general law position on a fiduciary's duty to disclose any conflicts that may affect the integrity of his decision, even if they are not of the type specifically listed in para 2 of the Third Schedule or if they arise *after* the person having the interest was appointed to the SC (see [146]–[151] above). There is also no reason why any conflict of interest which comes into existence *after* a member has been appointed to the SC is not subject to the same requirement of full disclosure to the subsidiary proprietors. The character of the conflict is exactly the same. In our view, an SC member who acquires additional units in the strata development (especially if they are financed by bank loans) *before or after* he becomes a member of the SC must disclose such interest to all the subsidiary proprietors including the objecting owners.

Duty of conscientiousness

153 An SC clearly has a duty to act conscientiously in exercising the power of collective sale. We note that trustees owe a duty of care to their beneficiaries and are bound to take all precautions in the management of the trust property as an ordinary prudent man of business would take in his own affairs (*Speight v Gaunt* (1883) 9 App Cas 1). Similarly, it was formerly customary to state that even gratuitous agents owed a duty to their principals to act with such skill and care as persons would ordinarily exercise in their own affairs (although recently the more open formulation that the agent's duty is "that which may be reasonably expected of him in all the circumstances" has been used, see *Bowstead & Reynolds* ([108] *supra*) at para 6-030). The core common law content of an agent's duty of conscientiousness to his principal is not irreconcilably dissimilar from that owed by a trustee in equity to his beneficiaries. It is the paramount duty of trustees "to exercise their powers in the best interests of [all] beneficiaries of the trust" (*Cowan v Scargill* [1985] Ch 270 *per* Sir Robert Megarry VC at 286–287). The relevant circumstances must be assessed in deciding whether the appropriate standard of care has been observed.

(1) Duty to obtain the best price

154 The duty to obtain the best price arises out of the SC's duty to act conscientiously as well as to act even-handedly in the collective interest of all the subsidiary proprietors. The duty to obtain the best sale price is particularly crucial for the objecting subsidiary proprietors. As alluded to at [114] above, such subsidiary proprietors may be compelled by virtue of an STB order to sell their units either at a price which they were not prepared to accept or where they were in fact not prepared to sell their units at any price for personal reasons. In such circumstances, their only consolation or compensation for losing their units is the sale price they will receive. The SC must therefore strive to achieve the best premium available for the subsidiary proprietors by obtaining the best price for the development as a whole.

155 This duty on the part of the SC is akin to the duty of a trustee in exercising a power of sale under the trust. The settled law is that, in exercising a power of sale, trustees are generally obliged

to use all possible diligence to secure the best price reasonably obtainable (*Ord v Noel* (1820) 5 Madd 438 at 440–441; 56 ER 962 at 963 and see also *In re Cooper and Allen's Contract for Sale to Harlech* (1876) LR 4 Ch D 802 and *Buttle v Saunders* [1950] 2 All ER 193). The legal position is explained by Wynn-Parry J in *Buttle v Saunders* at 195:

> It is true that persons who are not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain on the sale of property, and not infrequently a vendor, who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, notwithstanding that he is presented with a higher offer. It redounds to the credit of a man who acts like that in such circumstances. Trustees, however, are not vested with such complete freedom. *They have an overriding duty to obtain the best price which they can for their beneficiaries.* It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. *I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb: "A bird in the hand is worth two in the bush."* I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. *Each case must, of necessity, depend on its own facts.* [emphasis added]

156 There may be situations where the adage "a bird in the hand is worth two in the bush" holds true. An SC's duty to obtain the best price is counterbalanced by its overarching mandate, which is to bring about a collective sale (see [104]–[107] above). However, the SC must consider in each case whether there is an urgent need to sell the property at the offered price (and under the other terms of sale) in the prevailing market conditions. This is a challenging duty but a necessary judgment call for an SC to make in each instance. But, first and foremost, it must take the necessary steps to ensure that the best price is being offered for the development. In our view, to do that, it must take the steps which we will now describe.

(A) INCREASING THE PROSPECTS OF OBTAINING THE BEST PRICE

157 In order to increase the prospects of obtaining the best price for the property, an SC *qua* prudent owner ought to exercise due diligence in appointing a competent property agent to market the property and negotiate with potential purchasers. An SC ought 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.

158 The SC should follow up on all expressions of interest and offers that result from its marketing efforts. It should carry out sufficient investigations and due diligence to determine their genuineness, and not ignore them merely on the basis of its own perception or judgment.

159 Where reasonable, it should try and create competition between interested purchasers so as to obtain the best sale price, for instance by alerting a potential purchaser to the existence of other expressions of interest or offers (at the same or higher price) for the property. In this respect we are of the view that the recent STB decision in *Wee Chong Yew v Ong Guek Kim Valerie/Chia Hiang Kiat* [2008] SGSTB 3 ("*Wee Chong Yew*") (which was decided by a differently constituted STB) has adopted the correct approach. The STB there noted that the applicants were aware of a potential higher offer prior to the finalisation of a sale and purchase agreement but had only asked the earlier offeror to match and not better the later offer. (It also noted the rather hasty manner in which the sale and purchase agreement was executed.) For this and other reasons, the STB concluded that the

transaction had not been carried out in good faith (see *Wee Chong Yew* at [71]–[77]) and refused to sanction it.

(B) MAKING THE DECISION TO SELL

160 An SC must take care 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 (*Equity and the Law of Trusts* ([136] *supra*) at p 376). Crucially, the SC has a duty to obtain an independent valuation prior to settling on the final sale price. Otherwise, it would have no way to gauge whether or not it is obtaining a fair (not to mention the best) price for the property. However, an SC cannot rely on the mere fact of its having obtained such a valuation to excuse any lapses in respect of its duty to obtain the best price. We are in agreement with the following perceptive observations in Alec Samuels, "The Duty of Trustees to Obtain the Best Price" (1975) 39 Conv 177 at 178:

> [I]n certain circumstances a valuation may reasonably be assumed to be a fair indication of true market value, if there is no element of undue haste or improvidence on the part of the trustees. The valuation made by a firm of high reputation, knowing the purpose for which the valuation is required, would probably protect the trustees. For example, the purchaser is a sitting tenant with an option or other right to continue in occupation and the market is depressed, and the valuation looks right. But passive or supine conduct by the trustees in the face of an obviously erroneous valuation, for example, timber on land not included in valuation, or planning potential ignored, would be quite a different matter. *Although trustees may take the advice of a valuer they cannot simply delegate their duty to him,* e.g. *by agreeing to sell to a purchaser at a price to be fixed by a third party such as a valuer. The valuer might be shown to be unreliable or biased,* e.g. *acted also for the purchaser and negotiated the resale of the property before the completion at a much higher price****. The effects of inflation and the erratic and sudden movements in the market are matters that trustees must most carefully consider in these times.*** [emphasis added in italics and bold italics)

161 The introduction in 2007 (see [105]–[106] above) of the requirement in para 11(2) of the Third Schedule to the LTSA that the SC obtain a valuation report by an independent valuer at the date of the close of any public tender or public auction of a strata-titled property is a concrete manifestation of only one aspect of the SC's general law duty to obtain the best sale price. It cannot be construed as excluding an SC's general law duty to obtain an independent valuation in a private sale.

162 The advice of independent experts becomes particularly important in the following situations:

(a) when the market is in a state of flux (whether improving or declining rapidly);

(b) when there are divergent views within the SC as to whether or at what price the property should be sold; or

(c) where the property has a substantial value or 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.

163 The SC should certainly not settle for the reserve price or 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. The SC has to choose the most propitious timing for the sale of the property for this purpose. It should ordinarily wait on a rising market or for a falling market to recover (*ie*, again with the benefit of independent expert advice).

164 Prior to making its final decision to sell the property, an SC, in discharging its duty of fidelity, should also ensure that any personal interests on the part of its members which might possibly conflict with its duty to obtain the best sale price have been fully disclosed to all subsidiary proprietors. Full disclosure in the context of an SC member acquiring another property would include the terms of the sale and any existing loan arrangements. Indeed, given that such conflicts should be disclosed as soon as practicable (see [147] above), any such pre-existing interests should be disclosed to the other members of the SC and all the other subsidiary proprietors prior to the appointment of the member having the interest, and conflicts that arise after appointment ought to be disclosed well before the SC makes a decision to sell the property.

165 The SC should also ensure 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 (see [160] above).

(2) Duty to consult the subsidiary proprietors

166 Finally, whenever there is reasonable doubt as to the proper course to adopt, the SC ought to seek fresh instructions or guidance from the consenting subsidiary proprietors from whom it draws its mandate. It is true that the LTSA and most collective sale agreements do not contain any specific provision requiring an SC to obtain approval from the consenting subsidiary proprietors of the sale price before the SC issues an option to the potential purchaser (para 7(1)(*g*) of the Third Schedule to the LTSA provides that an SC shall convene a general meeting for the purposes of considering the terms and conditions of the sale and purchase agreement, but para 7(4) states that this need only be convened after the close of a public tender or auction or *after* the SC has entered into a private contract for sale). However, an SC's duty to consult with the consenting subsidiary proprietors arises out of its fiduciary obligations, independently of its contractual obligations (see [109] above).

167 An SC cannot rely on a mechanistic or literal compliance with its statutory and contractual obligations to escape indictment for breach of its obligations as fiduciary of the subsidiary proprietors. The first principle is that an SC has to work for the benefit of all the subsidiary proprietors. This will no doubt involve going beyond just paying lip service to the relevant procedural rules under the LTSA and its mandate under the collective sale agreement. Indeed, in evaluating the conduct of an SC, the contextual conditions in which the power of sale is exercised is everything.

Summary

168 We shall now summarise our view of an SC's duties in respect of the sale price. *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).

169 To round up this summary, we add that, in relation to the application process to an STB, an SC or its representatives ought to:

(a) act in a transparent manner and provide all relevant information to all subsidiary proprietors, including those objecting to the application;

(b) assist the STB by making full disclosure of all relevant facts and circumstances that would explain how the decision to sell was reached; and

(c) refrain from acting in an adversarial role against the objecting subsidiary proprietors.

Functions and duties of an STB

170 The principal function of an STB in the collective sale scheme is to consider and decide whether or not to approve any application for a collective sale. For this purpose, it is given certain express powers to scrutinise the application at a public hearing in which the applicants for the collective sale (usually members of the SC) and the objecting subsidiary proprietors put their respective cases before the STB for and against the sale. Section 89(2) of the BMSMA provides that:

> Unless otherwise provided by this Act or the Land Titles (Strata) Act (Cap. 158), a Board shall determine by *mediation-arbitration* every dispute of which it has cognizance and every matter with respect to which it has jurisdiction under this Act or that Act. [emphasis added]

171 It should be noted that under the collective sale scheme, the STB has to determine that the transaction is in good faith *whether or not there is an objection to the application for a collective sale* (see s 84A(6) of the LTSA). However, s 84A(10) provides that where no objection has been filed

under s 84A(4), the determination under s 84A(9) shall be made by the STB on the basis of the facts available to it.

172 It is plain to us that, when ss 84A(6), 84A(9) and 84A(10) of the LTSA are read together, the STB's duty to determine whether a given transaction was in good faith is more onerous in a case where there is an objection than in a case where there is no objection. The specific provision in s 84A(10), that the STB shall make its determination on the facts available to the STB, has no application if there is an objection.

173 In our view, the difference in the treatment of cases where objections have been filed signifies that the STB must play a proactive role in determining applications for a collective sale in such cases, rather than simply listening to the evidence and arguments of both sides and then ruling on their differences (in the event that mediation has failed). Despite the reference to its "mediation-arbitration" function, the STB has a significant inquisitorial role to play. It is not confined to what is presented to it by the contending parties, but must seek out the facts whenever there is evidence that the SC has not disclosed everything about the transaction to the STB. Under s 84A(5)(*b*) of the LTSA, the STB has the power to call for a valuation report *or other report* and to require the majority subsidiary proprietors to pay the costs. Pursuant to reg 18(1) of the Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S195/2005), it is not bound by the normal rules of evidence. Regulation 18(1) states:

> A Board shall not be bound to apply the rules of evidence applicable to civil proceedings in any court but may inform itself on any matter in such manner as it thinks fit.

Crucially, under s 96(1) of the BMSMA, the STB has the power to summon any relevant witnesses and to call for evidence. It must not shy from exercising this power whenever the occasion calls for it. In other words, combined with its mediative-arbitrative function, the STB has certain powers (and responsibilities) to act in an inquisitorial manner to call for such evidence as it considers necessary whenever objections are raised. Ultimately, the applicants must adduce sufficient evidence to convince the STB that the transaction was in good faith. For example, in cases where *prima facie* evidence of a potential conflict of interest has been adduced, the applicants must in turn produce sufficient evidence to disprove that conflict of interest (assuming this can be done) or to prove that such conflict is not material, and satisfy the STB of the good faith of the transaction.

174 We are aware that there has been a tendency for some STBs to carry out hearings before them as if the hearings were adversarial proceedings in the ordinary courts. This is not correct. In this respect, it is apposite to refer to the following passages from P P Craig, *Administrative Law* (Thomson Sweet & Maxwell, 5th Ed, 2003) at p 264:

> Whether in fact the adversary procedure is the best method for eliciting the truth in the normal court system may itself be debatable, but in any event some of the fundamental premises underlying its use in that context may well be absent in certain types of tribunals.
>
> An implicit premise behind the adversary system is that the two opponents are equal, save for natural inequalities of intellect and experience. Battle is waged and the judge, in the position of umpire, will decide. This premise may not be sustainable in relation to certain types of tribunals, such as those concerned with social welfare and immigration. It is illusory in these areas to imagine that the unrepresented claimant is in a position of parity with the public body. In addition to this the adversary system tends to see parties in the position of "plaintiff" and "defendant", which may well be inappropriate in some areas.

> A second reason for distinction is that the role of the decision maker in public law should not automatically be presumed to be the same as in private law. The adversary model fits the latter area because it accords with a notion of two individuals disputing a piece of property in which the essential interests at stake are private. This is reflected in the paradigm case of a transfer of land between two parties. Public law litigation is often very different. There may be a wider public interest involved, over and beyond that of the particular parties before the tribunal. Moreover, while much private law litigation is retrospective, in the sense of concerning a completed set of past events, public law will often be concerned with the future and with matters which have ramifications outside of the present dispute.

175 The objectors to an application for collective sale cannot be thought of as "plaintiffs" in the conventional sense, nor the applicants as "defendants". The objectors are not seeking recompense for violation of their personal rights; rather, they are objecting to the collective sale because the sale is in breach of the statute in that the transaction is not in good faith. To the extent that the STB's decisions affect the interests of contending subsidiary proprietors, proceedings before the STB may be said to be analogous to private litigation. However, there is a wider public interest involved in the implementation of the collective sale scheme (see [1] above).

Breaches and omissions of the original SC

176 We will now consider the significant acts and omissions of the original SC in carrying out the sale process to determine whether it had breached its statutory and common law duties. We find that the original SC had committed the following breaches of its duties:

(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 (see [39] above);

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

(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 HPL in a surging property market when there was no legal, or even moral obligation, to do so;

(f) deciding to sell the Property to HPL notwithstanding the conflicts of interest involving two key members of the SC and First Tree; and

(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.

Failure to act with due diligence and transparency in the process leading to the appointment of the property agent

177 The problems in relation to the sale process may be said to have begun with the appointment and employment of First Tree as the property agent and with the peculiar commission arrangement the original SC acceded to (see [192] below). We hasten to add that there was nothing inherently

objectionable in the employment of a property agent with no credible relevant track record in collective sales, which of course was then still a relatively new development in the property market. However, the haste with which First Tree was appointed and the terms of appointment agreed to reflected a lack of conscientiousness which characterised the original SC's subsequent conduct in the collective sale process. Arjun Samtani himself had in no uncertain terms informed the subsidiary proprietors at the 23 April 2006 EGM that no commitment had been made to engage First Tree and that it was the responsibility of the SC to exercise due diligence in the appointment of a property agent.[note: 39] Yet, only one day later, without any apparent competitive process or due diligence, Arjun Samtani emailed Claude Reghenzani and Chan Siew Chee (two other members of the original SC, see [13] above) asking for their endorsement of a few agenda items for an SC meeting to be held on 26 April 2006, including the appointment of First Tree as property agent.[note: 40] The appointment was then apparently made without any further enquiries (see also Wee Hian Siew's testimony on the appointment of First Tree, above at [9]). We have mentioned these facts because while they do not *per se* go towards evidencing the lack of good faith of the original SC, they assist in illuminating the context in which some of the subsequent actions of the original SC ought to be assessed, as well as in highlighting the critical role Arjun Samtani played in the entire process, right from the outset.

Failure to proactively follow up on the Vineyard offer and other expressions of interest

178 The SC did not proactively follow up on the Vineyard offer. The evidence shows that it was not keen to do so, and it did what it could to dissuade Vineyard from pursuing its interest. Before us, Mr Elias has strongly criticised the Horizon Board's acceptance of the original SC's attitude which it characterised as "might be said to be robust and cavalier, in the circumstances" (see [61] above). In our view, this finding is inconsistent with the Horizon Board's conclusion that the transaction was in good faith. The SC's duty was not to act robustly but to act as a prudent vendor to obtain the best possible sale price, in the interest of all the subsidiary proprietors.

179 The SC also failed to seriously follow up on the expressions of interest referred to in Tan Kah Gee's e-mail of 12 January 2007 (see [39] above). As will be discussed below, the SC could and should have taken the time to do so instead of rushing to finalise the sale to HPPL (see [185]–[187] below).

180 In this connection, Henry Lim admitted that, at the time the SC signed the option to purchase (see [42] above), he believed that the Property could be sold for more than $500m.[note: 41]

Failure to use Vineyard offer as leverage

181 At the very least, the SC should have used the Vineyard offer as leverage to vigorously negotiate a higher price with HPL, having regard to its awareness that the property market was in the midst of a price surge (see [36] and [39] above). Although Alvin Er averred that he had asked HPL for a higher price, this appeared to be a half-hearted attempt on his part to defend the original SC's decision to sell to HPL. There is no concrete evidence that he or any of the SC members actually made use of the existence of alternative offers to drive a harder bargain with HPL.[note: 42]

Failure to obtain advice from an independent property expert prior to the sale

182 The original SC failed to obtain crucial independent expert advice on matters material to the sale of the Property at certain critical junctures prior to the sale. First, it failed to obtain an independent valuation of the Property at any point prior to settling on the price of $500m in the 8 January 2007 letter (see [37] above), despite its solicitors' advice that it should obtain the advice of property experts (see [28] above). Instead, in the 8 January 2007 letter, the original SC resolutely

adhered to the reserve price which had been set some eight months earlier.

183 Secondly, despite the original SC's awareness of the dramatic changes in market conditions, it failed to obtain expert independent advice on whether to revise the reserve price of the Property upwards (even though it considered the issue at the 6 January 2007 SC meeting (see [28] above)) and also on whether it should wait to sell the Property. Instead, it appeared to have acted hastily on the advice of First Tree (see [41] above) to sell the property because there was no other offer on the table. No satisfactory explanation has been given why the original SC did not seek independent advice on whether to retract the 8 January 2007 letter and/or raise the reserve price of the Property in view of the 11 January 2007 BT article (which was known to Alvin Er who testified for the respondents), given that there was no firm offer from HPL then on the table. There was sufficient evidence to show that the original SC knew of the 11 January 2007 BT article (indeed, it would be difficult to believe that Henry Lim, whose duty was to find more potential purchasers for the Property, would have missed the article). In other words, the SC was aware of the following matters (see [38] above):

(a) the "continuing surge" in demand for strata development properties during this period;

(b) opinion in the media that the price of $500m for the Property might no longer look "that expensive for bidders with deep pockets";

(c) that "other developers may be considering whether it is worth making a fresh offer for the sprawling ... site"; and

(d) that the owners of the neighbouring property, Grangeford, which had a significantly lower plot ratio, a smaller site area and a shorter reversionary term of four years less to run on the lease, had just raised their reserve price by a remarkable 25%.

184 Indeed, the original SC was aware that First Tree had initially revised the reserve price from $450m to $500m on the basis of improvements in the market as evinced, *inter alia*, by recent successful collective sales (see [9] above). Yet, inexplicably, it failed to consider this option when the reserve price of the immediate neighbouring property was raised significantly. Revealingly, Henry Lim himself acknowledged that, if he had known of the BT article (on the unlikely assumption that he did not), he would have raised the reserve price.[note: 43] It is relevant to note that the chairman of the Horizon Board himself commented during the cross-examination that this was what a reasonable SC member would have done in the light of the price sought by a neighbouring property.[note: 44] Unfortunately, the Horizon Board did not eventually relate this eminently sensible view to the duty of an SC to sell at the best price reasonably possible.

Acting with undue haste in proceeding with the sale to HPL

185 The original SC acted with undue haste in issuing the 8 January 2007 letter to HPL. By Alvin Er's and Henry Lim's own admissions, the 8 January 2007 deadline was a self-imposed deadline.[note: 45](Wee Hian Siew claimed that HPL had imposed a deadline for the original SC to respond to its verbal offer of $500m,[note: 46]but inexplicably this was not recorded in the minutes of the 6 January 2007 SC meeting.) There was no compelling reason for the original SC to follow through on HPL's initial expression of interest and to send the 8 January 2007 letter to HPL on such an urgent basis.[note: 47] Henry Lim himself admitted that he was not given enough time to seek other offers by the original SC before the 8 January 2007 letter was sent to HPL, and that he was unhappy about its timing.

186 Even after the 8 January 2007 letter had been sent and HPL's formal offer (through Alkaff

Mansion Pte Ltd) dated 15 January 2007 had been received, the original SC could have, prior to the issuance of the option on 22 January 2007, considered withdrawing from the proposed sale and/or obtained independent advice and/or sought competitive bids from other developers in the light of the surge in the property market (see [183] above). Significantly, as we have noted at [39] above, even Tan Kah Gee had informed Arjun Samtani in an e-mail dated 12 January 2007 that "we should fetch more than $500MM given the current market condition" and he still had concerns "as to whether we should handle all expression[s] of interest properly".

187 We are aware that the original SC had waited for many months for the reserve price to be met and this was one of its main stated reasons for selling the Property to HPL in the manner that it did. We also note that this is one of the key reasons for the Horizon Board's conclusion that the original SC had acted reasonably and not in bad faith. With respect, the Horizon Board's reasoning altogether missed the crux of the matter. From the perspective of obtaining the best price, what mattered was not how long the wait was, but what the prevailing market conditions were when the option was issued on 22 January 2007 (see [37] to [44] above). *There can be no doubt that the sale took place in the context of a surging property market.*

Decision to sell to HPL notwithstanding the conflicts of interest involving two key members of the SC and First Tree

188 The original SC's decision to sell the Property to HPL, as reflected in the 8 January 2007 letter, was also tainted by the failure of Arjun Samtani and Tan Kah Gee to disclose to the other members of the SC and to the subsidiary proprietors their potential conflicts of interest arising from their purchase of additional units in the Property on bank financing, while spearheading the implementation of the collective sale process. It is clearly a reasonable inference that the purchase of these additional units (with substantial bank financing) had created an urgency on their part to sell the Property as quickly as possible, and to accept the best offer then on the table (the proverbial bird in hand) even if it was not necessarily the best price that could be obtained (the bird in the bush). Indeed, the evidence shows that Arjun Samtani and Tan Kah Gee did push for a quick sale. They had also acted in concert with Wee Hian Siew and Henry Lim to push for the commencement of a collective sale process for the Property from the outset (see [9] above).

189 Arjun Samtani and Tan Kah Gee 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, see [8] above) thought that disclosure of the ownership of the new units *was necessary*.[note: 48] (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 the Property had been filed (see [18] above).

190 In our view, it is not possible to conclude that the decision of the original SC to sell the Property hastily was not infected by the conflicts of interest of Arjun Samtani and Tan Kah Gee. The

failure of these two important SC members to disclose the additional units was plainly a breach of their duty of fidelity. Given the context in which these purchases were made, the substantial loans they both took and their roles in driving the collective sale, we are entitled to infer that the conflict of interest has influenced their decision. Further, their failure to testify reinforces this inference. Both of them had voted for the sale to HPL at the 6 January 2007 SC meeting (though, pertinently, Tan Kah Gee subsequently expressed concerns (see [39] above)). *It is also crucial to note that, on the facts before us, Arjun Samtani, as the chairman of the SC, had clearly played a dominant, if not decisive, role in initiating, implementing and finalising the collective sale* (see [19] above). The other original SC members appear to have acquiesced in most of the decisions of these two key movers of the collective sale, as reflected in the apparent unanimity of views that is consistently shown in all the minutes kept by the solicitors and/or First Tree (*eg*, the minutes of the 6 January 2007 SC meeting at [28] above, and the minutes of the SC meetings held on 6, 17 and 19 August 2006[note: 49]). Even in respect of the apparent division of views among the original SC members on the decision to sell to HPL at the reserve price, only Bharat Mandloi, at the 6 January 2007 SC meeting, and Tan Kah Gee (subsequently) had seemed willing to place their views on record (see [30]–[33] and [39] above). Interestingly, even as he did so, Tan Kah Gee emphasised that he had initially voted with the rest to preserve the sale so as to "*to maintain unanimity*" [emphasis added] (see [39] above).

191 The respondents had the opportunity to, but did not require, Arjun Samtani to testify on his role in the collective sale of the Property and why he was in favour of the sale. In view of the serious challenges mounted against the good faith of the original SC, it is indeed telling that Arjun Samtani himself did not come forward to testify, in order to clear up the suspicions of the objecting owners. He, the new SC and the respondents left it to Wee Hian Siew and Henry Lim to explain matters which only Arjun Samtani himself could explain. In our view, it would have been reasonable (indeed, necessary) for the Horizon Board to have drawn an adverse inference against the applicants for their failure to call Arjun Samtani to testify, the inference being that there was no reasonable explanation for the hasty decision to sell the Property.

192 The original SC's decision to sell to HPL, which was based on First Tree's recommendation (see [41] above), was also objectionable in that the SC acted on First Tree's recommendation without independent advice (see [182] to [184] above). It ought to have given consideration to the fact that First Tree was also in a position of conflict and that its recommendation could have been given to advance its own interest in procuring the commission from HPL. We pause here to make some observations on the unusual commission arrangement that the original SC acceded to without any apparent concerns (see [12] above for the terms). By allowing the agent to privately negotiate the commission up to 1%, the SC was practically allowing First Tree to negotiate the sale price to its own advantage (by ensuring that it would get the highest commission) which would not necessarily be to the advantage of the subsidiary proprietors. Moreover, it also bears mention that First Tree's original mandate from the SC was about to expire on 20 January 2007, just four days after HPL's offer was accepted. Having obtained a serious purchaser at the reserve price, it was in the interest of First Tree to see that the sale was effected before its mandate expired. In our view, a conscientious and prudent SC would have immediately appreciated First Tree's potential conflicts of interest that could arise from these two circumstances.

Failure to consult the consenting subsidiary proprietors

193 Finally, the original SC had breached its duty of conscientiousness by failing to consult the consenting subsidiary proprietors when some of its members had reasonable doubts about whether the original mandate to sell the Property at $500m still reflected the wishes of the subsidiary proprietors. We have already mentioned that the SC knew of the upswing in the market by the time of the 8 January 2007 letter to HPL. All the members of the SC were aware that the reserve price

approved by the consenting subsidiary proprietors was premised on an estimated 80% uplift or premium. If this was obtained, the appellants claim it would have enabled many of the subsidiary proprietors to relocate to comparable properties with cash to spare. It would be fair to say that the SC was aware that many of the subsidiary proprietors, when they entered into the CSA, had an expectation of a substantial premium over the prevailing market prices if and when the sale was entered into. Prior to issuing that letter, therefore, it ought to have confirmed that the consenting subsidiary proprietors wished the sale to proceed on the basis of the original mandate. Bharat Mandloi's testimony that the SC had refused to go back to the subsidiary proprietors for fear that the sale would be "as good as dead" (see [31] above) emphatically revealed its dereliction of its duty of conscientiousness as trustee of the power of sale.

194 Indeed, far from acting in accordance with its duty to consult with the subsidiary proprietors, the original SC failed even to update the subsidiary proprietors on the collective sale for three months (for reasons that are not altogether clear) while dramatic changes were occurring in the property market (see [36] and [39] above), although it must have been aware that the subsidiary proprietors expected the SC to keep them constantly informed of the progress of the collective sale (because Arjun Samtani had told them that this would be done (see [15] above)). This was *prima facie* in breach of cl 4.2 of the CSA and compounded the original SC's failure to act conscientiously.

195 We thus conclude for the reasons (in any number of permutations) given above (at [177]–[194]) that the original SC was in breach of its duties as enumerated earlier. Therefore, the transaction (*ie*, the sale of the Property at $500m at the time and in the circumstances in which it was sold) was not in good faith under s 84A(9)(*a*)(i) of the LTSA.

Errors in the Horizon Board's decision

196 We have summarised (at [176] above) the acts and omissions of the SC which, in our view, were a breach of their duties to the subsidiary proprietors collectively, and concluded that any number of permutations of these breaches viewed contextually meant that the sale to HPPL was not in good faith and *a fortiori* when they were assessed cumulatively. However, as both the Horizon Board and the Judge have held that the sale was in good faith, it is now necessary for us to examine their reasons for their decisions. We examine first the reasons of the Horizon Board.

197 For ease of reference, the Horizon Board's findings, decisions and rulings which are relevant in the present appeals are as follows:

(a) its decision not to exercise its power of calling witnesses by rejecting the application to subpoena Arjun Samtani to testify before it, on the ground that the applicants did not provide sufficient particulars of his proposed testimony;

(b) its decision to allow the original SC to claim legal professional privilege in respect of the advice given by their solicitors;

(c) its finding that the objecting subsidiary proprietors had not proved that there was an actual conflict of interest arising from the purchase by three members of the SC of additional units in the Property whilst they were involved or were about to be involved in implementing the collective sale;

(d) its finding that, in any case, there was no real conflict of interest because it would have been in the interest of such members to sell the Property at the best price for themselves, and therefore for the other subsidiary proprietors as well;

(e) its finding, by implication, that the failure of these members to disclose their additional purchases before or after being appointed to the SC was not material;

(f) its finding that the sale price was fair, having regard to all the circumstances;

(g) its narrow ruling that the requirement of "good faith" in s 84A(9)(*a*)(i) of the LTSA meant only "honesty, fairness and absence of unconscionable and perhaps even reckless behaviour" (at [60] of the HB decision); and

(h) its ruling that the SC "did not 'not act in good faith' when it did not pursue Vineyard's expression of interest" and that "*[t]he SC had taken the advice of its lawyers as to the appropriateness of accepting HPL's offer to pay $500 million for [the Property]*" [emphasis added] (at [65] of the HB decision, and see also [75] of the HB decision).

198 In our view, every single one of these decisions and rulings is objectionable in law in so far as they are rulings on the law, and they are also unsustainable in fact in so far as they are findings of fact. In this respect, we should clarify that, as the BMSMA does not permit any appeal on findings of fact (see [89] above), our decision in the present appeals is based purely on questions of law and not questions of fact.

199 With respect to the decisions at [197(a)] and [197(b)] above, it is our view that the Horizon Board had misconceived its role under Pt VA of the LTSA by restricting itself to playing the traditional role of a court of law or an arbitral tribunal determining private disputes in an adversarial setting. As mentioned above, the STB is a statutory tribunal vested with inquisitorial powers to ensure that all the relevant facts are before it where an objection has been made to an application for collective sale (see [173] above). Once the Horizon Board became aware that Arjun Samtani had purchased an additional unit in the Property immediately prior to being appointed to the SC, the Horizon Board should have on its own motion summoned him to explain his role in the ultimate decision to sell the Property. Instead, it disallowed the application to subpoena him to testify on dubious technical grounds (see [8] and [56] above). As for the granting of legal privilege, although D&N purported to act only for the SC as their principals, the SC had to represent the subsidiary proprietors *collectively*. The SC was, after all, an agent for all the subsidiary proprietors, and its solicitors were therefore sub-agents for all the subsidiary proprietors. The objecting subsidiary proprietors were entitled to know the contents of the legal advice and, indeed, the SC was in breach of its duty of even-handedness by claiming legal privilege in order to deny the objecting subsidiary proprietors information which they were entitled to receive. The SC was not, in the prevailing circumstances, entitled to rely on legal privilege to justify its decision and at the same time refuse to disclose the advice. In acceding to the respondents' objections, the Horizon Board denied itself access to pertinent evidence.

200 In respect of the findings at sub-paras (c), (d) and (e) of [197] above, 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 had 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. Furthermore, in ruling that the *objecting subsidiary proprietors* had not produced sufficient evidence to prove the conflict of interest, the Horizon Board had wrongly placed the burden of proof on the objectors, see also s 113 of the Evidence Act (Cap 97, 1997 Rev Ed). As mentioned above at [173], once *prima facie* evidence of bad faith is produced, the applicants have the task of

disproving such bad faith and establishing that the transaction was in good faith.

201 With respect to the ruling at [197(f)] above, the Horizon Board applied the wrong legal test: As mentioned above, the test of good faith, in the final analysis, is not whether the price is fair, but whether it is the best price reasonably obtainable in the prevailing circumstances.

202 In respect of the ruling at [197(g)] above, the Horizon Board erred in law in adopting a narrow interpretation of "good faith" in the LTSA. We refer to our discussion (at [126]–[133]) above.

203 As for the decision referred to at [197(h)] above, it is not the law that the agent is entitled to rely on legal advice alone to exonerate itself for any breach of fiduciary duty. While a trustee is entitled to obtain advice from experts on matters that are not within his competence or knowledge, ultimately the trustee has to reach his own decision in good faith, responsibly and reasonably. Thus, in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, while Warner J recognised that trustees, who may be laymen, normally have to rely on professional advice, he emphasised (at 1625–1626):

> But the question is not in my view to what extent trustees may in practice have to rely on professional advice. The duty to take into account all material considerations is that of the trustees. The extent of that duty is not affected by the amount or quality of the professional advice they may seek or obtain.

204 Neither a trustee nor an agent can delegate his duty to make a decision. As is correctly stated in *Equity and the Law of Trusts* ([136] *supra*) at p 376:

> It is, however, for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts.

Similarly, the general rule is that "an agent may not delegate the discretions to act for another which are reposed in him: *delegatus non potest delegare*" (*Bowstead & Reynolds* ([108] *supra*) at para 5-002; see also *De Bussche v Alt* (1878) LR 8 Ch D 286 at 310).

205 It should be noted that Henry Lim gave the following reply to a question from the Horizon Board on why he signed the option:[note: 50]

PANEL MEMBER: … [W]hat is the reason for you to sign?

A. Okay, frankly speaking, *I know that I was working on several potential buyers so these people need time, number one. On the other hand, we are given the impression that if we miss the HPL offer, we may be sued.*

PANEL MEMBER: So you are aware of everything and finally you made a final decision?

A. *So as a layman, I do not want to be sued.*

[emphasis added]

206 Here, we wish to make two observations. First, the Horizon Board did not ask why the original SC decided to issue the option to purchase to HPPL if the original SC was working on several potential buyers who needed time to consider making an offer. Presumably, and this is the second observation, the Horizon Board was satisfied with Henry Lim's reason that he thought the original SC would be sued if it did not issue the option then. No evidence was given as to why Henry Lim took the view that the original SC could be sued or what the substance of this advice was. Ironically, the only legal advice

by the original SC's solicitors disclosed to the Horizon Board was that the original SC had a duty to get the best price (see [28] and [79] above).

Errors in the decision of the Judge

207 We have mentioned earlier that the Judge affirmed the decision of the Horizon Board on the grounds that:

(a) the scope for appeal against a decision of an STB under s 84A(9) of the LTSA was narrow and confined only to the three requirements set out in s 84A(9)(*a*)(i);

(b) the only issue before him was that of the price;

(c) the Horizon Board had determined that the price was fair and that it was a decision on the facts; and

(d) accordingly, there was no right of appeal against the Horizon Board's decision.

In arriving at these findings, the Judge took the view that, in determining good faith in the transaction, it was not necessary for the Horizon Board to consider the role of the original SC in effecting the sale of the Property to HPPL and the possibility of "intrigue" in the collective sale process (see [74] above).

208 In our view, the Judge was wrong in taking such a restricted view of the duties of the STB in dealing with applications for approval for collective sales under Pt VA of the LTSA. We have explained why the requirement of good faith in the transaction goes beyond merely determining whether the price is fair or not, and that it includes the conduct of the SC in the entire sale process (see [131]–[133] above). The fact that there was the possibility of intrigue in the process should have alerted him to the possibility of a lack of good faith in the process, which could lead to a lack of good faith in the transaction. The Judge's erroneous ruling on the scope of the duties of the STB has resulted in his omitting to deal with all the issues we have examined earlier and this has led him into error in finding that the Horizon Board's determination that there was good faith in the transaction was a question of fact. In our view, the Judge's error was also an error of law.

209 Before we summarise our findings, there is one other observation we would like to make in relation to the conduct of the present appeals. In matters such as these, *ie*, collective sales involving disputes about the property rights of a substantial number of persons in a fluid property market, counsel ought ordinarily to seek expedited hearings. Had this course of action been adopted, finality could have been achieved much earlier.

Summary of our findings

210 In summary, we find:

(a) The Horizon Board erred in law in:

(i) misconceiving its statutory role and function in making a decision under s 84A(9)(*a*)(i) of the LTSA, in particular, failing to appreciate that its role was to ensure that all relevant evidence was placed before it;

(ii) applying the wrong legal test in assessing the relevance and admissibility of certain

evidence;

(iii) applying the wrong test for conflicts of interest;

(iv) misapprehending the duties of the original SC (*eg*, its duty to obtain the best sale price);

(v) misinterpreting the meaning of "good faith" under s 84A(9)(*a*)(i) of the LTSA; and

(vi) exonerating the original SC on the basis of its reliance on legal advice.

(b) The original SC had breached its duties as fiduciary agent of all the subsidiary proprietors by:

(i) failing to act with due diligence and transparency in the process leading to the appointment of the property agent;

(ii) failing to proactively follow up on the Vineyard offer and the other expressions of interest referred to in Tan Kah Gee's email of 12 January 2007 (see [39] above);

(iii) failing to improve the chance of obtaining a better price for the Property by making use of the existence of the Vineyard offer as leverage in negotiations with HPL;

(iv) acting with undue haste in pressing on with the sale to HPL when there was no legal or moral obligation to do so;

(v) deciding to sell the Property to HPL when there were undisclosed potential conflicts of interest on the part of two key members (including the chairman) of the original SC; and

(vi) failing to go back to (or even update) the consenting subsidiary proprietors to seek further instructions despite the surge in prices in the property market since the time at which those subsidiary proprietors first gave the original SC its mandate.

Conclusion

211 After careful deliberation, in the light of all the circumstances we have detailed and the several errors of law that have been made, we have decided that the Horizon Board's decision made on 7 December 2007 cannot be allowed to stand.

212 In the result, the present appeals are allowed. The Horizon Board's order made pursuant to its decision on 7 December 2007 is set aside. Parties are to write in within a week with their submissions on the appropriate costs to be awarded.

[note: 1]Merrill Legal Solutions Transcript of STB hearing on 7 November 2007 at p 60.

[note: 2]Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at p 28.

[note: 3]Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at p 22.

[note: 4]*Ibid*.

[note: 5]Merrill Legal Solutions Transcript of STB hearing on 30 July 2007 at p 25 and para 7 of Alvin Er's affidavit dated 18 July 2007.

[note: 6]Affidavit of Alvin Er dated 18 July 2007, in Tan Rajah & Cheah's bundle of documents vol R2, at paras 10–11 and Exhibit 3.

[note: 7]Merrill Legal Solutions Transcript of STB hearing on 30 July 2007 at pp 66, 67.

[note: 8]See Exhibit 5 of Affidavit of Wee Hian Siew and Henry Lim Meng Loke dated 18 July 2007 at p 166.

[note: 9]Record of Appeal vol 4C in CA119/2008 at p 1693.

[note: 10]Paragraph 3.3, Minutes of 23 April 2006 EGM, in Tan Rajah & Cheah's Bundle of Documents vol R28 at p 102.

[note: 11]Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at p 55.

[note: 12]Affidavit of evidence-in-chief of Hendra Gunawan filed in the STB hearings, at p 393.

[note: 13]Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 60.

[note: 14]Appellants' Core Bundle vol 2 in CA 119/2008, at p CB-23.

[note: 15]Merrill Legal Solutions Transcript of STB hearing on 31 July 2007 at p 11.

[note: 16]Affidavit of Alvin Er dated 18 July 2007 filed in the STB, at para 32.

[note: 17]Record of Appeal vol 4C in CA 119/2008, at 1758.

[note: 18]Appellant's Core Bundle vol 2 in CA119/2008 at p CB-60.

[note: 19]Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 18.

[note: 20]Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at pp 14–16.

[note: 21]Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at pp 16–17.

[note: 22]Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 20.

[note: 23]Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 25.

[note: 24]Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at pp 106–07.

[note: 25]Merrill Legal Solutions Transcript for STB hearing on 6 November 2007 at p 229.

[note: 26]Merrill Legal Solutions Transcript for STB hearing on 9 November 2007 at p 240–245.

[note: 27]Record of Appeal vol 4E in CA 119/2008, at 2337.

[note: 28]Record of Appeal vol 4C at p 1893.

[note: 29]Merrill Legal Solutions Transcript of STB hearing on 31 July 2007 at pp 102–104.

[note: 30]Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at pp 84, 201.

[note: 31]Merrill Legal Solutions Transcript of STB hearing on 9 November 2007 at p 206.

[note: 32]See CB Richard Ellis's letter annexed to the Appellants' Case in CA 120/2008.

[note: 33]Record of Appeal vol 4C in CA 119/2008 at 1755.

[note: 34]Appellants' Core Bundle vol 2 in CA 119/2008, at CB-75.

[note: 35]Appellants' Core Bundle vol 2 in CA 119/2008, at CB-80.

[note: 36]See the 18 October 2007 letter from Lim Seng Hoo, chairman of the new SC, to HPPL, annexed to the Appellants' Case in CA 120/2008.

[note: 37]Appellants' Core Bundle vol 2 in CA 119/2008, at CB-129 and CB-132

[note: 38]See the Appellants' Case in Civil Appeal No 119 of 2008 at paras 78–81.

[note: 39]Minutes of 23 April 2006 EGM, in Tan Rajah & Cheah's Bundle of Documents vol R28 at p 100.

[note: 40]Tan Rajah & Cheah's Bundle of Documents vol R17 at Tab HG-31.

[note: 41]Merrill Legal Solutions Transcript for STB hearing on 9 November 2007 at p 78.

[note: 42]Alvin Er's affidavit dated 18 July 2007 in the Horizon Board's proceedings below, in TRC's Bundle of Documents vol R2, at [33].

[note: 43]Merrill Legal Solutions Transcript for STB hearing on 9 November 2007 at p 60.

[note: 44]*Ibid*.

[note: 45]Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 71; Merrill Legal Solutions Transcript of STB hearing on 9 November 2007 at pp 128, 233.

[note: 46]Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at p 235.

[note: 47]Merrill Legal Solutions Transcript for STB hearing on 9 November 2007 at pp 49, 77, 229–230 .

[note: 48]Merrill Legal Solutions Transcript for STB hearing on 9 November 2007 at p 156.

[note: 49]Record of Appeal vol 4D in CA 119/2008, at pp 2119–2124.

[note: 50]Merrill Legal Solutions Transcript for STB hearing on 9 November 2007 at p 228.