Ng Swee Lang and Another v Sassoon Samuel Bernard and Others
[2007] SGHC 190

Case Number : OS 1089/2007

Decision Date : 09 November 2007

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Michael Hwang SC and Yeo Chuan Tat (Michael Hwang), Yip Shee Yin and Kenny Khoo (Ascentsia Law Corporation) for the plaintiffs; Christopher Yong and Joshua Chai (Legal21 LLC) for the defendants; Leong Yung Chang (Veritas Law Corporation) for Bukit Panjang Plaza Pte Ltd (on watching brief)

Parties : Ng Swee Lang; Yip Hoi Thong — Sassoon Samuel Bernard; Chong Kok Boon; Chong Yan Chin

Land – Strata titles – Strata titles board – Appeal to High Court from Board's decision – Whether collective sales agreement and sale and purchase agreement valid – Whether Board erring in law in granting collective sale order – Section 84A Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

9 November 2007 Judgment reserved.

Andrew Ang J:

1 This is an appeal against the whole of the order of the Strata Titles Board ("the Board") dated 26 June 2007 in STB No 6 of 2007, pursuant to an application under s 84A of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("the Act") in respect of the development known as Phoenix Court (Strata Title Plan No 287) comprised in Land Lot No 559X TS 21 ("the Development").

2 The plaintiffs seek the following orders in these proceedings:

(a) that the order of the Board under s 84A of the Act in respect of the Development on 26 June 2007 in STB No 6 of 2007 be set aside;

(b) that the application for a collective sale order in respect of the Development be dismissed;

(c) that the costs of this appeal and the proceedings before the Board below be paid by the defendants to the plaintiffs; and

(d) such further or other relief as the court deems fit.

3 The plaintiffs are joint subsidiary proprietors of unit No #07-70 in the Development.

4 The defendants claim to be the authorised representatives on behalf of subsidiary proprietors representing some 97.92% of the total share value in the Development ("the Majority") in the application for the collective sale of the Development.

5 The Development is a 13-storey residential development located at 70 St Thomas Walk on a freehold site. It comprises three penthouses on the 13th storey and 44 apartments units on the lower floors.

6 The Majority, comprising the owners of 46 out of the 47 apartments and penthouses, entered

into a Collective Sale Agreement ("the CSA") dated 16 April 2006. The plaintiffs did not agree to the collective sale and did not sign the CSA.

7 A Sale Committee ("SC") was appointed pursuant to the CSA to act on behalf of the Majority who signed up to the CSA. On 27 October 2006, the SC, on behalf of the Majority, entered into a Sale & Purchase Agreement ("S&P Agreement") with Bukit Panjang Plaza Pte Ltd ("the Purchaser") for the sale of the Development. The S&P Agreement was conditioned to terminate if a collective sale order was not obtained from the Board within six months after the date of the S&P Agreement, *ie*, by 26 April 2007.

8 On 17 January 2007, the defendants, on behalf of the Majority, applied to the Board for a collective sale order. The plaintiffs objected to the application.

9 On 25 April 2007, the SC, on behalf of the Majority, entered into a Supplemental Agreement with the Purchaser, extending to 27 June 2007 the time the Majority had to obtain a collective sale order.

10 The hearing of the plaintiffs' application to the Board took place from 21 to 22 June 2007. The Board made an order for the collective sale of the Development on 26 June 2007.

11 Being dissatisfied with the order of the Board, the plaintiffs brought this appeal.

12 The plaintiffs' grounds of objections to the *en bloc* sale are as follow:

(a) The Board erred in law in granting the collective sale order as, contrary to s 84A(1)(b) of the Act, there was no valid collective sales agreement between the subsidiary proprietors comprising not less than 80% of the share values of the Development.

(b) The Board erred in law in granting the collective sale order as, contrary to s 84A(1)(b) of the Act, there was no valid sale and purchase agreement between the subsidiary proprietors and an intended purchaser.

(c) The Board erred in law in granting the collective sale order on the application of the defendants who were not persons appointed by the subsidiary proprietors as their authorised representatives in connection with the application before the Board, contrary to s 84A(2) of the Act.

(d) The Board erred in law in granting the collective sale order although, contrary to para 1(e) of The Schedule and s 84A(3) of the Act, notice of the application for a collective sale order was not accompanied by a valid valuation report.

(e) The Board erred in law in granting the collective sale order when, contrary to s 84A(1) of the Act, there was no sale and purchase agreement which specified the proposed method of distributing the sale proceeds to all the subsidiary proprietors (whether in cash or in kind, or both).

(f) The Board erred in law in granting the collective sale order when the transaction was not in good faith, having regard to the sale price, contrary to s 84A(9)(a)(i) of the Act.

(g) The Board erred in law in granting the collective sale order when the transaction was not in good faith, having regard to the method of distribution of sale proceeds, contrary to s 84A(9)(a)

(ii) of the Act.

13 The principal questions arising in this appeal are:

(a) Whether the grounds of appeal raise points of law;

(b) Whether there was a failure to comply with any statutory requirement in connection with the *en bloc* sale or the application for the Board's order; and

(c) If so, what is the consequence of such non-compliance.

14 Before considering the individual grounds of appeal, it is necessary to deal in general terms with the following:

(a) The distinction between a point of law and one of fact; and

(b) What is the consequence of non-compliance with a statutory requirement.

Point of law

15 Relying upon s 98(1) of the Building Maintenance and Strata Management Act 2004 (Act 47 of 2004) ("BMSMA"), the defendants raised the preliminary objection that the plaintiffs were not entitled to appeal against the Board's decision other than on a point of law. Section 98 provides as follows:

98. — (1) 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.

(2) Where an appeal is made to the High Court, the Court may confirm, vary or set aside the order or remit the order to the Board for reconsideration together with such directions as the Court thinks fit.

(3) The filing of a notice of appeal shall not operate as a stay of execution of an order or suspend the effect of an order unless the Board or the High Court, as the case may be, otherwise orders and any stay or suspension of an order may be subject to such conditions as the Board or High Court thinks fit.

16 As to what constitutes "a point of law", Mr Christopher Yong, counsel for the defendants, pointed to the Court of Appeal decision in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (S) Pte Ltd (No 2)* [2004] 2 SLR 494 ("*Northern Elevator*") where the Court of Appeal cited with approval the following statement by GP Selvam JC in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749 ("*Ahong Construction*") 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. The point of law must substantially affect the rights of one or more of the parties to the arbitration. 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.

The Court of Appeal then continued 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.

17 The defendants also relied on *Yeo Loo Keng v Tan Yee Lee Kevin* [2007] 3 SLR 455 which was also an appeal against the order of a Strata Titles Board. In that appeal, the High Court was presented with an argument that the Board made an error of law when it accepted a valuation report which was not in compliance with the Valuation Standards and Guidelines issued by the Singapore Institute of Surveyors and Valuers. The court ruled that this issue did not involve any question of law.

18 Mr Michael Hwang SC, counsel for the plaintiffs, referred to *MC Strata Title No 958 v Tay Soo Seng* [1993] 1 SLR 870 ("*Tay Soo Seng*") where GP Selvam JC considered the then s 108(1) of the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed) which read as follows:

> No appeal shall lie to the High Court against an order made by a Board except on a point of law.

Selvam JC had quoted, with approval, the following statement in Halsbury's Laws of England, vol 1(1) (Butterworths, 4th Ed Reissue, 1989), para 70:

> 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.

19 *Tay Soo Seng* and the above quoted statement in Halsbury's were cited to Woo Bih Li J in *Koh Gek Hwa v Yang Hwai Ming* [2003] 4 SLR 316 ("*Koh Gek Hwa*"), which was also an appeal from an order of a Strata Titles Board. Also cited was the following passage[note: 1] from *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 where Lord Radcliffe said at 35 and 36:

> My Lords, I must apologise for taking so much time to repeat what I believe to be settled law. But it seemed to be desirable to say this much, having regard to what appears in the judgments in the courts below as to a possible divergence of principle between the English and Scottish courts. 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. … 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 upon 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]

The foregoing statements were cited by counsel before Woo J without any dispute between counsel as to their applicability to an appeal from an order of the Board. Woo J himself appeared to agree.

20 Later, in considering one of the grounds of the appeal, Woo J also stated:

> [I]t was not for me to substitute my views for that of the Board unless there was an error of law.

We may infer therefore that Woo J accepted that errors of law of the type described in the statements cited to him would be grounds for an appeal against the decision of the Board.

21 Mr Hwang therefore submitted before me that the examples of errors of law given in paras 18 and 19 above would be sufficient basis for an appeal to the High Court from the Board. He also referred to *Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 where Lee Hun Hoe CJ of the Malaysian Federal Court of Civil Appeal stated:

> Appeals from the decisions of the Special Commissioners in tax cases are made by way of case stated under the Income Tax Act, 1967 Schedule 5, paragraph 34. The paragraph states clearly that any appeal is on a question of law. Hence, pure findings of fact may not be challenged on an appeal. However, the court has clear and undoubted jurisdiction to reverse a decision on questions of law. The term "question of law" includes the correctness of (a) pure statements of law (e.g. as to the correct interpretation of a statutory provision), and (b) the inferring of a conclusion from the primary facts (where the process of inference involves assumptions as to the legal effect or consequences of the primary facts).

22 It is interesting to note that Selvam JC who decided *Tay Soo Seng* ([18] *supra*), relying on the statement in Halsbury's Laws of England as to what constitutes errors of law, was also the judge whose statement in *Ahong Construction* ([16] *supra*) as to what constitutes a question of law was the basis upon which the Court of Appeal made its decision in *Northern Elevator* ([16] *supra*). Was Selvam JC unaware of the apparent inconsistency or could a distinction be drawn between the two cases?

23 Mr Hwang suggested that the distinction was between the scope of appeal from a statutory board decision and that from a private domestic arbitration under the Arbitration Act.

24 First, he submitted that there was a clear and vital distinction between statutory tribunals and private arbitrations. Statutory tribunals such as the Board perform 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. According to him, manifestation of such closer supervision is that, while it is expressly stated that parties could contract out of a possible appeal on a question of law under s 49(2) of the Arbitration Act, there is no similar provision in the BMSMA. Furthermore, the BMSMA itself recognises that the Arbitration Act shall not apply to proceedings before the Board: s 92(6) of the BMSMA. In his view, the legislature clearly recognised that there is a fundamental difference between private arbitrations, whose existence is underpinned by the principle of party autonomy, and a hearing before the Board under the Act.

25 I am inclined to agree with Mr Hwang that *Northern Elevator's* definition of "question of law" was given in the context of an application for leave to appeal from an arbitral award where different policy considerations applied. It was common ground in *Northern Elevator* that for leave to be granted, the appellant had to satisfy the guidelines laid down by the House of Lords in *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 ("*The Nema*") and in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191 ("*The Antaios*") which were affirmed by the Court of Appeal in *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609. Those guidelines were summarised by the Court of Appeal in *Northern Elevator* at [11] as follows:

> The *Nema-Antaios* guidelines for determining whether leave should be granted may be summarised thus: Where the question of law raised is a "one-off" point, leave to appeal should not be given unless it is apparent to the court that the arbitrator was obviously wrong on the face of the record. Where the question does not concern a "one-off" issue, leave to appeal should not be given unless the court considers that a strong *prima facie* case has been made out that the arbitrator was wrong.

26 As can be seen from that summary, in the context of an application for leave to appeal against an arbitrator's award, the mere fact that a question of law is raised is not enough. Where it is a "one-off" point, the error of law must appear *prima facie* or, in other words, be patent on the face of the record. Even if the point of law is not a "one-off" point, leave would still not be given unless there was a strong *prima facie* case that the arbitrator had erred in law.

27 The Court of Appeal's statement in *Northern Elevator* and that of Selvam JC in *Ahong Construction* as to what constitutes a "question of law" must therefore be understood in that context. For the purposes of s 98(1) of the BMSMA, I would adopt the wider meaning as to which guidance may be found in the passage from *Halsbury's Laws of England* quoted by Selvam JC in *Tay Soo Seng* ([18] *supra*) and Lord Radcliffe's statement in *Edwards (Inspector of Taxes) v Bairstow* ([19] *supra*).

What is the consequence of non-compliance with a statutory requirement?

28 A recurrent problem in the interpretation of statutes is that such legislation often dictates what requires to be done without also spelling out the consequence of non-compliance.

29 In earlier submissions at the hearing before me, Mr Hwang took the position that s 84A(3) of the Act and para 1(e)(vi) of The Schedule had to be strictly complied with and that failure so to comply rendered the application to the Board invalid. (He maintained this position in the face of ***express provision*** – (a) in reg 12(1) of the Building Maintenance and Strata Management (Strata Titles Board) Regulations 2005 ("the BMSM Regulations") empowering the Registrar in interlocutory proceedings to allow, *inter alia*, amendments to the application before the hearing; and (b) in reg 13(4) of the BMSM Regulations empowering the Board, to give directions as to a cut-off date after which no further amendment may be made.) He further contended that the Board had no power to disregard any technical or procedural irregularity. It followed that the Board had no jurisdiction to entertain the application. Such, according to Mr Hwang, were the inevitable consequences of failure to comply with the statutory requirements. He later moderated his stand somewhat (see [46]) as a result of my request for further submissions after the hearing but maintained that the statutory requirements allegedly breached in the present case went to jurisdiction. For reasons which will follow, I find those submissions untenable.

30 The approach to the question as to what the consequence of non-compliance is has evolved over time. Under the traditional approach, the answer to this question depended on whether the requirement was held to be mandatory or directory. Non-observance by an authority of a mandatory requirement was fatal to the validity of the authority's decision. However, if the requirement was held to be merely directory, non-compliance therewith would not invalidate the authority's decision. Further refinements were made to this distinction. As *Wade, Administrative Law* (9th Ed) noted at p 221, "the same condition may be both mandatory and directory: mandatory as to substantial compliance, but directory as to precise compliance". Or, as Lord Steyn observed in the House of Lords in *R v Soneji* [2006] 1 AC 340 at 349:

> There were refinements. For example, a distinction was made between two types of directory

requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance.

31 A case in point introducing such refinement is *R v Secretary of State for the Home Department, Ex parte Jeyeanthan* [2000] 1 WLR 354 ("*Jeyeanthan*") where Lord Woolf MR suggested, at 362, that the conventional dichotomy between mandatory and directory requirements was only a first step in addition to which the following likely questions should be added:

1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)

2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.

3. If it is not capable of being waived or is not waived then what is the consequence of non-compliance? (The consequences question.)

It should be noted that those questions were posed in the context of the wider enquiry into the legislator's intention as to the procedural requirement in question. As the court in that case held, in determining the consequence of non-compliance with a procedural requirement the court had to consider the language of the legislation and the legislature's intention against the factual situation and seek to do what was just in all the circumstances.

32 The modern approach can be seen in cases decided in the last decade or so in common law jurisdictions around the world, notably England, Australia and Canada as well as in Singapore.

33 In *R v Soneji* ([30] *supra*), after a comprehensive review of the case law, including those from other common law jurisdictions (in particular, the Australian High Court decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355) ("*Project Blue Sky*"), Lord Steyn concluded as follows at 353:

Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (No 3 of 1999)*, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.

34 In that case, the judge in two criminal trials had sentenced each of the two defendants to a term of imprisonment. He subsequently made confiscation orders against the defendants pursuant to power under the Criminal Justice Act 1988 ("the 1988 Act") as amended by subsequent legislation. Although there was a power to postpone the making of a confiscation order under s 72A of the 1988 Act, there was provision in s 72A(3) that the period of postponement was not to exceed six months from the date of conviction save where the court was satisfied that exceptional circumstances existed. The Court of Appeal had held that as the judge had failed to consider or make any finding as to exceptional circumstances, he had no jurisdiction to make the confiscation orders. Accordingly, the confiscation orders were quashed.

35 Reversing the Court of Appeal's decision, the House of Lords held that the correct approach in such a situation was to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid. The House of Lords further found that the purpose of the relevant provisions was to make the sentencing process as effective as possible and that the judge's failure to adhere to the requirements of s 72A(3) had caused no prejudice to the defendants in respect of their sentences. Any other prejudice to them caused by the delay was outweighed by the public interest in seeing that convicted persons should not escape confiscation for *bona fide* errors in the judicial process. It followed therefore that Parliament would not have intended that the confiscation orders be invalidated.

36 It will reward our understanding of the development of the law to revisit some of the cases Lord Steyn reviewed. The first was *London E Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182. Lord Steyn attributed to the following dictum of Lord Hailsham of St Marylebone LC in that case (at pp 189–190) inspiration for the new approach:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity,' and so forth maybe helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

In the words of Lord Steyn ([30] *supra*) at 350:

> This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In

framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament.

37 Another case reviewed was *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91. In that case s 64(1) of the Police and Criminal Evidence Act 1984 required that after a defendant had been cleared of an offence, fingerprints or samples taken from him in the investigation of the offence must be destroyed. There was a breach of that statutory duty. A DNA profile obtained from swabs taken from a rape victim was found to match that of the defendant from a saliva sample (taken from him in the course of investigation into another offence) which the authorities had failed to destroy. A further DNA profile was obtained from a hair sample taken from the defendant at the time of his arrest. That too matched that obtained from the swabs. At the defendant's trial, the judge ruled that evidence of the link between the defendant's DNA profile obtained from the hair sample and the profile obtained from the swabs was inadmissible by reason of s 64(3B)(b) of the 1984 Act, as amended, which prohibited the use of information derived from a sample required to have been destroyed under s 64(1) for the purposes of any investigation of an offence. He further held that if he had any discretion to admit such evidence, he would have exercised it against admitting the evidence. The Attorney General referred a question for the opinion of the Court of Appeal as to whether in such circumstances a judge had such a discretion notwithstanding s 64(3B) of the Act. The Court of Appeal answered the question in the negative. On a further reference by the Court of Appeal at the request of the Attorney General, the House of Lords reversed the decision of the Court of Appeal and rejected the mandatory/directory distinction in spite of explicit imperative language in the statute. It held that the parliamentary intention could not have been such as to render inadmissible the evidence obtained as a result of the failure to destroy the DNA sample earlier taken. In the words of Lord Steyn (who was also in the coram) at 118:

> Counsel for the respondent was further compelled to concede that the construction adopted by the Court of Appeal leads to absurd consequences. Counsel for the Attorney General gave the following illustration. The police receive information from a forensic laboratory that X appears to have been responsible for a number of serial murders. The source of the information is derived from a sample which ought to have been destroyed pursuant to section 64(1) of PACE. The police can do nothing until a further crime is committed. Even a consequential confession by X or discovery of the murder weapon in the house of X could not be used. But one does not have to resort to hypothetical examples: on the interpretation of the judge and the Court of Appeal a case involving evidence of a very serious rape could never reach the jury and in *Weir* a conviction for a brutal murder was quashed on the ground that the DNA evidence should not have been placed before the jury. ***It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides***. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. In my view ***the austere interpretation which the Court of Appeal adopted is not only in conflict with the plain words of the statute but also produces results which are contrary to good sense. A consideration of the public interest reinforces the interpretation which I have adopted.*** [emphasis added]

Lord Cooke of Thorndon held as follows at 120–121:

> In the present case I think that ***the Court of Appeal fell into the trap (and they were in good company in doing so) of treating the issues to be resolved according to whether***

section 64(3B)(b) of the Police and Criminal Evidence Act 1984 should be classified as mandatory or directory. That it is in ordinary language mandatory there can be no doubt. In clear terms it provides that certain categories of samples required to be destroyed shall not be used for the purposes of any investigation of an offence. Use in breach of this prohibition is plainly unlawful. ***But paragraph (b), in contrast with paragraph (a), does not go on to provide that, in the event of such unlawful use, the results of the investigation shall not be admissible in evidence*** against the person who was entitled to the destruction of the sample. Nor does it provide that an unlawful investigation shall be null and void or deemed never to have occurred – provisions which would indeed read rather oddly in relation to an investigation.

…

In the instant case there is in paragraph (b) no such express statutory provision; and ***in my view, it would be astonishing if Parliament had intended the evidence eventually tendered to have been ruled out.*** [emphasis added]

38 In *Project Blue Sky* ([33] *supra*), in a joint judgment, McHugh, Gummow, Kirby and Hayne JJ of the Australian High Court had this to say at [93]:

In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".

In *R v Soneji* ([30] *supra*), Lord Steyn found this decision to be most valuable. In his view, the reasoning therein provides an improved analytical framework for examining questions as to the validity of an act done in breach of a statutory provision.

39 In Canada, in *Society Promoting Environmental Conservation et al v Attorney General of Canada* (2003) 228 DLR (4th) 693, Evans JA delivering the main judgment of the Federal Court of Appeal held at [35]:

(iv) … ***the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties***, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity. [emphasis added]

40 The courts in Singapore have kept pace with these developments. In *Re Rasmachayana Sulistyo; ex parte The Hongkong and Shanghai Banking Corp Ltd* [2005] 1 SLR 483 at [24], V K Rajah Jobserved:

> The elusive historical approach of characterising procedural provisions as either directory or mandatory is largely anachronistic today. The preferred approach in modern times in determining the validity of an Act is to understand the purpose of the relevant procedural rule as well as the scope and intent of the governing statute. This approach does not entail ignoring the usage of words such as "shall" or "must" in legislation. It suggests that any *prima facie* inference raised by such words may be dislodged after taking into consideration the scope and objectives of the legislation and the consequences arising from alternative constructions.

41 In *Chee Siok Chin v Attorney-General* [2006] 3 SLR 735 ("*Chee Siok Chin*"), Andrew Phang JA adopted the same approach after quoting the above passage by V K Rajah J, at [82]:

> Indeed, this is precisely the approach that I have adopted in the present proceedings, and which, incidentally, was also the approach adopted by Lee J in the *Chong Thain Vun* case ([25] *supra* at 73). It might, nevertheless, be helpful to observe that words such as "mandatory" and "directory" are still helpful inasmuch as they assist in focusing on the *nature* of the provision concerned and (more importantly) on the *consequences* of non-compliance with it. However, such words do not, in and of themselves, aid substantively in the *process* of ascertaining whether or not the provision concerned is indeed "mandatory" or "directory". In this regard, there is no substitute for a close analysis of the language of the provision itself set in its legislative context.

42 In *Chai Choon Yong v Central Provident Fund Board* [2005] 2 SLR 594, the Court of Appeal had to decide whether a deceased's nomination of a beneficiary to receive the moneys in his Central Provident Fund account was null and void on the ground that the nomination form had not been signed in the presence of two witnesses as required under r 4 of the Central Provident Fund (Nomination) Rules. At first instance, Belinda Ang J had found in favour of the beneficiary on other grounds and her remarks (following *Jeyeanthan* ([31] *supra*) that there had been substantial compliance with r 4 were *obiter*. Nevertheless, in view of the likelihood of similar questions arising in the future, the Court of Appeal used the occasion to address the issue. Lai Siu Chiu J (delivering the judgment of the court) at [45] said:

> It was not wrong of Ang J to draw guidance from the above test. There is no real conflict between Lord Woolf's approach and Bennion's. Lord Woolf disapproved of the mandatory/directory dichotomy only in so far as it focused merely on determining whether words like "shall" or "may" were used. ***His exhortation to also consider the Legislature's intention is sound, as it advocates a more holistic and flexible approach to statutory interpretation. The three questions he posed sprang from his overall focus on the intended consequences of any irregularity*.** [emphasis added]

Further, at [47] Lai J said:

> [I]nstead of adopting Ang J's approach of deciding whether r 4 was merely a procedural requirement (imposed primarily for the Board's benefit) and then determining whether it was mandatory or directory, ***we preferred to focus on the implications of non-compliance*.** [emphasis added]

43 To conclude, the modern approach in Singapore as well as in England, Australia and Canada is to treat the question as one of statutory construction to be answered by looking at the whole

scheme and purpose of the Act and by weighing the importance of the particular requirement in the context of that purpose and asking whether the legislature would have intended the consequences of a strict construction, having regard to the prejudice to private rights and the claims of the public interest (if any).

44 Mr Hwang, however, sought to introduce a qualification based, according to him, on *R v Ashton* [2007] 1 WLR 181, an English Court of Appeal decision following shortly after *R v Soneji* ([30] *supra*).

45 The law report reveals that there were actually three applications before the Court of Appeal for leave to appeal against conviction. Following the approach in *R v Soneji*, the Court of Appeal refused leave in the first two, holding that in neither of them was there any indication that it was Parliament's intention that the procedural failure which took place should affect the validity of the proceedings, provided a defendant was not prejudiced by the failure. With regard to the third, the Court of Appeal granted the application and allowed the appeal on the ground that the judge had no power to deal with the defendant in relation to a prosecution for a "summary only" offence brought outside the statutory limit. It was held that such a defect was wholly jurisdictional rather than procedural in nature.

46 Mr Hwang submitted as follows:

> 79 …
>
> (i) There is a distinction between questions of jurisdiction and questions of procedure which do not go to jurisdiction. If the [Board] had no jurisdiction over the present proceedings due to non-compliance with conditions required to give the [Board] jurisdiction, the [Board] will have no power to entertain the application. Such considerations may include procedural requirements: *R v Ashton*.
>
> (ii) If the statutory provisions are not conditions which must be fulfilled to give the [Board] jurisdiction, then the court must determine what consequences the legislature intended, i.e. whether the procedural defects would invalidate the proceedings. If not provided for in the statute, this would require an examination of the considerations outlined in *Re Soneji*, *Re Ashton*, and *Project Blue Sky* discussed above, including language of the statutory provisions, the scope and object of the whole statute, and the consequences which will flow from requiring strict compliance with the statutory provision.

A careful reading of *R v Ashton* ([44] supra) will reveal that the court regarded the defect in the third case as jurisdictional because s 127(i) of the Magistrates' Courts Act 1980 provides:

> [A] magistrates' court ***shall not try*** an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose. [emphasis added]

This was not a case where the legislation was silent on the consequences of a breach of the statutory time limit.

47 At [4] and [5] the Court of Appeal drew a clear distinction between failure to take a required step, properly or at all, before a power is exercised ("a procedural failure") and acting without jurisdiction:

> 4. The outcome of each of these cases essentially depends on the proper application of the

principle or principles to be derived from the decision of the House of Lords in *R v Soneji* [2006] 1 AC 340, together with the earlier decision of this court in *R v Sekhon* [2003] 1 WLR 1655. Indeed, these three applications demonstrate how far-reaching the effect of those authorities is likely to be whenever there is a breakdown in the procedures whereby a defendant's case progresses through the courts (***as opposed to the markedly different situation when a court acts without jurisdiction***). In our judgment it is now wholly clear that whenever a court is confronted by ***failure to take a required step, properly or at all, before a power is exercised ("a procedural failure")***, the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice in account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.

5. On the other hand, ***if a court acts without jurisdiction – if, for instance, a magistrates' court purposes to try a defendant on a charge of homicide – then the proceedings will usually be invalid*.**

[emphasis added]

48 In the case of the strata legislation, there is no provision which is expressly jurisdictional. Clearly, therefore, the approach to be adopted is the one summarised in [43]. To draw the distinction advocated by Mr Hwang between (1) conditions which must be fulfilled to give the Board jurisdiction; and (2) those which do not go to jurisdiction, is to resurrect the mandatory/directory distinction under a different guise. As noted by the Australian High Court in *Project Blue Sky* ([33] *supra*), such classification is the end of the inquiry and not the beginning. It begs the question how one decides whether a condition goes to jurisdiction or otherwise.

49 From a review of the provisions of the Act dealing with *en bloc* sales and The Schedule, it is obvious that the main purpose of the legislation is to make it easier for *en bloc* sales to take place. This is achieved by dispensing with the need for unanimity and requiring in lieu thereof the consent of only the requisite majority of the subsidiary proprietors more particularly set out in s 84A(1) of the Act. At the Second Reading of the Bill containing the provisions for *en bloc* sales, the Minister of State for Law said [*Singapore Parliamentary Debates, Official Report* (31 July 1998), vol 69 at cols 601 – 607]:

I had informed this House on 19th November last year that Government would be amending the law to ***make it easier for en-bloc sales to take place. The current position is that a single owner, for whatever reason, can oppose and thwart the sale***. Government has received many appeals and feedback from frustrated owners whose desires to sell their flats or condominiums en-bloc have been so thwarted. ***As a result, these buildings cannot take advantage of enhanced plot ratios to realise their full development potential, which would have created many more housing units in prime 999-year leasehold or freehold areas for Singaporeans. A secondary benefit is that these developments, especially the older ones, could have been rejuvenated through the en-bloc process*.**

I said that the law would be amended to remove the need for unanimous consent.

[emphasis added]

50 Cogent reasons behind this move were cited by the Minister of State: "**I emphasised that in**

land-scarce Singapore, such an approach was ... imperative as it would make available more prime land for higher-intensity development ...". Without such an approach, as long as even a single owner objected, properties could not take advantage of enhanced plot ratios to yield more housing units; neither could old residential buildings be replaced by new and better housing.

51 As the Minister explained, safeguards were introduced in the legislation to protect the interests of minority owners. Hence, the detailed procedures set out in the legislation. As stated by the Minister, the purpose of these procedures is to

> [E]nsure that all relevant parties will have adequate notice of the sale and its terms, ***in order to decide whether or not to lodge objections with the Strata Titles Board*****.** [emphasis added].

The procedures were not built in as absolute obstacles to be surmounted on pain of the Board being precluded from exercising jurisdiction if any of the procedural requirements were not met, regardless of whether and to what extent the interests of the minority were affected.

52 The grounds upon which the Board will disapprove an *en bloc* sale are spelt out in s 84A(7) to (9). Inferentially, therefore, these are the express grounds upon which objection could be made to the sale. Under s 84A(7), a minority owner can object if he will incur a financial loss or if the proceeds of sale will be insufficient to redeem any mortgage or charge (this latter objection being also available to a mortgagee or chargee). Additionally, objections could be made under s 84A(9) on the grounds that:

> (a) the transaction is not in good faith after taking into account only the following factors:
>
> (i) the sale price;
>
> (ii) the method of distributing the sale proceeds; and
>
> (iii) the relationship of the purchaser to any of the subsidiary proprietors; or
>
> (b) the sale and purchase agreement would require any minority owner to be a party to any arrangement for redevelopment of the land on which the strata lots and common property stood.

53 Unless the Board is satisfied that any of these specific grounds is made out, the Board is required to approve the sale. It should be noted that, in imperative terms, s 84A(7) provides that "the Board **shall**, subject to subsection (9) … approve the application … and order that the lots and common property … be sold unless … the Board is satisfied that" any minority owner will suffer a financial loss or the proceeds of sale for any lot to be received by an objector (*ie*, owner, mortgagee or chargee) are insufficient to redeem any mortgage or charge.

54 The Minister of State for Law said as much in Parliament at the Second Reading:

> ***The Board will look at the sale price, method of distributing the sale proceeds to ensure that the minority owners are treated no less favourably than the majority, and the relationship of the purchaser to the owners, to ensure that there is no collusion. If the Board decides that the transaction is bona fide and an arm's length transaction, the sale will proceed*****.** [emphasis added]

Further down, he said:

> ***If mediation fails, the sale will nevertheless proceed as long as the transaction is bona***

> ***fide and at arm's length***, unless there are exceptional circumstances to warrant the Board assuming a more pro-active role; for example, the sale proceeds are lower than the purchase price he had paid for the unit or are insufficient to redeem the outstanding mortgage or charge on the unit. This is based on the underlying assumption that none of the owners in an en-bloc sale should lose out financially. [emphasis added]

This is not to say, however, that apart from the express grounds, there cannot be any other circumstance in which a Board may decline (or even be precluded from) ordering a sale. Obviously, if lower than the requisite percentage of owners consented to the sale the Board should not approve the sale and, if it did, the court should set aside the Board's approval. Applying the modern approach, one would quite easily arrive at the conclusion that Parliament would not have intended that less than the requisite majority of owners could drag an unwilling owner into an *en bloc* sale. A breach of this sort is clearly prejudicial to the rights of the minority and cannot be countenanced. However, whilst I do not wish to be categorical about it, it seems to me that the instances in which a Board's approval of an *en bloc* sale is liable to be struck down for non-compliance must be few, bearing in mind the overall objective and scheme of the legislation.

55 At the end of the day, each objection must be examined on its own facts and the particular requirement breached set against the overall purpose of the legislation. One should then consider whether a strict construction and the invalidation of the Board's order is what Parliament would have intended, taking into account any prejudice to the rights of parties and the public interest (if any).

56 It follows from the foregoing that the Board must have power where an application contained any error or omission, to allow correction of the same. It was so held by Choo Han Teck J in the very recent case of *Siow Doreen v Lo Pui Sang* [2007] SGHC 174 ("*Horizon Towers*"). Realising the significance of that decision, both Mr Yong and Mr Hwang wrote in to make further submissions, understandably taking opposite views as to its correctness. In that case, the Board hearing an application for an order for a collective sale decided to dismiss the application ("on the face of the application filed, but not its merits") midway through the proceedings when it emerged that three execution pages ("the three missing pages") had been omitted from a copy of the collective sale agreement required to be filed in the application. The Board was also concerned that this omission affected the accuracy of the statutory declaration confirming that certain statutory provisions had been complied with. In deciding to dismiss the application, the Board took the view that it had no power to allow rectification of the defect. Disagreeing with the Board, Choo J held at [9] and [10]:

> If the application was incomplete or contained errors or omissions of facts, the effect of those errors would be precisely the matter that the Board has to hear and determine. If an error or omission had caused prejudice to the minority, the Board may, in the exercise of its discretion dismiss the application. If it does not, the Board is, in my opinion, empowered to allow an amendment or correction so that the record is clear. If one takes the view that the Board has no power to allow an amendment even for a typographical error, then an entire *en bloc* sale could be stalled by a comma in the wrong place. The law should not have such drastic consequences when there was otherwise no prejudice. Moreover, one cannot demand absolute precision and at the same time deny the opportunity of amendment. One cannot demand that an application must contain the signature of every owner who had purchased his unit after the application had been lodged and at the same time deny that the application can be amended. The scheme for an *en bloc* sale under the LTSA [Land Titles (Strata) Act] is not a complicated one in so far as the critical information to be given to the Board in the CSP [Consenting Subsidiary Proprietors] application is concerned. From the information required, it is envisaged that some of the information may be out-of-date by the time the application is heard. Hence, regulation 12 permits amendments before the hearing, and after that, regulation 13 permits that any application can be

made only if the Board grants leave to do so. So now with further amendments to the Act, Parliament is telling the Board very categorically, that the Board has the power to allow amendments. The courts have also been saying the same thing in cases such as *Koh Gek Hwa v Yang Hwai Ming and Another* [2003] 4 SLR 316 (the Dragon Court case).

The regulations referred to in the above passage are, of course, the BMSM Regulations and the further amendments to the Act are the amendments introduced by the Land Titles (Strata) (Amendment) Act 2007.

57 Before me, it was argued that the Explanatory Statement to the Amendment Bill (Bill No 32/2007) ("the Amendment Bill") showed that under the Act as it then stood, the Board did not have power to disregard any technical or procedural irregularity in the application. Counsel for the plaintiffs pointed to a statement in the Explanatory Statement to the Amendment Bill regarding one of the proposed amendments to the Act that it was "to empower a Board to disregard any technical or procedural irregularity". It is a matter of some surprise to me that counsel thought it appropriate to rely upon the Explanatory Statement to a later Amendment Bill to interpret the Act sought to be amended. It is one thing, when interpreting a statutory provision, to refer to an Explanatory Statement relating to a Bill containing that provision but another thing altogether to resort to a later Explanatory Statement for that purpose. The former is permitted under s 9A(3)(b) of the Interpretation Act (Cap 1, 2002 Rev Ed) but the latter is not.

58 The same distinction applies to the speech made in Parliament by the Minister at the Second Reading of the Amendment Bill (see s 9A(3)(c)). Without the two impermissible references, it is open to interpretation whether the Amendment Bill as passed truly amends the Act or is merely declaratory of existing law. It is the function and duty of the court to interpret the statute. In this regard, I respectfully share Choo J's view that even without the amendment the Board is empowered to disregard any technical or procedural irregularity. Eschewing the unwarranted references, the recent amendment to the Act could quite as easily be attributed to the legislature's desire to make explicit the intention that the courts, adopting a purposive interpretation, have attributed to it. The amendment no doubt arose out of a desire on the part of the legislature to clear the confusion caused by conflicting decisions among various Strata Titles Boards.

59 I note from Choo J's judgment in *Horizon Towers* ([56] *supra*) that counsel for the respondents in that case had contended that the provisions in regs 12 and 13 of the BMSM Regulations (which allow amendments to the application) could not confer greater powers than the parent Act. In my view, a simple answer is that such contention is premised upon the assumption that the Act does not permit amendment to the application. If, as the courts have done in *Horizon Towers* and *Koh Gek Hwa* ([19] *supra*), the Act (prior to its latest amendment) is interpreted as allowing amendment, the objection immediately falls away. Such interpretation would promote the purpose of the Act which is to make it easier for *en bloc* sales to take place. Such interpretation would also be in keeping with s 9A(1) of the Interpretation Act which enjoins:

> In the interpretation of a provision to a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

60 Before going on to deal with the specific grounds of appeal, I should deal with another general point raised by Mr Hwang in his further submissions. He argued that the procedural requirements that the Majority allegedly failed to comply with were all directed at the Majority before they could exercise their right (which is not available at common law) to compel the sale by the minority owners.

Taking this argument to its logical end, the right to obtain a collective sale would only be available to the Majority upon fulfilment of the requirements imposed by the statute (including but not limited to the procedural requirements). For this proposition, he relied on Andrew Phang JA's observations at [117] of *Chee Siok Chin* ([41] *supra*):

> It is also axiomatic, commonsensical as well as just and fair that there cannot be a claim by a party for the vindication of legal rights without that party simultaneously fulfilling his or her legal responsibilities. In other words, one cannot claim one's legal rights without fulfilling one's legal responsibilities. The rhetoric of rights is not a licence for the unilateral appropriation of advantages without legitimate reciprocation; indeed, such conduct would be *the very antithesis* of the ideal underlying the very concept of rights as legitimately conceived.

61 In that case, the plaintiff had applied under s 90 of the Parliamentary Elections Act (Cap 218, 2001 Rev Ed) ("the PEA") for the results of the 2006 General Elections to be declared null and void. The defendant, in turn, applied for the plaintiff's application under the PEA to be dismissed on the ground that the plaintiff had failed to comply with the requirements of r 13 of the Parliamentary Elections (Application for Avoidance of Election) Rules ("the PER") to furnish security for the defendant's costs within timelines fixed under r 13(1) of the PER. The principal issue before the court was whether the requirement and specific timelines in r 13 had to be complied with strictly.

62 I set out [72] to [75] from the judgment to illuminate the context in which Phang JA made the foregoing observations:

> 72. Secondly, and as I have just mentioned, there are in fact *two specific timelines prescribed* within r 13(1) itself. The first is that security shall be payable "at the time of the filing of the application". Presumably, this is the most efficient scenario envisaged. It also presupposes that the plaintiff, having taken the time and trouble to file an application under s 90 of the Act, has also taken the time and trouble to acquaint himself or herself with *all* the relevant procedure – including the provision of security as required under r 13. I pause here to note that such an application is indeed a *very specific and specialised* one. It is specific because it relates to a very special procedure impugning a result in an event that does not take place every other day, to put it mildly. It is also specific because it is not only an attempt by the plaintiff to vindicate his or her rights but is also an attempt (simultaneously) *to impugn and presumably take away the rights of another party (here, of the successful candidate who would normally be the defendant to such an application)*. I shall elaborate more on this point below as well as in the conclusion to this judgment because it goes to the very root of the concept of rights itself – viewed not merely in the abstract but in a very real and practical context. It will suffice for the present to reiterate the fact that, given, *inter alia*, the very specific and specialised nature of the context and its concomitant proceedings, there is a clear underlying assumption that the plaintiff would indeed be prepared, simultaneously with his or her filing of an application under s 90 of the Act, to furnish the requisite security pursuant to r 13.
>
> 7 3 *However*, and this is where *the Legislature* has in fact *built in a very limited exception* which takes the form of *a second (and alternative) timeline*, if the plaintiff does *not* in fact furnish the requisite security pursuant to r 13 at the time of the filing of the application, then *there is a further grace period of three days to do so*. This is embodied in no uncertain terms by the words "*or* within 3 days afterwards" [emphasis added] in r 13(1) itself. This further grace period presumably permits the plaintiff some extra time to garner the necessary funds. However, given the special nature of the proceedings and the need (as we have seen above in the relevant case law) for a speedy determination of the proceedings, it is *an extremely limited (and, I might add, extremely specific) period of three days – no more, and no less*. It is nevertheless *an*

additional period that has been *expressly stipulated in* r 13(1) itself.

74 It is clear, in my view, that the Legislature, having stipulated *two* extremely specific timeframes in equally clear language, *intended that these timeframes be adhered to strictly*. In other words, the general requirement under r 13 in general and the specific timeframes stipulated in r 13(1) in particular are *mandatory*. There was no intention to provide for any further flexibility, nor is any indicated within the express language of r 13(1) itself.

75 I turn, now, to a related point, which I have in fact already alluded to above. Once again, this point does not appear to have been canvassed in the relevant case law although it seems to me to be one that arises clearly not only on the face of the language of the various provisions of the Act itself but also from the spirit underlying those various provisions. And that is the need to be conscious, not only of the plaintiff's rights, but also of *the rights or interests* of the defendant which are *impugned by an application under s 90 of the Act*. As has already been noted, the present proceedings do not constitute a "normal" election petition (see [47] above). I do not wish to state more here since this leads naturally on to issues that are not before me in the present proceedings, *viz*, whether or not the plaintiff had filed an application against the wrong defendant in the present proceedings and whether or not (as a closely related point) the thrust and spirit of the Act (read both logical as well as historical contexts) envisaged applications under s 90 being brought only in relation to the results of specific constituencies, and not the entire General Election *in toto*. Be that as it may, it cannot, in point of fact, be denied that the present application is not "normal" inasmuch as the defendants to s 90 applications are usually the successful candidates whose seats are being impugned. However, even assuming that the plaintiff was entitled to file her application in the present proceedings against the Attorney-General, it was nevertheless undeniable that the rights of all the elected Members of Parliament in the 2006 General Election (as *de facto* defendants) were necessarily involved as a result of the plaintiff's application. This actually *underscores* the point I have just made with respect to viewing the relevant Act and rules from *the perspective of the rights of the defendant (whether* de facto *or* de jure) *as well*. In other words, the strict timelines (*inter alia*, in r 13(1)) represented, in my view, the *Legislature's attempt to balance the plaintiff's and the defendant's rights which were*, ex hypothesi, *in irreconcilable conflict with each other*. Whilst the Legislature afforded the plaintiff the right to impugn election proceedings which, if successful, would take away the defendant's rights (including the rights of "*de facto* defendants" in proceedings such as the present), because of precisely the nature of the proceedings as I have put it, the Legislature imposed strict timelines to ensure that the plaintiff's application was mounted seriously and in good faith. Indeed, in the specific context of r 13 itself, we have seen (at [30] above) that the purposes for requiring the furnishing of security are *not only consistent with but also buttress the point made in the preceding sentence*. It is undoubtedly the case that the *public interest* ought to be safeguarded as well. I do not wish to detract, in any way, from this particular (and extremely important) purpose and rationale – not least because it has been embodied in authorities as august as that of the Judicial Committee of the Privy Council (in the *Devan Nair* case at [35] above). However, I do need to emphasise that there is an *additional* reason which is by no means insignificant and which *also* contributes to the reason and rationale for the strict timelines embodied within, *inter alia*, r 13(1): *This is to ensure that the defendant candidate's rights are not disregarded as the plaintiff asserts his or her rights under the Act and the PER in the process*. In this regard, the following observations by Singham J in the *Dr Shafie* case ([20] *supra* at [31]) might also be usually noted:

> I am of the view that where it is viewed contemporaneously in the context of the other provisions of the Act … r 4 of the Election Petition Rules 1954 confirms not only the intention of the legislature to expedite the early determination of election petition *but also to prevent*

> *any injustice on the defending candidates*, whose election is being challenged, against unspecific and unforeseen allegations from irresponsible challengers. [emphasis in original]

63 First, it should be noted that the learned judge's observations were made in the context of "a very special and specific" application to impugn the results of a general election where time was of the essence. Hence, his conclusion as to the mandatory nature of the general requirement under r 13 and the specific time frames stipulated in r 13(1): see [73] and [74] of his judgment. Second, assuming that the learned judge's discussion on the balancing of the plaintiff's and the defendant's rights under the statute were integral to and part of the determination of the legislative intent this, nevertheless, would not detract from the modern approach or conclusion I have arrived at in the present case. A closer examination of the judge's analysis of this issue is merited at this juncture to illustrate my point.

64 In *Chee Siok Chin* ([41] *supra*), Phang JA noted at [75]:

> In other words, the strict timelines (*inter alia*, in r 13(1)) represented, in my view, the *Legislature's attempt to balance the plaintiff's and the defendant's rights which were*, ex hypothesi, *in* ***irreconcilable conflict with each other***. Whilst the Legislature afforded the plaintiff the right to impugn election proceedings which, if successful, would take away the defendant's rights (including the rights of "*de facto* defendants" in proceedings such as the present), because of precisely the nature of the proceedings as I have put it, the Legislature imposed strict timeliness to ensure that the plaintiff's application was mounted seriously and in good faith. [emphasis added in bold print]

65 As alluded to above, the fact that Phang JA's decision (that the provision was mandatory) may have been informed (in part at least) by the consideration that the legislature's intention to balance irreconcilable rights of the plaintiff and the defendant were intended to be given effect to by the imposition of strict timelines does little to advance the plaintiff's case. On our facts, unlike the situation in *Chee Siok Chin*, the Majority's right to a collective sale was not necessarily ***irreconcilable*** with those of the minority – limited under the statutory scheme to a right to oppose the sale –

> (a) if a financial loss would be incurred or if the proceeds of sale would be insufficient to render any mortgage or charge;
>
> (b) if the transaction was not in good faith taking into account only the sale price, the method of distributing the same and the relationship of the purchaser to any of the subsidiary proprietors; or
>
> (c) if the sale and purchase agreement would require the minority to be a party to any arrangement for redevelopment of the land.

Thus, as earlier reasoned in [51] to [54], procedural irregularities that did not prejudice or significantly impair the minority's rights (as detailed above) should not affect the determination of the Board to allow the sale to proceed as it is enjoined to do.

66 Third, if Mr Hwang's submissions were taken to its logical conclusion, no application to the Board could ever be considered unless the application complied in every respect with the statutory requirements. This would bring us right back to square one – the untenable proposition that total compliance in every respect with the statutory requirements was a condition precedent to the exercise of the Board's jurisdiction. Such a position would be at odds with the modern approach discussed earlier at some length in my judgment and, in particular, with the very authority (*Chee Siok*

Chin) on which Mr Hwang built his submissions. For in *Chee Siok Chin*, as we have seen, Phang JA stated very clearly at [81] and [82] that he was adopting the modern approach.

67 We are now in a position to deal individually with the grounds of appeal.

Grounds of appeal

No valid Collective Sale Agreement

68 This ground, together with the one immediately following, was raised before Lai Siu Chiu J in Originating Summons No 829 of 2007 brought by certain of the Majority against the members of the SC alleging that their authority under the CSA had lapsed and that they were therefore not competent to extend the validity of the S&P Agreement. Early in the hearing, I raised the question whether the plaintiffs were precluded from raising the same grounds in this action by reason of *res judicata*, issue estoppel or because to do so would have been an abuse of process. I have no desire to digress from the main task at hand and shall deal only briefly with the question.

69 Having considered the written submissions of counsel, I am of the view that neither *res judicata* nor issue estoppel applies for lack of identity of parties in the two actions. I am also of the view that, in all the circumstances of this case, it is not an abuse of process for the plaintiffs to raise the same grounds in this appeal. Mr Yong had urged the Board to proceed with the hearing of the application even though OS No 829 of 2007 was pending. Rightly or wrongly, he had categorically submitted to the Board: "The same issues are not before the Board and the High Court … How can there be duplicity when whatever the High Court decides has no bearing on the respondents [*ie*, the plaintiffs in this appeal]".

70 The first ground of appeal is that the Board erred in law in granting the collective sale order as there was no valid collective sale agreement between the Majority, contrary to s 84A(1)(b) of the Act. This involves a construction of cl 13 of the CSA and is therefore a question of law.

71 The plaintiffs argued that on a plain reading of cl 13.1 of the CSA dated 16 April 2006, it expired upon the effluxion of 12 months after that date ("the 12-month period"). Clause 13 reads as follows:

> This Agreement shall remain effective and binding on each of the Owners from the date of the Owner's execution of this Agreement and shall determine on any of the following events:-
>
> 13.1 upon the expiry of twelve (12) months from the date of this Agreement; or
>
> 13.2 if no Contract is entered into twelve (12) months from the date of this Agreement; or
>
> 13.3 where a Contract is entered into:-
>
> (a) on the performance of all Owners' obligations under the Contract and this Agreement; or
>
> (b) if the Contract is rescinded by either the Owners or the purchaser:-
>
> (i) remedies of the Owners and the purchaser against each other have been resolved fully and finally; or
>
> (ii) all rights and remedies of both the Owners and purchaser as against each other are exhausted; or

(iii) where no further appeal is available or made to the court having jurisdiction.

Mr Hwang drew support for this construction from the word "any" appearing in line 3 of cl 13.

72 On the other hand, Mr Yong argued that the clause should be construed purposively in the context in which the CSA was made. The object of the CSA was to achieve a collective sale of the Development, the SC being appointed the agents of the Majority to negotiate and execute the S&P Agreement and to do all things necessary to facilitate the collective sale and to give effect to the terms of the S&P Agreement. I note that under cl 2.5.12 the authority of the SC under the CSA extends to the taking of action against the Purchaser under the S&P Agreement in the event of a breach by the Purchaser.

73 Mr Yong therefore argued that the construction contended for by Mr Hwang was absurd in that under such construction, even after the S&P Agreement had been executed and remained subsisting, the authority of the SC automatically lapsed upon the expiry of the 12-month period.

74 It is clear that cl 13 is unhappily drafted. Be that as it may, Mr Yong submitted that the three sub-sections are to cater to three different scenarios in the following manner:

(a) Clause 13.1 provides for the termination of the CSA 12 months after the date thereof if by then fewer than the requisite majority of subsidiary proprietors with 80% of the share values have signed the CSA;

(b) Clause 13.2 provides for the termination of the CSA 12 months after the date thereof where the 80% was reached but no S&P Agreement was entered into; and

(c) Clause 13.3 deals with the situation where a S&P Agreement has been entered into.

Mr Yong further submitted that para 1A of The Schedule to the Act lent support for such construction. The paragraph reads:

For the purposes of this Schedule —

(a) the permitted time in relation to a collective sale agreement executed or to be executed by subsidiary proprietors or proprietors referred to in section 84A(1), 84D(2) or 84E(3), means a period —

(i) starting from the date the first subsidiary proprietor or proprietor, or his duly appointed attorney, as the case may be, signs the collective sale agreement; and

(ii) ending not more than 12 months after the date the first subsidiary proprietor or proprietor, or his duly appointed attorney, as the case may be, signs the collective sale agreement; and

(b) the collective sale agreement shall be regarded as executed notwithstanding that it is executed on separate copies thereof and at different times.

75 Mr Hwang countered that Mr Yong's construction would entail putting qualifications into cl 13. He also pointed out that the reading suggested by the defendants would render cl 13.1 superfluous as the situation it purports to apply to would be covered by cl 13.2, which is that there was no S&P

Agreement entered into 12 months after the date of the CSA. He insisted that cl 13.3 could be read consistently with cl 13.1 without putting in any qualifications to mean, in situations where:

(a) the Majority (through the SC) performed all obligations under the CSA and S&P Agreement *prior* to the expiry of the 12-month period; or

(b) where the circumstances in cl 13.3(b) took place before the expiry of the 12-month period,

the CSA would terminate before the 12-month period. I have more difficulty with such a construction than with Mr Yong's.

76 First, it would follow from such a reading that even if the S&P Agreement was entered into one day before the expiry of the 12-month period, the CSA would still have to terminate the day after such agreement. How are the SC to accomplish all their obligations under the S&P Agreement and the CSA within one day? If the CSA was truly conditioned to terminate the next day, how did the Majority contemplate the sale to be completed without the SC? (It bears repeating that the SC were appointed under the CSA as agents for the Majority to do all things necessary to facilitate the collective sale and to give effect to the S&P Agreement.)

77 Second, such a construction contended for by Mr Hwang would give primacy to cl 13.1 and render cl 13.2 redundant, the same way he contended Mr Yong's construction would render cl 13.1 superfluous. In practical terms, even cl 13.3 would in all likelihood be rendered redundant because it is highly unlikely that all obligations under the CSA and S&P Agreement would have been performed within the 12-month period. It is even more unlikely, in the circumstances referred to in cl 13.3(b) (*viz*, where the S&P Agreement was rescinded) that within the 12-month period –

(a) the remedies of the owners and the purchaser against each other will have been resolved fully and finally; or

(b) that all rights and remedies of both the owners and the purchaser against each other will have been exhausted; or

(c) that all avenues of appeal will have been exhausted.

78 It is little wonder then that the Board rejected the plaintiffs' insistence upon a literal construction of the word "any" as one leading to absurdity and went on to conclude that the parties to the CSA could not have intended that the CSA was to terminate while the S&P Agreement was extant.

79 Mr Hwang relied upon Lord Mustill's observation in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 387–388:

> The words of Lord Reid in *Wickman Machine Tool Sales Ltd. v. Schuler A.G.* [1974] A.C. 235, 251 do, of course, reflect not only a method of constructing contracts but also the common experience of how language is understood:
>
> > "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

> ***This practical rule of thumb (if I may so describe it without disrespect) must however have its limits. There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms. Certainly, if in the present case the result of finding a condition precedent would be anomalous there would be good reason for the court to look twice, and more than twice, at the words used to see whether they might bear some other meaning. In the end, however, the parties must be held to their bargain.*** [emphasis added]

He also cited *Kazakstan Wool Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV* [2000] Lloyd's Rep IR 371 ("*Kazakstan Wool*") where Peter Gibson LJ said:

> The court is entitled to look at those consequences because the more extreme they are, the less likely it is that commercial men will have intended an agreement with that result. ***But the court is not entitled to rewrite the bargain which they have made merely to accord with what the court thinks to be a more reasonable result, and the best guide to the parties' intentions remains the words which they have chosen to use in the contract.*** [emphasis added]

Finally, Mr Hwang referred to *City Alliance Ltd v Oxford Forecasting Services Ltd* (Transcript: 16 November 2000) for Chadwick LJ's statement that –

> It is not for party who relies upon the words actually used to establish that those words effect a sensible commercial purpose. It should be assumed, as a starting point, that the parties understood the purpose which was effected by the words they used; and that they used those words because, to them, that was a sensible commercial purpose. ***Before the Court can introduce words which the parties have not used, it is necessary to be satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it, and (ii) that they did intend some other commercial purpose which can be identified with confidence.*** [emphasis added]

80 I would just say that the construction urged upon us by Mr Yong is in line with the purpose of the CSA to pursue a sale of the Development to completion and that to adopt such a construction, *viz*, that cl 13.3 alone applies where the S&P Agreement has been signed, is not to force another meaning on the words of cl 13 which they cannot bear.

81 I would further draw attention to the fact that each of the passages cited by Mr Hwang also confirms that the more unreasonable or extreme the result of a particular construction, the less likely the parties will have intended an agreement with that result.

82 Apropos the effect of the use of the word "any" in line 3 of cl 13, the decision of the Court of Appeal in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891 comes to mind. In that case, the appellant's mother ("the patient") had been admitted to hospital to undergo an angioplasty. At the time of the patient's admission, the appellant had signed two documents – an estimate of hospital charges ("the Estimate") and a standard form contract stating the hospital's conditions of services and policies ("the Contract"). The estimate for the angioplasty was in the region of $15,000. Under the contract, the appellant, as guarantor, undertook joint and several liability with the patient to pay "all charges, expenses and liabilities incurred by and on behalf of the

patient". Owing to an unanticipated series of events, the medical bill eventually came to a sum in excess of $500,000.

83 The trial judge held that the appellant was bound by the terms of the Contract and ordered the appellant to pay $320,000 after deducting certain amounts for reasons which are not relevant here. The appeal to the Court of Appeal raised one basic issue – was the ambit and scope of the Contract confined only to expenses and charges related to the angioplasty procedure or did the Contract cover ***all*** charges and expenses incurred? The Court of Appeal rejected the respondent's literal interpretation which emphasised the word "all". Andrew Phang JA, delivering the judgment of the court, said (at [29]):

> The key concept here is that of *context*. No contract exists in a vacuum and, consequently, its language must be construed in the context in which the contract concerned has been made. We would go so far as to state that even if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into if this context is clear or even obvious, since the context and circumstances in which the contract was made would reflect the intention of the parties when they entered into the contract and utilised the (contractual) language they did.

84 Having regard to the Estimate, which the Court of Appeal held it was entitled at common law to do to establish the factual matrix, the court decided that the undertaking to pay all charges was given in the context of the angioplasty procedure. Accordingly, it decided that the ambit and scope of the Contract was confined to the angioplasty procedure.

85 In the present case, we do not even need to go outside the four corners of the CSA to determine the context. The CSA read as a whole clearly shows the intention of the Majority to confer on the SC authority to act on their behalf to procure the sale of the Development and to take all necessary steps to bring the sale to a successful conclusion. It even goes beyond that to confer authority on the SC to bring action against any member of the Majority in respect of any breach of his obligations under the CSA or the S&P Agreement. Similar powers are given to the SC to bring action against the Purchaser for default under the S&P Agreement. There is simply no room for the contention that the Majority intended the CSA to terminate at the end of 12 months regardless of whether a S&P Agreement had been executed. There is therefore no breach of any statutory requirement in this regard. It follows that it is unnecessary to go on to consider what the consequence would have been if there was no valid CSA. However, for completeness, I should just say that if truly there were no valid CSA, there would be no basis for any application to the Board.

No valid S&P Agreement

86 The second ground of appeal is that there was no valid S&P Agreement at the time of the hearing before the Board and therefore the requirement of s 84A(1)(b) of the Act and para 1(e)(ii) of The Schedule to the Act was not met.

87 The S&P Agreement was entered into on 27 October 2006. Under cl 3 thereof, if an order of the Board was required and was not obtained within six months after the date of the S&P Agreement, the S&P Agreement would be terminated. An application to the Board was made on 17 January 2007. However, by 27 April 2007 (the end of the period of six months), the order of the Board still had not been obtained. On 25 April 2007, two days prior to the expiry of the 6-month period, the S&P Agreement was extended to 27 June 2007 by agreement between the SC and the purchaser. The approval of the sale was given by the Board on 26 June 2007.

88 The plaintiffs contended that the S&P Agreement had not been validly extended and that it therefore came to an end on 27 April 2007. The basis for the plaintiffs' contention was that –

(a) the CSA (from which the SC derived their authority) itself expired on 16 April 2007 so that when on 25 April 2007 the SC purported to exercise their authority to extend the S&P Agreement, they lacked authority to do so; and

(b) in any event, the terms of the CSA did not confer on the SC authority to extend the S&P Agreement.

The first point, *viz*, that the CSA expired on 16 April 2007, has already been shown to be untenable in my consideration of the first ground of appeal. The second point is, likewise, devoid of merit.

89 Under cl 2.5 of the CSA, the Majority gave full authority and discretion to the SC to deal with all matters relating to the collective sale, including (but not limited to) certain matters particularised in cll 2.5.1 and 2.5.14. Clause 2.5.5 specifically gave the SC such authority and discretion –

… to amend any term of the [S&P Agreement] and the related documents (but subject always to the limits as set out in Clause 4).

90 Clause 4 sets out the salient terms upon which the Majority agreed to sell the Development. Only cl 4.1.5 is relevant to the question whether or not the SC could extend the S&P Agreement. It provides as follows:

Completion of the Collective Sale shall be scheduled:-

(a) twelve (12) weeks from the date of award of tender (if Collective Sale is by way of tender) or the date of exercise of the option to purchase or the date of the sale and purchase agreement (if the Collective Sale is by way of private treaty); or

(b) twelve (12) weeks from the date of the Strata Titles Board's approval to the Collective Sale;

whichever is later.

Therefore, there was no impediment to the SC's exercise of their authority to extend the validity of the S&P Agreement to 27 June 2007.

91 Clause 2.5.14 further gave the SC full authority and discretion "generally to do all acts deeds matters and things which the [SC] shall in good faith and in accordance with the spirit and intent of this Agreement deem necessary or proper for the implementation of the terms and conditions of this Agreement, the Collective Sale and the [S&P Agreement]". Plainly, in my view, the conduct of the SC fell within this clause as well since their intention in extending the validity of the S&P Agreement was clearly to bring to fruition the collective will of the Majority to achieve the *en bloc* sale of the Development.

92 Several other provisions of the CSA were listed by Mr Yong as likewise showing that the SC was empowered to extend the life of the S&P Agreement but, in my view, it is unnecessary to go any further.

93 Since the S&P Agreement was validly extended, there is no statutory non-compliance to speak

of. If the S&P Agreement had not been validly extended (which is not the case here) there would have been no basis for applying for a collective sale order. It seems obvious that Parliament would not have intended that in the absence of a valid S&P Agreement an order for collective sale could still issue.

Application was not brought by authorised representatives

94 Section 84A(2) of the Act provides:

> The subsidiary proprietors referred to in subsection (1) shall appoint not more than 3 persons from among themselves to act jointly as their authorised representatives in connection with any application made under that subsection.

The subsidiary proprietors referred to in sub-s (1) for the purposes of the present case are the Majority who signed the CSA.

95 The plaintiffs contended that the defendants are not the authorised representatives which the Majority appointed under the CSA. They relied on cl 1.1 of the CSA which states:

> "Representatives" shall refer to the persons listed in Schedule 6 authorised to represent the Owners in the Application.

Schedule 6 names the representatives as

(a) Tan Sin Yin

(b) Ong Lay Teng Andrew

(c) Chong Yan Chin

The plaintiffs therefore contended that only the three named persons acting jointly could represent the Majority in the application to the Board and that since, of the three defendants, only the third was named in Schedule 6, the application to the Board had not been competently made.

96 The defendants, however, referred to cl 11.1.2 of the CSA whereby the Majority agree "to authorise ***any*** three of the members of the Sale Committee to act as their Representatives in connection with the Application". The defendants contended that, on a plain reading, cl 11.1.2 necessarily meant that the SC were empowered to choose three persons from amongst the members of the SC to act as the representatives.

97 It is trite law that a contract must be construed as a whole. Accordingly, one cannot take into account only the provisions which the plaintiffs rely on (*viz*, cl 1.1 and Schedule 6) without taking into account cl 11.1.2 and giving it a proper construction. That the definition of "Representatives" was not intended as the last word on the matter can be seen from its similarity with the definition of "Sale Committee" which provides thus:

> "Sale Committee" shall refer to the list in Schedule 2.

98 Although the SC members were listed in Schedule 2, it was clearly not intended that the list be immutable. Clause 2.3 provides:

> Any member of the Sale Committee may elect to resign in writing and such resignation will take

immediately effect from the date thereof. In such event, the Sale Committee shall have the power to re-appoint another Owner to replace the member who has resigned.

In the same way, since the initial choice of these representatives was made under cl 1.1 read with Schedule 6, cl 11.1.2 ought to be construed as allowing for the representatives to be changed. The words "any three" in cl 11.1.2 should be read as permitting substitution to be made. If the list in Schedule 6 was cast in stone, cl 11.1.2 would be rendered redundant.

99 What then is the effect of cl 11.1.2? One view is that it is an agreement amongst the Majority to agree on the appointment of substitutes for the representatives – in other words, if there were to be substitution the Majority would have to select the substitute(s). Such a decision would require the agreement of each and every member of the Majority since there is no provision in the CSA for decisions of the Majority to be taken by majority vote. It is immediately clear that such an agreement to agree is no agreement at all. Such a construction would render cl 11.1.2 of no legal effect.

100 An alternative construction of cl 11.1.2 is that the Majority thereby agreed in advance that in the event of a need for substitution ***any*** three members of the SC would be authorised to act as the Majority's representatives. Admittedly, there remains the need to decide on the selection of the substitute. But instead of the Majority, such substitution is decided by the SC who, as noted earlier, have been given wide-ranging powers under the CSA including the power under cl 2.3 to appoint a substitute for a member of the SC who resigns. Unlike the Majority, decisions of the SC are taken by majority vote. This, coupled with the fact that the SC have bound themselves to act diligently in the discharge of their duties, should ensure that the sale will be carried through despite any representative resigning.

101 In my view, such a construction is much to be preferred as it would further the intention of the Majority that the SC is to do all acts deeds matters and things which they in good faith and in accordance with the spirit and intent of the CSA deem necessary for the implementation of the CSA, the collective sale and the S&P Agreement.

102 In contrast, the former construction would mean that despite the CSA and the S&P Agreement having been signed, the resignation of a single member amongst the three named representatives could cause the sale to come to a grinding halt with potentially disastrous consequences should the Majority fail to agree unanimously on a substitute. The Majority would be in breach of their obligation to the Purchaser to apply for the approval of the Board. Also those among the Majority who had gone ahead to commit themselves to the purchase of alternative accommodation could well be left in a quandary for lack of funds to complete their respective purchases.

103 It is also pertinent to note that none of the signatories to the CSA has ever challenged the appointment of the representatives. One would have thought that if they, being signatories to the CSA, had thought that the representatives had not been duly authorised, they would have been the first to raise such objection, especially since certain of them had taken out OS No 829 of 2007 seeking to impugn the authority of the SC so as to be released from their obligations under the CSA and the S&P Agreement.

104 A second issue is whether the first defendant, Samuel Bernard Sassoon, was a member of the SC. If he was not, then he would not have qualified for appointment under cl 11.1.2 as a representative. (There is no dispute that the second and third defendants are members of the SC and that the third defendant, Chong Yan Chin, was named as one of the three representatives in Schedule 6.)

105 I note from the Notes of Evidence that Mr Low Chai Chong, then counsel for the plaintiffs, in his cross-examination of the first defendant (when the latter first gave evidence before the Board) throughout accepted that he was a member of the SC. When the Board recalled the first defendant to clarify whether he was entitled to make an application before the Board, even then Mr Low did not challenge his appointment as a member of the SC.

106 The first defendant testified that he was appointed a member of the SC sometime in September 2006 and the Board was shown a copy of the minutes of a meeting of the SC on 26 September 2006. Mr Low did not raise any question as to whether the SC was competent to appoint him as a member of the SC (*ie*, whether there was any vacancy caused by a resignation) or as to the manner of his appointment.

107 Mr Low did question whether 15 subsidiary proprietors present at the annual general meeting of the Management Corporation were sufficient to appoint the first defendant or the second defendant (Chong Kok Boon) as representatives for the purpose of the application to the Board. When the first defendant replied that he thought the CSA allowed the SC to act for and on behalf of the Majority, all Mr Low said was, "Well, we will take that into submissions."

108 In these circumstances, it is not open to the plaintiffs to raise a **question of fact** whether the first defendant had been properly made a member of the SC. The Board having decided (inferentially at para 9(a) of the Grounds of Decision) that the first defendant had been properly appointed as a member of the SC, the plaintiffs could not raise this point as a sub-part of their ground of appeal that the defendants were not authorised representatives. In other words, whilst submissions as to the proper construction of the CSA are permissible, submissions as to whether the first defendant had been duly appointed a member of the SC are not. Certainly nothing on the face of the record suggests that the Board's inferential finding that the first defendant was a member of the SC must have been premised on a misconception of the law. Therefore all the three representatives were authorised.

109 Assuming *arguendo* that the first and second defendants were not authorised (which is not the case here) at the very least the third defendant was. No prejudice has been suffered by anyone even if the first and second defendants joined in the application without having been duly authorised. Applying the approach to the statutory construction discussed earlier in my judgment ([43] *supra*), I arrive at the conclusion that, given that the purpose of the legislation is to facilitate *en bloc* sales, Parliament would not have intended that the collective sale, consented to by all but the plaintiffs and ordered by the Board, should be nullified by this technical objection.

Invalid valuation report

110 The fourth ground of appeal is that the valuation report (required under para 1(e)(vi) of The Schedule to be served on all the subsidiary proprietors together with the proposed application to the Board) was invalid because the valuers appraised the Development as of 6 December 2006 when (on the plaintiffs' contention) they should have measured its value as at the date of the S&P Agreement.

111 Para 1(e)(vi) of The Schedule states:

> 1. Before making an application to a Board, the [Majority] … shall —
>
> …
>
> (e) serve notice of the proposed application on all the subsidiary proprietors of all the lots

and common property in the strata title plan concerned … by registered post and by placing a copy of the proposed application under the main door of every lot or flat, together with a copy each of the following:

…

(vi) a valuation report ***that is not more than 3 months old***; …

[emphasis added]

The plaintiffs argued that in deciding whether a property was sold at its true market value, the valuation had to be done with reference to the time of the sale agreement.

112 In support of this contention, there were cited to me statements from various decisions in England and in Singapore regarding the duty of a mortgagee in a mortgagee sale. In each of those decisions, the courts stated the duty of the mortgagee as being to take reasonable precautions to obtain the best price reasonably obtainable at the time of sale. I have no doubt that those statements correctly state the duty of a mortgagee in the exercise of its power of sale.

113 However, a number of observations may be made. First, "the duty of the mortgagee is only to take reasonable precautions. Perfection is not required. On the contrary, some latitude is allowed to a mortgagee": *per* Anderson J in *Hausman v O'Grady* (1988) 42 DLR (4th) 119 at 129. The learned judge further referred to the oft-cited decision of the English Court of Appeal in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 quoting the following passage at 969:

No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.

In *Fisher & Lightwood's Law of Mortgage* (LexisNexis, 12th Ed) at 30.23, it is stated:

If the mortgagee decides to exercise his power of sale, he is under a specific duty ***to take reasonable care*** to obtain the best price reasonably available for the mortgaged property at the time, which will normally equate with the current market value … It is a matter for the mortgagee how that general duty is to be discharged in the circumstances of any given case (e.g. mode of sale, advertisement, time on the market). Such decisions inevitably involve an exercise of informed judgment on the part of the mortgagee, ***in respect of which there are no absolute requirements***. The mortgagee will not be adjudged to be in default unless he is plainly on the wrong side of the line … ***The burden of proof is on the mortgagor***, or other person seeking to set aside the sale, to prove breach of this duty by the mortgagee. [emphasis added]

114 Second, and consistently with the absence of absolute requirements, in none of the cases cited by the plaintiffs, is there any suggestion that the mortgagee must have obtained a valuation with reference to the actual date of sale. In practice, it is certainly not uncommon for a valuation to be obtained at or around the time a decision was taken to sell the property rather than at the time of sale. *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997 cited by the plaintiffs, gives implicit recognition to this at 1005:

If the period of time between the dates of the decision to sell and of the sale is short, there may be no difference in value between the two dates and indeed in many (if not most cases) this may be readily assumed.

115 In the present case, para 1(e)(vi) of The Schedule does not prescribe that the valuation must be undertaken with reference to the date of the S&P Agreement. On the contrary, the requirement clearly is only that the valuation report should not be more than three months old.

116 The plaintiffs did not furnish any proof that the Development was sold at an undervalue. *Per contra*, the valuer, Mr Daniel Ee, had testified at the hearing before the Board that there was no substantial difference in value between that on 27 October 2006 (the date of the sale) and the value on 6 December 2006 (the date of valuation). Amazingly, the plaintiffs' rebuttal in this regard was that it was irrelevant whether there was a difference in the value and that The Schedule absolutely required that the valuation be as at the date of sale (which, as noted above, it does not).

117 But even if I were to assume that the plaintiffs were correct, what would be the consequence of such non-compliance? As noted, the uncontroverted evidence was that there was no material difference in value whichever of the two dates the valuation was made on. Given that the purpose of the legislation is to make it easier to achieve *en bloc* sales, and no prejudice to the plaintiffs having been shown, I am of the view that the legislature would not have intended that the decision of the Board be invalidated by such a footling objection.

118 This ground of appeal therefore also fails.

S&P Agreement did not specify method of distributing sale proceeds

119 I move on to the fifth ground of appeal.

120 Section 84A(1) provides that an application to a Board for an order for sale of all the lots and common property in a strata title plan may be made by "[the Majority] who have agreed in writing to sell [the Development] to a purchaser under a sale and purchase agreement which specifies the proposed method of distributing the sale proceeds to all the subsidiary proprietors (whether in cash or kind or both), subject to an order being made …".

121 There was no provision in the S&P Agreement specifying the proposed method of distribution of the sale proceeds. However, such specification was provided in the CSA, a copy of which was given to all the subsidiary proprietors and to the Board as required by paras 1(e) and 4 of The Schedule. At the hearing before me, it was not disputed that the Purchaser had also been given a copy of the CSA. In these circumstances, what was the effect of the omission in the S&P Agreement?

122 For the plaintiffs, it was argued that such a requirement was a "condition precedent" to the assertion of jurisdiction by the Board over the application so that it did not matter that this ground had not been raised before the Board. It was further contended that clearly the legislature's intention was that the S&P Agreement had to specify the method of distributing the proceeds of sale. In support of this contention, my attention was drawn to the Minister of State for Law, Associate Professor Ho Peng Kee's speech in Parliament at the Second Reading of the Land Titles (Strata) (Amendment) Bill on 31 July 1998 where he said that the conditional S&P Agreement "must" state the price and the method of distributing the sale proceeds.

123 The plaintiffs submitted that there were good reasons why the S&P Agreement should specify the proposed method of distributing the sale proceeds to all the subsidiary proprietors. First, the plaintiffs contended that the S&P Agreement was an aggregation of separate contracts between each subsidiary proprietor and the purchaser and that the failure to specify the proposed method of distribution would mean that the S&P Agreement would lack the price payable to each subsidiary proprietor. This point was recently considered by Tan Lee Meng J in *UOL Development (Novena) Pte*

Ltd v Commissioner of Stamp Duties [2007] SGHC 173. In that case the purchaser of an *en bloc* development sought to minimise the stamp duty payable on the contract for sale by arguing that the *en bloc* sale was made up of 53 separate acceptances of the purchaser's offer, each of which was entitled to enjoy the lower *ad valorem* stamp duty on the first $360,000 of the consideration for such transfer (resulting in a saving of $5,400 per transfer). Tan J rejected the purchaser's contention and held that the *en bloc* sale was one transaction. I respectfully agree with the learned judge. That was a case in which all the owners had agreed to sell. Our present case is even stronger.

124 A cursory look at s 84A will show that the *en bloc* sale is one transaction. First, s 84A(1) refers to the [Majority] having "agreed in writing to sell all the lots and common property … subject to an order being made" by the Board. Clearly, the Majority did not own all the lots but yet they contracted to sell all. If the agreement was an aggregation of separate sale and purchase agreements, ***all*** the subsidiary proprietors would have had to contract to sell their respective lots. Second, s 84A(9)(a) refers to the sale in the singular number as "the transaction" and also to a single "sale price for the lots and the common property".

125 The second reason offered by the plaintiffs why the S&P Agreement should specify the proposed method of distributing the sale proceeds is that the legislature intended such specification as a means of protecting the minority who are compelled to sell their units to the Purchaser. In particular, the plaintiffs reasoned that such specification would provide for direct contractual recourse against the Purchaser. My response to that is first, that this was not anywhere mentioned in the Minister of State's speech (at the Second Reading) as a reason for the specification. Instead, he specifically stated:

> These procedures will ensure that all relevant parties will have adequate notice of the sale and its terms, ***in order to decide whether or not to lodge objections with the Strata Titles Board.*** [emphasis added]

(The procedures he mentioned in his speech included the requirement to include in the S&P Agreement the method of distributing sale proceeds.)

126 Second, it would be strange indeed that Parliament would have contemplated that the minority might be seeking to enforce a sale in which *ex hypothesi* they were unwilling participants to begin with. Third, since a minority owner would not have been party to the CSA, he would not have appointed the SC as his agents in the execution of the S&P Agreement. Rather, his eventual participation, if the Board approved the *en bloc* sale, would be by reason of compulsion of law. It is at best a moot point whether he could properly be regarded a "party" to the S&P Agreement.

127 We return to consider the effect of the omission to include the provision for distribution of the sale proceeds in the S&P Agreement. Does it invalidate the decision of the Board? The general discussion on this question in [28] and [58] should be recalled as it is particularly relevant to this ground of appeal.

128 As was observed in the joint judgment in *Project Blue Sky* ([33] *supra*) at [91]:

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a

contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

Fortunately, as we have seen in [48] to [53], in the present case, there is no difficulty in discerning the purpose of the Act in regard to *en bloc* sales and the place of the statutory requirement in question in the context of that purpose.

129 Although there was no provision in the S&P Agreement specifying the proposed method of distribution of the sale proceeds, such specification was provided in the CSA, a copy of which was given to all the subsidiary proprietors and to the Board. The subsidiary proprietors were therefore provided with the information so as to be able to decide whether or not to object to the sale. (As was explained by the Minister, this was the purpose of giving notice of the terms of the sale to all relevant parties.) The Board was also able to carry out its duty under s 84A(9) to determine whether the sale was in good faith, taking into account the sale price and the proposed method of distributing the proceeds of sale. Considering that the purpose of the legislation is to make *en bloc* sales easier to achieve and taking into account the compliance in effect if not in form with the requirement for specification of the method of distribution and in the absence of any real prejudice to the plaintiffs, I am of the view that Parliament would not have intended that the approval of the sale by the Board should be invalidated by reason of such a technical objection.

130 We move on to the sixth and seventh grounds which were set out in the plaintiffs' former solicitors Rodyk & Davidson's written submissions. Mr Hwang had earlier indicated that he was not proceeding with those two grounds but, at the last moment, changed his mind.

Transaction not in good faith having regard to the sale price

131 This ground and the arguments made in support of it relate to questions of fact as to which there is no right of appeal (see s 98(1) of BMSMA). Furthermore, the contentions raised under this ground are devoid of merit.

132 First, it was alleged that the defendants had failed to show that the transaction was in good faith allegedly as required by s 84A(9)(a)(i). The short answer is that the onus of satisfying the Board that the transaction was not in good faith fell on the party making the allegation.

133 Second, in similar vein, it was argued that the defendants had to show that the sale price was the best possible in the circumstances. Again, the short answer is that the onus fell on the plaintiffs to show that the sale price arrived at was not the best price reasonably obtainable. Tellingly, the plaintiffs presented no valuation report or other evidence to challenge the *bona fides* of the sale price. Instead, they relied on totally unsubstantiated rumours that the 13th floor owners (who had earlier refused to sell unless they were paid for their accessory lots) had been paid off by a person or persons unknown and contended that such surreptitious payments should be added to the sale price. The Board accepted the evidence of Mr Daniel Ee of Savills (Singapore) Pte Ltd (who had prepared the valuation report) based on three comparable sales which showed that the sale price of $88.1m was above the valuation of $87.5m and the reserve price of $88m.

134 This ground of appeal must therefore fail.

Transaction not in good faith having regard to the method of distribution of sale proceeds

135 The plaintiffs contended that the Board erred in law in accepting a method of distribution which appeared to be inconsistent with a report by Bernard Valuers & Real Estate Consultants Pte Ltd ("Bernard Valuers"). The Board was of the view that the proposed method which called for half of the sale proceeds to be divided based on share value and the other half to be divided based on strata area, was not an unreasonable method. It was not satisfied that the transaction was not in good faith. Whether in the view of the Board the agreed method of distribution impacted on the *bona fides* of the transaction, is necessarily a question of fact. This is not a case where the facts are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. The plaintiffs therefore have no right of appeal on this ground. Nevertheless, I wish to add a further comment.

136 Under the CSA, the proposed method of distribution did not take into account the accessory lots (roof terrace) attached to the units on the 13th floor. Bernard Valuers were of the view that the 13th floor units ought to be apportioned an additional element for their accessory lots. However, despite initial reluctance, the owners of the 13th floor units accepted and entered into the CSA on its terms. They did not appear before the Board to raise objections to the sale.

137 The plaintiffs have no cause for complaint as they are owners of a 7th floor unit. As such, under the proposed method of distribution of the sale proceeds, they suffered no loss but in fact stood to gain by the denial of allocation of any part of the sale price to the 13th floor accessory lots. Remarkably, the stand the plaintiffs took in this appeal also contradicted the testimony of the second plaintiff during the hearing before the Board. When asked whether he would agree to the 13th floor owners receiving more for their units, he had replied in the negative!

138 In the result, the appeal is dismissed with costs to be taxed.

[note: 1]As cited before Woo J, the last two sentences in the passage appear to have been omitted.