N K Rajarh & Ors *v* Tan Eng Chuan & Ors
[2013] SGHC 76

Case Number : OS No 1199 of 2012

Decision Date : 08 April 2013

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : David De Souza and Kevin De Souza (De Souza Lim & Goh LLP) for the plaintiffs; Lim Seng Siew (OTP Law Corporation) for 1st and 2nd defendants; Lai Swee Fung (Unilegal LLC) for 3rd defendant.

Parties : N K Rajarh & Ors — Tan Eng Chuan & Ors

Land – Strata titles – Collective Sales

Equity – Fiduciary relationships

Words and Phrases

8 April 2013

Belinda Ang Saw Ean J:

1 The essential facts in the Originating Summons No 1199/2012/C ("OS1199/2012") are relatively simple, though I cannot say the same for the issues raised here.

2 This application *vide* OS 1199/2012 is to approve the collective sale of a 3-storey walk-up block of flats known as Harbour View Gardens (Strata Title Plan No. 927) comprised in Land Lot No. 1789M of Mukim 3 ("the Development"). The Development is a small residential development of 14 residential units of different sizes with different share values.

3 The Collective Sale Committee ("CSC") was appointed on 10 September 2011. The CSC put up the Development for a collective sale by public tender between 18 April 2012 and 16 May 2012. The reserve price was $34m. No offers to purchase the Development were received at the close of the tender. Subsequently, on 19 July 2012, an offer was received to purchase the Development at the price of $33m. The defendants opposed the collective sale throughout.

4 On 17 September 2012, the plaintiffs applied to the Strata Title Board ("STB") to approve the collective sale. Mediation by the STB proved unsuccessful. On 26 November 2012, the STB issued a Notice to Stop Order under s 84A(6B) of the Land Titles Strata Act (Cap 158 Rev Ed 2009)("LTSA"). The defendants did not withdraw their objections. Consequently, the STB issued a s 84A stop order on 6 December 2012. The plaintiffs filed OS 1199/2012 on 19 December 2012.

5 Several points were advanced in arguments by counsel for the plaintiffs, Mr David De Souza ("Mr De Souza"), counsel for the first and second defendants, Mr Lim Seng Siew ("Mr Lim"), and counsel for the third defendant, Mr Lai Swee Fung ("Mr Lai"). The points are comprehensively set out in all the written submissions and reiterated in oral submissions. Essentially, the defendants object to the sale on the grounds of lack of good faith.

6 In the present case, it is common ground that the subsidiary proprietors of unit 217, Han Min Juan ("Mr Han") and Jee Meng Tu (collectively referred to as "the Hans") signed the Collective Sale Agreement ("CSA") and a Supplemental Agreement (agreeing to the collective sale at a price below the reserve price) after they were promised an incentive payment of $200,000. The defendants contended, and it was accepted by the plaintiffs, that this inducement was for the sole objective of obtaining and achieving the requisite 80% threshold (by share value and strata area) prescribed by s84A(1A). It was contended on behalf of the defendants that the sale transaction was not in good faith because it was wrong to incentivise a subsidiary proprietor in order to secure the requisite 80%. In this connection, the CSC did not act in a transparent manner in the sale process, and was in breach of the good faith provision under the LTSA and at common law. It was further argued that the CSC did not act even-handedly in the interest of all the subsidiary proprietors because the additional inducement payment of $200,000 was only offered by the CSC to one opposing minority owner and not to all opposing minority owners. That is to say, the CSC's offer was targeted at the Hans to the prejudice of the defendants. Mr Lim explained that with the inducement payment of $200,000, the Hans would receive more money than what they would have gotten even if the Development was sold at the reserve price of $34m. The final broad objection, which is tied to the inducement payment of $200,000, related to the method of distributing the proceeds of sale.

7 I propose to start with Mr De Souza's interpretation of s 84A(9)(a)(i) of the LTSA which he mounted in reply to the defendants' contention that the sale transaction was not in good faith because of the incentive or inducement payment of $200,000. Mr De Souza argued that parliament had prescribed three specific factors under s 84A (9)(a)(i) for the court to take into consideration when it considers whether or not the transaction was made in good faith (*viz*. the sale price, the method of distributing the proceeds of sale and the relationship of the purchaser to any of the subsidiary proprietors). According to him, the defendants' contention introduced a new factor which the court should disregard as it is outside the ambit of the three specific factors.

8 Mr De Souza's strict reading of s 84A(9)(a)(i) misses the meaning and intent of the statutory provision. Andrew Ang J in *Tsai Jean v Har Mee Lee* [2009] 2 SLR(R) observed (at [24]) that a strict and literal interpretation of the sub-section in question would render it unworkable. I agree with Ang J's observation. Furthermore, the Court of Appeal in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 ("*Horizon Towers")* at [133] has ruled that the duty of "good faith" under s 84A(9)(a)(i) requires the CSC to discharge its statutory, contractual and equitable functions and duties faithfully and conscientiously, and to hold an even hand between the consenting and the objecting owners in the sale process. In short, the CSC has to discharge its duty of good faith in five (non-exhaustive) areas in relation to the entire collective sale process. The Court of Appeal in *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724 ("*Allgreen*") took the opportunity to summarise the five areas in question (at [85]):

> To recapitulate, the duty of good faith requires the [CSC] to discharge its duties in good faith in five specific areas, including but not limited to (a) the duty of loyalty or fidelity; (b) the duty of even-handedness; (c) the duty to avoid any conflict of interest; (d) the duty to make full disclosure of relevant information; and (e) the duty to act with conscientiousness.

9 By s 84A(9)(a)(i) and in the context of this case, the court has to take into consideration the fact that the sale price of $33m for the lots and the common property in the strata title plan was below the reserve price of $34m; and that at the time the offer of $33m was made on 19 July 2012 and even up to 23 July 2012, there was still no requisite 80% consent for a collective sale at the below reserve price of $33m. As such, this court has to consider how the 80% threshold for a collective sale at the sale price of $33m was eventually obtained.

10 In doing so, this court has to take note that RH West Coast Pte Ltd's ("RH West Coast") offer of $33m was received on 19 July 2012 which was one week before expiry of the ten-week window to proceed with a collective sale by private treaty (see Third Schedule to LTSA para 11(3)); that there was a rush to get the Supplementary Agreement signed by the subsidiary proprietors (who had earlier signed the Collective Sale Agreement ("CSA")) before 25 July 2012 (which was the last day for the CSC to sign the sale and purchase agreement with RH West Coast); and that even though the subsidiary proprietors who had earlier signed the CSA agreed to sign the Supplemental Agreement consenting to a collective sale below the reserve price, the 80% threshold had still not been met on 23 July 2012 which was the date of the general meeting. In determining whether the transaction was in good faith, the court has to also consider the circumstances which led to an agreement to pay the Hans the sum of $200,000 as a condition for their signatures on the CSA and the Supplemental Agreement. Mr N K Rajarh ("Mr Rajarh") stated in his 2nd Affidavit (at para 24) that "the objective of the offer was to obtain the requisite 80% and the Additional Payment was a fixed amount [of $200,000], the payment would be made to the subsidiary proprietor(s) of the 1st unit that signed the CSA and the Supplemental Agreement so that the 80% would be achieved." Mr Rajarh confirmed in cross-examination that the offer of $200,000 was only made to the Hans. I digress to mention for completeness that Mr Rajarh was cross-examined instead of Mr Han after Mr De Souza advised that he could not contact Mr Han to take the stand on 8 March 2013.

11 The LTSA does not specify precisely what it is about the sale price the court should take into account under s 84(9)(a)(i)(A). However, the approach as described earlier (see [9] and [10]) above is not dissimilar to the approach taken by the STB in *Horizon Towers* and approved by the Court of Appeal in *Horizon Towers* at [129] and [130] of that decision.

12 I must emphasise that the true discourse in this case centres on the collective sale process. As such, the entire collective sale process has to be scrutinised.

13 This leads me to the CSC's refusal to provide a copy of the Contribution Agreement to the defendants. Mr De Souza argued that the Contribution Agreement was not an agreement signed by the CSC. He stated in his written submissions that it was signed by several majority subsidiary proprietors who had voluntarily agreed to contribute a portion of their sale proceeds on legal completion to incentivize the Hans to sign the CSA and the Supplementary Agreement (see para 15 of the plaintiffs' submissions). Mr Rajarh confirmed in his 2nd Affidavit (at para 31) that the plaintiffs' refusal to disclose the Contribution Agreement (he called it the "Compensation Agreement" in his affidavit) was because it was a private arrangement between the contributing owners and the Hans, and, as such, the defendants were not entitled to see it.

14 This court ordered Mr Rajarh to disclose the Contribution Agreement on 8 March 2013 in the course of his cross-examination. I must point out that up to that point in time, the defendants were only aware that the consenting owners were willing to contribute the additional payment of $200,000 and their respective lawyers were asking for sight of a copy of the agreement including the names of the contributors. All the while the defendants were labouring under the impression that the contributing owners had contracted to pay the Hans. This was not the case. Following the direction to disclose the Contribution Agreement, a second agreement surfaced. This was the agreement where Colliers International (Singapore) Pte Ltd ("Colliers") had contracted with the Hans on 24 July 2012 ("the Colliers Agreement") to pay them the $200,000 in consideration for the Hans signing the CSA and the Supplementary Agreement. I will come to the significance of the Colliers Agreement shortly. Suffice it to say at this point that the plaintiffs' refusal to disclose the Contribution Agreement for the reason that it was a private arrangement between some contributing owners with the Hans was disingenuous. The order to disclose the Contribution Agreement forced the Colliers Agreement to come

to light. The disclosure of the Contribution Agreement revealed that the contract was between the contributing owners and Colliers. Interestingly, the second contract was between Colliers and the Hans.

15 At a clarification hearing on 3 April 2013, Mr De Souza was asked, amongst other things, to explain the Colliers Agreement. The upshot of this was a further disclosure of e-mail exchanges between Colliers and Miao Miao (the subsidiary proprietor of unit 219A). Andy Gan of Colliers ("Andy") sent to Miao Miao an e-mail on 24 July 2012 (timed at 15:17:52) with the heading "Re Collective Sale of Harbour View Gardens- Proposed Compensation to Han". Andy wrote:

> The majority of the owners present [at the general meeting] agreed to compensate the last owner who [to] sign the CSA at the previously agreed figure of approximately $230,000.
>
> Your proportion for compensation is also proportionately reduced to only $15,881.00.
>
> Please sign both copies against your name in the table & get it witnessed before a notary public or in Singapore consular in Shanghai as suggested by you.
>
> Please scan a copy & e-mail back first.
>
> Would it also be possible for you to send it back to our address via express courier?
>
> We need to wrap up this deal by tomorrow, as our deadline for a private treaty expires 25 July 2012.

16 Miao Miao replied on 24 July 2012 at 16:09:27. He wrote

> Thanks Andy for the updating.
>
> I just confirmed appointment with Singapore consular in Shanghai at 1530pm tomorrow (25 July 2012). Will go there and sign before a consular and then send you a scanned copy of the documents. The couriered documents should reach your office on Thursday or latest Friday.

17 Andy's e-mail mentioned a compensation figure of $230,000 which is $30,000 more than the figure of $200,000 shown in the Contribution Agreement. This e-mail throws up another line of query in relation to this $30,000. Mr De Souza dismisses this apparent discrepancy as an error. Mr Lim points out that there is no evidence to support this claim. Be that as it may, the two e-mails, at best, established that Miao Miao on the afternoon of 24 July 2012 was in principle agreeable to contribute towards the "proposed compensation to Han". There was no binding and enforceable agreement until the formal contract (*ie*, the Contribution Agreement) was signed.

18 Not only was Miao Miao's Contribution Agreement signed on 25 July 2012, his Supplemental Agreement was also signed on the same date and occasion before the same Vice-Consul at the Singapore Consulate in Shanghai. The court was not told the time the CSC signed the sale and purchase contract with RH West Coast. Putting this latter discreet point aside, the Colliers Agreement was improper for the reasons explained below. The Collier Agreement has a bearing on the propriety of the collective sale process. The conduct of the members of the CSC, who were contributing owners, must also be scrutinised when considering whether the duty of good faith was observed in the collective sale process.

19 It is not disputed that the CSC owed duties as a fiduciary to all the subsidiary proprietors

including the defendants. Both groups had conflicting interests. Thus, the obligation of loyalty to both groups requires the CSC to act in good faith in the interests of each group. It must not act with the intention of furthering the interests of one group to the prejudice of the other. Finally, the CSC as fiduciary must take care not to find itself in a position where there was actual conflict of duty so that it could not fulfil its obligations to one group without failing in its obligations to the other.

20 The CSC's fiduciary relationship with all subsidiary proprietors contains disclosure obligations. This fiduciary relationship involves expectations of honesty. An expectation of honesty from the CSC is central to good faith. Although its requirements are sensitive to context, the test of good faith is objective. It depends not on a party's perception of whether conduct is improper, but on whether the conduct is regarded as commercially unacceptable by reasonable and honest people (see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378).

21 V K Rajah JA in *Allgreen* at [85] said that in the context of a collective sale, "the duty of good faith is confined to the conduct of the CSC (and the majority owners) in relation to the collective sale process". The conduct of "the majority owners", the words in parenthesis at [85] of *Allgreen*, is to be understood in the context of members of the CSC who are part of the group of majority owners in favour of a collective sale. The conduct of "the majority owners" in parenthesis in the sale process is also to be understood in the light of Rajah JA's comments (at [3] of Horizon Towers) in relation to what is socially and morally unacceptable behaviour:

> ..,[I]t cannot be gainsaid that, in establishing the statutory scheme, Parliament had carefully considered both the rights and financial interests of the objecting subsidiary proprietors. As a class, they have to be adequately protected from bullying and underhand tactics as well as any potentially collusive or improper conduct on the part of any of the majority owners. Thus, detailed modalities were put in place to ensure that the views of objecting owners are adequately ventilated and their objections independently appraised. In particular, a State Title Board ("STB") is expressly empowered to review the entire sale process and to ensure that it has been carried out in good faith...

22 I should add that Colliers as the CSC's appointed marketing agent was, at all material times, a sub-agent for all the subsidiary proprietors including the dissenting minority. In *Horizon Towers* at [107], VK Rajah JA observed that "*The [CSC] and advisers also have the duty to avoid any possible conflict of interest*". In reaching this dicta, VK Rajah JA must have had in mind para 7 of the Third Schedule of the LTSA that covers the appointment of property consultants or marketing agent and lawyers in connection with the collective sale. Therefore, Colliers like the other professional advisers appointed by the CSC had a duty to avoid any possible conflict of interest.

23 In this case, the CSC and the plaintiffs as representatives of the majority owners did not disclose the Colliers Agreement to the defendants. Mr De Souza's submissions stated that the Contribution Agreement was not the property of the CSC. Mr De Souza and Mr Rajarh avoided any reference to the Colliers Agreement. In my view, the Colliers Agreement with the Hans would not count as a private arrangement between the contributing owners and the Hans. It was an agreement entered into by Colliers who was a sub-agent of *all subsidiary proprietors* in connection with the collective sale. There was therefore no question that such an agreement had to be disclosed to the defendants as minority owners.

24 The Colliers Agreement is an important document. Significantly, this agreement was signed on 24 July 2012. It is clear from reading the Colliers Agreement that it was Colliers who was contractually obligated to pay the Hans the sum of $200,000 and the purpose of this payment was to induce them to sign the CSA and the Supplemental Agreement. The Hans' signatures were critical to achieving the

80% threshold needed for the CSC to sell the Development to RH West Coast Pte Ltd at below the reserve price. The last day for the CSC to sign the sale and purchase agreement with RH West Coast was on the 25 July 2012.

25 Returning to Mr De Souza's argument that there was nothing wrong in making an incentive payment to reach the threshold of 80%, he explained that the LTSA did not prohibit this, and the Court of Appeal in *Allgreen* did not disapprove incentive payments to minority owners. Both Mr Lim and Mr Lai argued that it was wrong to make incentive payments if the threshold of 80% was not reached in the first place. *Allgreen* was distinguishable on the facts. In that case, the requisite 80% was achieved and the purchaser's incentive payment to the non-consenting minority was to obviate the necessity of a contested hearing before the STB. The purchasers in *Allgreen* were striving for unanimous approval. In this case, the incentive was given to achieve the statutory threshold of not less than 80% (by share value and by strata area).

26 As I see it, the Colliers Agreement is a material source of concern and, as such, the nub of the issue is whether the Colliers Agreement was improper in the context of the collective sale process. The recital (d) to the Colliers Agreement stated that Colliers was assisting the CSC to obtain the signatures of not less than 80% (by share value and by strata area) of the subsidiary proprietors of the Development to the Supplemental Agreement. By recital (e), Colliers had requested the Hans to sign the CSA and the Supplemental Agreement and they had agreed to sign on the condition that the gross sale price that they would receive for their unit was not less than $3,400,693. Colliers agreed to pay the $200,000. Colliers also obtained, in exchange for the inducement payment of $200,000, the Hans' undertaking not to exercise their statutory right to rescind their signatures to the CSA within 5 days from their signing the same.

27 Nowhere was it stated in the Colliers Agreement that the $200,000 was from the contributing owners. By clause 3, Colliers undertook to pay the Hans the sum of $200,000 upon successful sale of the Development and its legal completion. Clause 4 reiterated the converse position in clause 3: that Colliers would not be under any obligation whatsoever to pay $200,000 or any part thereof to the Hans if the collective sale and legal completion did not take place. In the event, the CSA and the Supplemental Agreement would also be deemed cancelled and void.

28 So why did Colliers intervene? Or why was Colliers interposed? If it was a private arrangement, why was the Contribution Agreement not signed by the majority owners directly with the Hans? The answer is self-evident. On 24 July 2012, Miao Miao (the subsidiary proprietor of unit 219A) was in Shanghai and he had yet to sign the Contribution Agreement for his contribution of $15,881. It cannot be disputed that Miao Miao signed the Contribution Agreement in Shanghai on 25 July 2012. Significantly, from the signatures found on the Contribution Agreement on 23 July 2012, the amount pledged was $184,594. Colliers stepped in or was interposed to "underwrite", so to speak, the shortfall of $15,881. Colliers who was acting for the CSC entered directly into a contract with the Hans on 24 July 2012. Colliers willingness to enter the Colliers Agreement was obvious. It is evident from the documentary evidence that Colliers' commission was payable only if the collective sale was successful. Colliers put itself in a position where its duties to the CSC and the defendants conflicted with its own interest.

29 As regards Colliers' duty as sub-agent of the defendants, Colliers acted directly against the defendants' interest not to sell below the reserve price. Separately, I find that the Colliers Agreement was so drafted and entered into (before there was a binding and enforceable Contribution Agreement for the total sum of $200,000) to assist the CSC to act in breach of the fiduciary duties owed to the defendants by conceiving, planning and assisting in giving effect to a scheme jointly with those members of the CSC who were also contributing owners to pay the Hans a cash inducement of

$200,000 to achieve the requisite 80% before the last day for the CSC to sign the sale and purchase agreement. Members of the CSC who signed the Contribution Agreement would be hard pressed to deny that they were not aware of the circumstances that led to the Colliers Agreement. By clause 2 of the Contribution Agreement, Colliers was required to enter into the Colliers Agreement with the Hans. This brings into play the CSC's causal role in engaging Colliers to act in conflict of interest. The Colliers Agreement was part and parcel of the scheme that was put in place because Miao Miao had not signed the Contribution Agreement and Supplemental Agreement consenting to the collective sale at $33m before 25 July 2012.

30 Even if the Colliers Agreement was conceived as a stop-gap measure, factually, it was on the back of the Colliers Agreement that the Hans signed the CSA and the Supplemental Agreement on 24 July 2012, and between them, it was a binding and enforceable agreement. The fact that the Contribution Agreement was ultimately signed by the last person, Miao Miao, on 25 July 2012 did not make the Colliers Agreement any less improper. It also did not matter that Colliers would be reimbursed by the contributing owners under the Contribution Agreement. The fact remains that Colliers had contracted with the Hans to pay them $200,000 on 24 July 2012. It cannot be denied that the CSC knew of and acquiesced in Colliers being interposed to contract directly with the Hans before the entire $200,000 contribution was formally secured for the purpose of collecting the Hans' signatures. Even if for the sake of argument that the CSC was kept in the dark, which is highly unlikely, Colliers' knowledge as the agent of the CSC would be imputed to the CSC. I agree with both Mr Lim and Mr Lai that the CSC also did not act in a transparent manner in the sale process. It breached its duty of disclosure until it was ordered to disclose the Contribution Agreement and the Colliers Agreement surfaced. It also breached its obligation of loyalty owed to the dissenting minority owners. In my view, the CSC's honesty to the defendants was wanting. It breached its duty of loyalty and honesty to the defendants by its acquiescence of the Colliers Agreement and so furthered the interest of the majority owners to the prejudice of the defendants (see the principles stated in [19] above). By taking part in the scheme that resulted in the Colliers Agreement, the CSC acted in conflict of its duty to the defendants. Accordingly, for all these reasons, the CSC had not acted in good faith in the sale transaction.

31 On the evidence, the $200,000 additional payment was not offered to the defendants for their respective units. This finding is consistent with other objective facts in evidence. In the case of the first and second defendants, they owned two units and it would make no sense for them to agree to sell one without the other. In short, any incentive payment would be for both units. In the case of the third defendant, her unit was too small for her consent to be meaningful. Above all, on the facts, the contributing owners were in no position to offer the additional payment to all the non-consenting owners because there was no fund of $200,000 as at 24 July 2012 as not *all* contributing owners had signed the Contribution Agreement by that time. It was Colliers who offered and contracted to pay $200,000 to the Hans on 24 July 2012.

32 The 80% threshold is prescribed by parliament. It is a statutory percentage that was supposed to be reached voluntarily. This understanding is reinforced by the existence of the statutory cooling-off-period of 5 days designed to give every subsidiary proprietor who had signed the CSA a chance to retract or rescind the CSA. This is the statutory right to rescind. In discharging its responsibility to secure a collective sale, the sale process must be carried out in good faith. In the context of this case, the participation of Colliers in cash inducement with the knowledge and acquiescence of the CSC is conduct that is commercially unacceptable by reasonable and honest people. Such an inducement was on the CSC's part an act of bad faith and in breach of fiduciary duty owed to the defendants.

33 At present, the law does not prohibit incentive or inducement payments to minority owners *per*

se (see *Allgreen* at [91]). In *Allgreen*, there was no issue with the purchaser making such incentive payments to the minority owners. After all, within the statutory framework of the LTSA, the purchaser owed no contractual or legal duty to the majority consenting owners.

34 In *Allgreen*, the Court of Appeal, in disagreeing that there should be a general implied term prohibiting the making of inducement payments to minority owners, acknowledged that (at [72]):

> ...such a term would mean that even if some of the majority owners, who might for personal, or even noble, reasons be keen to ensure that the sale is carried through, they would be unable to incentivise any or all of the minority owners to alter their stances for the wider common good.

35 I want to add a gloss to the passage above. It should not be objectionable if subsidiary proprietors (who are not members of the CSC) for noble or other reasons make such inducement payments directly and privately to a minority owner. Nevertheless, the clear import from this analysis is that there are certain parties that are subject to duties of good faith and fidelity in relation to the minority owners. One group is CSC members and their incentive payment in their capacity as subsidiary proprietors, but their conduct, will be invariably subject to the test of good faith. Another group is the CSC's professional advisors including its marketing agent like Colliers in this case.

36 As regards members of the CSC making inducement payments in their capacity as subsidiary proprietors of their respective units, there is a policy tension in considering whether they should be permitted to make inducement payments to minority owners. In fact, in small developments, where a large proportion of the subsidiary proprietors would inevitably also be members of the CSC, a blanket prohibition of members of the CSC making additional payments would seem impractical and arguably contrary to the legislative intent of the collective sale regime: which is to facilitate rather than impede collective sales.

37 On the other hand, the argument may be made (a stand taken by the defendants) that CSC members owe fiduciary duties to all subsidiary proprietors including minority owners, and are held to a higher standard of accountability. Members of CSC who are also in the group of majority owners in favour of a collective sale may well argue (as was the case here) that incentive payments are personal and made in their capacity as subsidiary proprietors. Such an argument, in my view, is artificial. Simply put, members of the CSC as fiduciaries have a higher level of accountability owe a duty to all subsidiary proprietors in the collective sale process - they cannot be allowed to enter into engagements which their personal interests conflict with or which may possibly conflict with the interests of those whom they are bound to protect. Any incentive payment by any such individual would be scrutinised and subject to the test of good faith. In the final analysis, each case turns strictly on its individual facts.

38 In the context of this case, applying the principles set out in [19] above, the CSC was in breached of its duty as fiduciary in the following manner. The participation of Colliers in the incentive or inducement payment with the knowledge and acquiescence of the all six members of CSC who were also the contributing owners is conduct that is commercially unacceptable by reasonable and honest people. Such an inducement was on the CSC's part an act of bad faith and in breach of fiduciary duty. Furthermore, it was wrong for Colliers as sub-agent to enter into the Colliers Agreement. The six CSC members knew or must have known about the conflict of interest that Colliers was placing itself in. Good faith required the CSC to ensure that it did not allow conflict of interest faced by its professional advisers (including the marketing agent) to take a foothold in the transaction (see *Horizon Towers* at [165]). In this case, the transaction with Colliers involved Mr Han who was also a CSC member and co-owner of unit 217.

39 Finally, for completeness, I come to the third broad contention, namely the method of distribution. Mr Lai submitted that the proposed method of distributing the sale proceeds to all the subsidiary proprietors under s 84A(9)(a)(i)(B) was inaccurate as it did not show the additional $200,000 to be received by the Hans. In other words, the $200,000 would upset the method of distribution of the $33m and that this was in breach of the good faith requirement in s 84A(9)(i)(B). However, I agree with Mr De Souza that the additional payment was not part of the sale price of $33m under the sale and purchase agreement.

40 For all the reasons stated, OS 1199/2012 is dismissed with costs.