Ng Eng Ghee and Others v Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, intervener) and Another Appeal
[2009] SGCA 30

Case Number	: CA 119/2008, 120/2008, OS 10/2008, 11/2008
Decision Date	: 07 July 2009
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Harry Elias SC, Philip Fong, Justin Chia and Kylie Peh (Harry Elias Partnership) for the appellants in CA 119/2008; Rudy Darmawan (in person) for the appellants in CA 120/2008; C R Rajah SC, Karthigesu Anand Thiyagarajah, Burton Chen and Lalitha Rajah (Tan Rajah & Cheah) for the respondents; Ang Cheng Hock SC, Corina Song, William Ong and Loong Tse Chuan (Allen & Gledhill LLP) for the interveners
Parties	: Ng Eng Ghee; Hendra Gunawan; Sulistiowati Kusumo; Ong Sioe Hong — Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, intervener)

Civil Procedure – Costs – Dismissal of application for collective sale order based on technical non-compliance – Appeals to High Court and Court of Appeal – Appellants having separate representation in proceedings below and in Court of Appeal – Some parties to proceedings below choosing not to participate in appeal – Some appellants appearing in person – Intervener participating in proceedings – Whether non-appealing parties' costs of proceedings below recoverable – Whether appellants entitled to one set of costs each – Whether costs should be awarded for proceedings pertaining to technical non-compliance – Whether standard or indemnity basis – Whether in-person litigants entitled to costs – Whether appellants' counsel entitled to costs of three counsel – Whether intervening party liable for costs – Order 59 r 18A Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Land – Strata Titles – Substantial interest accumulating on deposit paid under Collective Sale Agreement – Strata Titles' Board's order for collective sale set aside at appellate level – Whether objecting subsidiary proprietors entitled to share of interest

7 July 2009 Judgment reserved.

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

Introduction

1 The right to recover legal costs is especially significant when considerable costs have been incurred in a dispute where one party has deeper pockets than the other. Costs rules and awards could in such circumstances have a profound impact on the final outcome of the legal proceedings. A party's vindication on the merits may prove to be hollow if the fruits of success are soured by uncompensated costs. The primary objective of a costs order is to *compensate* the successful party for all *reasonable* costs incurred rather than to punish the unsuccessful party. Nevertheless, it is trite law that the court may exercise its discretion to give different costs orders on the basis of what it thinks is fair and just. In adjudicating on costs, the court also has to bear in mind that unmerited barriers in the path of recovering reasonably incurred costs might well have the chilling effect of deterring parties, in future, from legitimately pursuing or defending their rights.

2 This judgment is in relation to the cost orders to be made for Civil Appeal No 119 of 2008 ("CA 119/2008") and Civil Appeal No 120 of 2008 ("CA 120/2008") (collectively referred to as "the Appeals") relating to the collective sale of the development known as "Horizon Towers". We gave

judgment in the Appeals in favour of the appellants on 2 April 2009 (see *Ng Eng Ghee v Mamata Kapildev Dave* [2009] SGCA 14 ("*Ng Eng Ghee*")). At the conclusion of our judgment (*ie*, *Ng Eng Ghee*), we invited the parties to address us on the various possible costs permutations that ought to follow our various findings. The parties (as well as two objecting subsidiary proprietors owning a single unit, Then Khek Koon and Tan Kim Lian Jasmine, who had appeared in the High Court proceedings but did not appeal to this court (collectively referred to as "the non-appealing parties")), responded vigorously to our request. After considering their submissions, we now give our decision.

Factual matrix

3 The material facts have been fully elaborated in our judgment in *Ng Eng Ghee*, and we need not repeat them in the present judgment in full. For ease of reference, in this judgment, we shall adopt the same references to the parties that we had earlier employed in *Ng Eng Ghee*. Needless to say, the present judgment and *Ng Eng Ghee* ought to be read together as the present judgment is the corollary of *Ng Eng Ghee*. For present purposes, however, it should be recalled that the identity of the applicants for the collective sale had changed twice in the course of the Strata Titles Board ("the Horizon Board") proceedings (in July to August 2007 ("the First Tranche") and October to November 2007 ("the Second Tranche") (collectively referred to as "the Horizon Board proceedings") before the respondents in the Appeals were substituted for the earlier applicants in the application for the collective sale. For this reason, we will refer to the earlier applicants for the collective sale as "the majority owners". Where, from time to time, we intend to refer to those who consented to the collective sale generally, we will use the term "consenting subsidiary proprietors". Broadly speaking, however, both of these terms refer to the same persons.

4 It should also be remembered that various proceedings involving the parties to the Appeals and other parties had been concluded prior to the filing of the Appeals. It is pertinent, for the purposes of assessing costs, that not all of the parties had been involved in each of these earlier proceedings. By way of a quick illustration, we need only mention that the intervener, Horizon Partners Pte Ltd, was not allowed to be heard in the Horizon Board proceedings. Therefore, to facilitate understanding, we think it will be helpful to tabulate an outline of all of the parties' actual involvement at the various stages of the dispute, up to and including the Appeals:

Stage of proceedings	**Relevant parties**	**Counsel**
The Horizon Board proceedings (*ie*, the First Tranche and the Second Tranche)	The majority owners	M/s Tan Rajah & Cheah ("TRC")
	The appellants in CA 119/2008	M/s Harry Elias Partnership ("HEP")
	The appellants in CA 120/2008 and the non-appealing parties	M/s Tan Kok Quan Partnership ("TKQ")

The appeal by way of Originating Summons No 1269 of 2007 ("OS 1269/2007") to the High Court against the Horizon Board's decision after the First Tranche to dismiss the application for a collective sale on the ground that the application was technically irregular	The majority owners	TRC
	The appellants in CA 119/2008	HEP
	The appellants in CA 120/2008 and the non-appealing parties	TKQ
	The intervener in the Appeals	M/s Allen & Gledhill LLP ("A&G")
The appeals by the objecting subsidiary proprietors by way of Originating Summonses Nos 10 of 2008 and 11 of 2008 to the High Court against the Horizon Board's decision in October 2007 to allow the application for a collective sale ("the High Court Proceedings"), which led to the appeals	The respondents in the Appeals	TRC
	The appellants in CA 119/2008	HEP
	The appellants in CA 120/2008 and the non-appealing parties	All in person
	The intervener in the Appeals	A&G
The appeals against the decision in the High Court proceedings to uphold the Horizon Board's order for a collective sale (*ie*, the Appeals)	The respondents in the Appeals	TRC
	The appellants in CA 119/2008	HEP
	The appellants in CA 120/2008	In person
	The intervener in the Appeals	A&G

Issues to be considered

5 In arriving at our final cost orders we had to primarily determine: (a) who is entitled to costs; (b) what costs are recoverable; and (c) who is liable to pay costs.

The costs indemnity principle

6 Before we discuss the issues set out in [5] above, it is important to recall the general rule in Singapore, *viz*, that costs should follow the event except in special circumstances (see *Singapore Civil Procedure 2007* (GP Selvam gen ed) (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure 2007*") at paras 59/3/1 and 59/3/5; see also *Tullio v Maoro* [1994] 2 SLR 489). This principle (*ie*, that an unsuccessful party would generally be ordered to pay the successful party's reasonable litigation costs) has been sometimes termed "the indemnity principle". It is not to be confused with costs on "the indemnity basis", which would be costs taxed on the basis that any doubts as to their reasonableness are to be resolved in favour of the receiving party (O 59 r 27(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules")), as the alternative to costs on "the standard basis", where any doubts as to reasonableness is to be resolved in favour of the paying party (see O 59 rr 27(1) and 27(2) of the Rules).

7 The fundamental conception of costs which underlies the indemnity principle is that costs are imposed to *compensate* the successful party and not to punish the losing party (although costs may sometimes be imposed as a punishment for improper or unreasonable behaviour in the proceedings; see, *eg*, O 59 rr 7 and 8 of the Rules). As Bramwell B astutely noted in *Harold v Smith* (1860) 5 H & N 381 (at 385); 157 ER 1229 (at 1231):

> Costs as between party and party are given by the law as an indemnity to the person entitled to them : they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained.

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

Parties entitled to costs

Entitlement of the non-appealing parties to costs

The submissions

8 The appellants in CA 120/2008 and the non-appealing parties submitted that the non-appealing parties should be awarded costs for the following reasons:

> (a) This court has the power to award such costs on the basis of O 59 rr 2(2) and 3(2) of the Rules.
>
> (b) The non-appealing parties expended substantial time, effort and money in building and contributing to the final success of the Appeals; *eg*, through the cross-examination of the

applicant's witnesses in the Horizon Board proceedings.

(c) This court's decision in *Ng Eng Ghee* ([2] *supra*) affirmed the non-appealing parties' position on issues that they had consistently raised in the Horizon Board proceedings and the High Court proceedings.

(d) This court's decision in *Ng Eng Ghee* reversed the decisions of the Horizon Board and the High Court. It would be illogical and inequitable if those decisions (including the costs orders) were overturned only for the benefit of the objecting subsidiary proprietors who appeared before this court but not all those who appeared below. All of them shared an indivisible community of interests in the proceedings below, in that any decision regarding the collective sale order would simultaneously affect the ability of each and every one of them to retain their homes.

(e) This court should give effect to its finding of bad faith *apropos* the *en bloc* sale of Horizon Towers by compensating all those who had contributed towards the build-up of the case.

(f) The non-appealing parties should not have to suffer out-of-pocket expenses because they wanted to right a wrong done to them and their neighbours.

9 TRC (for the respondents in the Appeals) and A&G (for the interveners) submitted that the decision of the High Court in *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR 513 ("*Aloysius* (HC)") and the decision of this court in *Teo Chee Yeow Aloysius v Tan Harry* [2004] 3 SLR 588 ("*Aloysius* (CA)") (collectively referred to as "the *Aloysius* cases") underscored an established principle of law: if a court or tribunal makes a decision affecting two or more parties, against which only one party appeals but not the others, then if the appeal is successful, the parties with overlapping interests which fail to appeal are generally not entitled to the fruits of the successful party's appeal.

10 On the basis of these two cases, they submitted that it would be unfair to allow the non-appealing parties to enjoy the benefit of any costs orders arising from the Appeals. They emphasised that the non-appealing parties had not joined in the Appeals and had not accepted the risk of paying the costs of an unsuccessful appeal.

Our views

11 The question we have to answer is a very narrow one. Where a lower court or tribunal has made a decision against two or more parties with overlapping interests and the appeal succeeds on grounds earlier raised by parties who have chosen not to appeal, should the parties who have chosen not to appeal be also awarded their costs below by the appellate court?

12 In our view, the *Aloysius* cases do not stand for the general proposition contended for by TRC and A&G. Those cases involved two joint tortfeasors who had appealed against the quantum of damages awarded. Each of their appeals was confined to a single head of damages. The head of damages in question in each appeal was different. Each of the tortfeasors had sought to reduce the quantum of damages ordered to be paid not only by the amount reflecting the head of damages appealed against by that tortfeasor but also that appealed against by the other tortfeasor. The High Court's and this court's rejection of these imaginative attempts to minimise liability *does not* lend support to a wider principle that parties to the original proceedings who do not pursue an appeal *can never* reap the fruits, including the costs benefits, of a successful appeal. Quite different considerations come into the picture where the issue is damages not costs. In the circumstances of the *Aloysius* cases for instance, if each joint tortfeasor could have relied on a ground not raised by him to reduce the amount of compensation due to be paid, the successful plaintiffs could have been

unfairly doubly deprived of compensation that had earlier been adjudged to be due to them (see *Aloysius* (HC) at [126]). The courts in the *Aloysius* cases also appeared to be concerned about the prejudice occasioned by the absence of proper notices of appeal in relation to substantive (as opposed to purely procedural) issues (*id* at [128]–[129] and *Aloysius* (CA) at [22]).

13 This court's power to order payment to a non-appealing party in the situation envisaged in [11] above may be found in O 59 r 4 of the Rules, which states:

> **Stage of proceedings at which costs to be dealt with (O.59, r.4)**
>
> **4.—(1)** Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any costs ordered shall be paid forthwith notwithstanding that the proceedings have not been concluded, unless the Court otherwise orders.
>
> (2) *In the case of an appeal the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal and of the proceedings connected with it, may be dealt with by the Court hearing the appeal*; and in the case of any proceedings transferred or removed to the High Court from any other court, the costs of the whole proceedings, both before and after the transfer or removal, may be dealt with by the Court to which the proceedings are transferred or removed.
>
> [emphasis added]

This provision confers a generous power on the appellate court to deal with the costs of all the proceedings preceding an appeal.

14 Furthermore, O 57 r 13 of the Rules provides that:

> **General powers of Court (O.57, r.13)**
>
> **13.—(1)** In relation to an appeal the Court of Appeal shall have *all the powers* and duties as to amendment and otherwise *of the High Court*.
>
> …
>
> (4) ... notwithstanding that —
>
> (a) no notice of appeal has been given in respect of any particular part of the decision of the Court below or by any particular party to the proceedings in that Court …
>
> [emphasis added]

The power conferred on this court by the above would necessarily include the power to make such orders as to the costs as the High Court would be empowered to make.

15 In the present case, the Judge had left the issue of costs in the High Court proceedings at large. Further, as we have set aside the Horizon Board's order for the collective sale of Horizon Towers, made pursuant to its decision on 7 December 2007 (*Ng Eng Ghee* ([2] *supra*) at [212]), its costs orders also no longer have any force. Having had the benefit of perusing and evaluating the transcripts of the Horizon Board proceedings, this court is well-placed to make the requisite cost orders and there is therefore no need to remit the determination of costs back to the Horizon Board.

16 However, we should make it clear that there is no general rule that all parties to proceedings in a lower court will ordinarily be able to receive their costs incurred in the lower court if that court's decision is ultimately overturned at the appellate level. It is trite that the mere existence of a power by no means requires its exercise in every case. There may well be cogent countervailing factors or considerations which weigh against such an outcome. All that need be said for now is that the court's power to order costs to be paid to parties who have chosen not to appeal must always be judicially exercised. Applications for such orders must also be made timeously to the appropriate appellate court.

17 In the present case, we agree with the submissions of the appellants in CA 120/2008 and the non-appealing parties set out at (b), (c), (d) and (f) in [8] above. Had the High Court or the Horizon Board come to the right decision in the first place, they would have been entitled to their costs. The fact that they did not appeal is not critical because other appellants were able to appeal and succeed before us on precisely the same issues. The fact that they had not accepted the "risk" of paying the costs of an unsuccessful appeal is neither here nor there. Also, there is nothing to suggest that the respondents have been prejudiced in any way. In this respect, it might be added that even if the non-appealing parties had been parties to the Appeals, the respondents would not necessarily have been entitled to more costs had they succeeded.

18 In the context of collective sales, these considerations apply with even greater force given the clear legislative recognition of the need to safeguard the interests of minority subsidiary proprietors in the course of collective sales (see, *eg*, the Second Reading of the Land Titles (Strata) (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at col 601 (Assoc Prof Ho Peng Kee, Minister of State for Law)) and the Third Reading of the aforementioned Bill (*Singapore Parliamentary Debates, Official Report* (4 May 1999) vol 70 at col 1328 (Prof S Jayakumar, Minister for Law)). We are especially mindful that, given the significant costs (and not insignificant irrecoverable out-of-pocket expenses) incurred at every step of these bitterly fought, convoluted and labyrinthine proceedings, it was not unreasonable for some of the objecting subsidiary proprietors to forgo their appellate participation before this court. We cannot lose sight of the fact that the non-appealing parties have (together with the appellants) been literally driven from pillar to post in their arduous efforts to protect their homes. In their submissions to this court, they have cogently explained why they should be entitled to the costs they have incurred in these proceedings[note: 1]:

> [W]e were made to defend our homes against an en bloc process actuated by a lack of good faith. We have sacrificed time, effort and money, not for any gain but to maintain the *status quo*, that is, to keep our homes.

19 For these reasons, we are of the view that the non-appealing parties are entitled to recover costs for the Horizon Board proceedings (but only the Second Tranche for the reasons set out at [29]–[30] below) and the High Court proceedings. In arriving at our decision, we have not placed any particular reliance on our finding that there was a lack of good faith in the *en bloc* sale. We have already noted that costs are generally compensatory and not punitive (see [1] and [7] above). Although the conduct of the paying party in the *proceedings* may have an impact on costs orders (especially where the paying party unnecessarily complicates or prolongs proceedings, or otherwise acts in a manner amounting to abuse of court processes), the lack of good faith in the *transaction* does not always call for exceptional treatment. It bears emphasis that our finding in relation to the lack of good faith centred on the behaviour of certain individuals who are not parties to these proceedings. All said and considered, it would be quite unfair to attribute their lack of good faith and/or diligence to the respondents for the purposes of assessing costs, thereby increasing their costs burden substantially.

Entitlement of appellants to one set of costs each

The parties' submissions

20 HEP (for the appellants in CA 119/2008) and the appellants in CA 120/2008 submitted that they should each be awarded one set of costs because, *inter alia*, each set of appellants had the right to appoint their own counsel, whether based on their view of the counsel's ability or the level of trust they placed in their respective counsel. This was especially since, at the time of lodging objections to the application to the Horizon Board, each set of appellants was not well-acquainted with the other minority owners who had lodged objections. Thus, they had no choice but to obtain their own representation and conduct their own cases. Furthermore, the appellants' arguments were not identical. While the arguments could be broadly grouped under certain categories (*eg*, bad faith), the precise points relied on by each set of appellants were not the same. Finally, the *en bloc* sale had been tainted by bad faith from the start.

21 TRC (for the respondents in the Appeals) and A&G (for the interveners) submitted that the court had the discretion to award only one set of costs even where the parties were separately represented. The case of *Harbin v Masterman* [1896] 1 Ch 351 was cited as authority for the proposition that separate sets of costs would only be awarded to successful defendants who were separately represented if the court was satisfied that such separate representation was justified.

Our views

22 We accept that the right to be represented by separate counsel does not invariably carry with it an entitlement to recover all the attendant legal costs incurred. This right must be judiciously balanced against the desirability of not unduly penalising the losing party by visiting it with unreasonably incurred costs. As sagely noted by Sir Richard Malins VC in *Smith v Buller* (1875) LR 19 Eq 473 (at 475):

> It is of great importance to litigants who are unsuccessful that *they should not be oppressed by having to pay an excessive amount of costs*. … I adhere to the rule which has already been laid down, that *the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them*. [emphasis added]

To this, we would add the qualification that these observations should now be read in the context of our present costs regime that allows recovery of all costs *reasonably* rather then just *necessarily* incurred.

23 The court's reasoning in *Harbin v Masterman* ([21] *supra*) neatly demonstrates how these opposing considerations may be evaluated. In that case, an annuitant had brought an appeal against the order of the judge at first instance, which directed the annuitant to pay over certain funds to certain charities being residuary legatees although her annuity was still charged upon the residuary estate. In the appeal, the five residuary legatees were represented by four different sets of counsel. The appeal was dismissed. On the issue of costs, it was submitted for the respondents that each respondent was entitled to appear and defend itself by the counsel whom it chose to instruct and neither the court nor the appellant could question it for doing so (*id* at 363.) To this contention, Lindley LJ gave the following response with his customary clarity (*id* at 364):

> In these cases there is always a discretion in the Court of Appeal as to the orders it ought to

make with reference to the question of costs; and the Court is bound to see that its orders are not necessarily oppressive. *It appears to me that in this case there really was no sensible reason for all parties appearing by separate solicitors. It is well known that only two counsel in the same interest can be heard here. I think it would be oppressive to allow more than one set of costs*. What we are prepared to do is to exercise our discretion on this occasion, and give the costs to the party who has the conduct of the cause. There will be one set of costs to be paid by the appellant, and the others must pay their own costs. *They are perfectly justified in employing their own solicitors if they like; but this is not a case where it was necessary for four sets of counsel to be instructed in order to protect the rights of the residuary legatees*. [emphasis added]

24 It is axiomatic that counsel, as officers of the court, ought not to unnecessarily consume judicial time (or, for that matter, the time of quasi-judicial or administrative tribunals) by repetitively covering the same ground. Each determination of whether to award more than one set of costs will necessarily have to turn on the facts of the case.The court ought to take into consideration all relevant factors, including: (a) the degree of the community of interests existing among the parties; (b) the size of the sum or the importance of the interest that is the subject matter of the dispute; and (c) the degree of overlap in the pre-hearing preparations and conduct of proceedings. *In general*, the greater the community of interests, the less inclined the court will be to grant separate costs for separate representation. *On the other hand*, the more important and distinct the interests which are the subject of the dispute, the more likely would an order for more than one set of costs be given. An order for more than one set of costs is also more likely where counsel have taken efforts to avoid the duplication of effort. Plainly, where there is an obvious community of interests between multiple parties on the same side, their counsel should try and agree, as far as possible, on the best approach towards advancing a unified case for their clients. That said, the court will also bear in mind the need to not unduly deter persons from making reasonable efforts to protect or vindicate their rights (see [1] above). Finally, for completeness, it should be noted that as this court recently indicated in *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR 814 (at [201]–[202]), the usual order where different parties with broadly similar interests are represented by different counsel is just one set of costs.

25 The factual matrix of *Harbin v Masterman* ([21] *supra*) differs markedly from that of the present appeals (*ie*, the Appeals). First, in *Harbin v Masterman*, the starting point was that the two co-defendants had a *joint* defence and the court had to decide whether the defence was rightfully severed such that separate sets of costs should be ordered. In the present appeals (*ie*, the Appeals), the starting point is that the two sets of appellants filed separate appeals in respect of separate originating summonses; we now have to determine whether only one set of costs should be awarded in respect of the successful appeals. Admittedly, this consideration alone should not affect the mechanics of the court's decision, as in both cases, the court has to evaluate the justifiability of separate costs, having regard to the prevailing factors such as those set out in [24] above. Pertinently, the court's decision in *Harbin v Masterman* appeared to be constrained by a procedural rule that only two counsel could be heard in the same interest in the court (*viz*, the Chancery Division); in Singapore there is no equivalent rule. That said, as a general rule, parties advancing or supporting the same cause should ordinarily not be entitled to receive separate sets of costs for repeating or reiterating points or matters.

26 In the present appeals (*ie*, the Appeals), it was not unreasonable for the appellants to engage separate counsel, given the importance of the subject matter at stake, *viz*, their homes, and the involved nature of the dispute. Given the emotional and sentimental attachment that people tend to form to their homes, it was quite understandable that each set of appellants chose counsel they trusted to personally manage their case, rather than simply casting their lot together with all of the

other objecting subsidiary proprietors. The appellants have quite reasonably explained that they had indeed aligned themselves with other subsidiary proprietors they were familiar with and on that basis had attempted to engage common counsel where feasible. This assertion was not strenuously challenged by either the respondents or the intervener. In the circumstances, the *key consideration* for us in this matter would be whether there was an unnecessary duplication of work and/or wastage of time as a result of the appellants' separate representation.

27 Although both sets of appellants raised the issue of good faith, they had from the outset differentiated themselves in their cross-examination of witnesses and in the approaches adopted in their submissions. In particular, a not insignificant number of points we developed in *Ng Eng Ghee* ([2] *supra*) had their seeds in the cross-examination of Mr Ramesh Kannan from TKQ in the course of the Second Tranche of the Horizon Board proceedings. Not all of these points had been raised or followed up by counsel for the other objecting subsidiary proprietors. Mr Rudy Darmawan's submissions before us (for the appellants in CA 120/2008) on the conflict of interest on the part of First Tree Properties Ltd and the members of the original sale committee who bought additional units in Horizon Towers (*id* at [188]–[192]) and the original sale committee's decision at the 6 January 2007 sale committee meeting to proceed with the sale of Horizon Towers despite the erosion of the original sale committee's estimated 80% premium (*id* at [193]–[195]), which were founded on the face of the facts, were also helpful and persuasive. They were quite distinct from the submissions made by HEP which were quite narrowly centred on the lack of proper disclosure and follow-up in relation to the offer from Vineyard Holdings (HK) Ltd ("Vineyard") to purchase Horizon Towers ("the Vineyard offer") (*id* at [178]–[180]).

28 There was, of course, some degree of duplication of legal resources in this matter, though our perusal of the relevant records does not indicate that it was unreasonable. The separate representation was therefore neither oppressive nor embarrassing. Thus, in our view, the appellants in CA 119/2008 and CA 120/2008 are entitled to separate sets of costs for the Horizon Board proceedings (but only the Second Tranche for the reasons set out at [29]–[30] below), the High Court proceedings and the present appeals (*ie*, the Appeals) with an appropriate diminution of the quantum being given to take into account duplication of work, legal relevance and the cogency of the contentions advanced. After considering, *inter alia*, the record of the entire proceedings, the contentions made by the appellants and the non-appealing parties, and for the reasons given in this judgment, we are of the view that the appellants in CA 119/2008 represented by HEP ought to receive only 60% of their costs here and below. The appellants in CA 120/2008 are entitled to 80% of their costs incurred here and below. The non-appealing parties' stance was broadly similar to the appellants in CA 120/2008 and they are also entitled to recover 80% of their costs for the High Court proceedings and likewise the Horizon Board proceedings. Since the appellants in CA 120/2008 and the non-appealing parties were both represented by TKQ in the Horizon Board proceedings, the costs of those proceedings when recovered are to be shared equally between the appellants in CA 120/2008 and the non-appealing parties.

The costs that are recoverable

Costs for the First Tranche and OS 1269/2007

29 At the end of the First Tranche of the Horizon Board Proceedings, the Horizon Board dismissed the application for a collective sale on the technical basis that three pages comprising the execution pages of three consenting subsidiary proprietors were not attached to the collective sale agreement in question ("the CSA") filed as part of the application. As to the issue of costs, no order was made on the basis that the defect leading to the dismissal had not been the subject of the objections filed by the objecting subsidiary proprietors. In OS 1269/2007, the High Court allowed the majority owners'

appeal against the Horizon Board's decision and remitted the matter back to the Horizon Board, leaving the issue of costs to be heard at a later date.

30 It is apposite to note that s 84A(7C) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) now deals specifically with situations of technical non-compliance with the procedural requirements of an application for a collective sale. Statutory sanction to overlook such defects has now been made express. However, the provision only came into effect after the First Tranche. In these circumstances, it is fair that no order for costs for the First Tranche and OS 1269/2007 be made.

Standard or indemnity basis

31 The appellants submitted that costs should be ordered against the respondents on an indemnity basis, because, *inter alia*, the respondents had suppressed information relating to the Vineyard offer (essentially by failing to produce Vineyard's written offer of $510m for Horizon Towers during discovery) (see, *inter alia*, *Ng Eng Ghee* ([2] *supra*) at [77]–[78]), and because the respondents had conducted the Horizon Board proceedings in an unjustifiably adversarial manner by, *inter alia* asserting legal privilege over the advice given by the original sale committee's solicitors (*id* at [8] and [55]).

32 Although different aspects of the respondents' conduct certainly merited varying degrees of criticism, we are of the view that the matters alleged by the appellants did not compel a departure from the usual basis of costs (see, *eg*, *Heng Holdings SEA (Pte) Ltd v Tomongo Shipping Co Ltd (No 2)* [1997] 3 SLR 919 where the Court of Appeal ordered costs to be on a standard basis even though there was a material non-disclosure of facts).

Reasonable costs incurred by in-person litigants

33 The respondents submitted that the appellants in CA 120/2008, who were represented in person, should be entitled to their disbursements only. Given that we have decided that the non-appealing parties (*ie*, Then Khek Koon and Tan Kim Lian Jasmine) should be awarded costs, it is also necessary to determine whether the award for the High Court proceedings (in which the non-appealing parties appeared in person) should be limited to their disbursements.

34 The ordinary entitlement of a successful litigant-in-person to costs has now been clarified by O 59 r 18A of the Rules, which indicates that successful litigants-in-person would generally be awarded "such costs as would reasonably compensate the litigant for the time expended by him, together with all expenses reasonably incurred". The respondents and the intervener have not made out a persuasive case as to why the usual costs orders for a successful litigant-in-person should not be made. We also note that there has been no suggestion from either the respondents or the intervener that the non-appealing parties had conducted their case inappropriately. Accordingly, the appellants in CA 120/2008 are entitled to such costs of the appeal (*ie*, CA 120/2008) and the High Court proceedings as would reasonably compensate them for the time expended by them, together with all expenses reasonably incurred. The same entitlement applies to the non-appealing parties in respect of the High Court proceedings.

Costs for three counsel

35 Counsel for the appellants in CA 119/2008, HEP, submitted that they should be entitled to a certificate of costs for three counsel pursuant to O 59 r 19 of the Rules because of the lengthy and complicated nature of the Horizon Board proceedings and the High Court proceedings, as well as the lengthy submissions and large number of authorities raised.

36 In the light of O 59 r 19(1) of the Rules, certification is now only required where the costs of more than two solicitors (or counsel as the case maybe) are sought. Nevertheless, the use of more than two solicitors must be reasonable, having regard to para 1 of Appendix 1 to O 59. In our view, the appellants in CA 119/2008 are entitled to the costs of only two counsel for CA 119/2008, the Horizon Board proceedings and the High Court proceedings, because, as mentioned at [27] above, TKQ and Mr Darmawan had in fact helped to develop many of the issues on good faith that, in the final analysis, took centre stage in these proceedings. The appellants in CA 119/2008 are not entitled to the costs incurred in relation to the canvassing of the administrative and constitutional law points in the earlier proceedings as all these points have been found to be without merit by the High Court. It bears mention that these particular points were not pursued in this court.

Liability for costs

37 The intervener claims that its participation in the proceedings was all along "secondary" to that of the respondents. The record of proceedings indicates otherwise. It is clear from the transcripts of the High Court proceedings that the intervener took the lead in defending the Horizon Board's decision to make an order for the collective sale. Indeed, although the intervener was not allowed to appear in the Horizon Board proceedings, it was quite apparent that the intervener was directly or indirectly influencing the majority owners in the conduct of those proceedings. Furthermore, it can be fairly said that the intervener by its conduct engendered the continuation of the dispute in the Second Tranche, the High Court proceedings and the present appeals (*ie*, the Appeals). It had, *inter alia*, filed proceedings against the majority owners in Originating Summons No 1238 of 2007 in respect of an alleged failure to fulfil their contractual obligation to obtain a collective sale order. Indeed, TRC now unequivocally asserts that:[note: 2]

> [C]ompliance with the Interveners [*sic*] demands is however the single key factor for the prolongation of the entire hearings, and the concomitant costs incurred by all parties in the process.

38 On the other hand, we note that the respondents could well have simply stood their ground and insisted that the collective sale had been aborted instead of meekly acquiescing to the intervener's attempt to prevail on them through legal means (see *Ng Eng Ghee* ([2] *supra*) at [47]). They cannot be permitted to shirk all responsibility for their role in this matter and especially the conduct of the proceedings below.

39 On the balance, we are of the view that fairness dictates that the costs ordered against the respondents for the High Court proceedings and the Appeals should be borne equally by the interveners and the respondents. The costs of the Second Tranche of the Horizon Board Proceedings are to be borne by the respondents alone.

Interest on the deposit

40 Our attention has also been drawn to another contentious issue which only surfaced after we delivered our judgment on 2 April 2009. A substantial amount of interest has accumulated on the deposit paid for the purchase of Horizon Towers. As at 6 May 2009, the amount was $1,883,087.40. In a letter to the consenting subsidiary proprietors dated 24 April 2009, the present sale committee stated it had taken legal advice from its conveyancing solicitors on the appropriate apportionment of the interest. The advice, as set out in the aforementioned letter, reads as follows:

> We have reviewed the terms of the Collective Sale Agreements (CSA) and in particular clause 17 entitled Division of Sale Proceeds. In our view clause 17 governs the distribution of the sale

proceeds where all owners are consenting subsidiary proprietors (CSP) or where an Order has been obtained from the Strata Titles Board (STB) approving the sale. Under the present circumstances Clause 17 cannot apply and the interest should be distributed according to the general principles which have governed this collective sale. They are:

1. The sale and purchase agreement (S&P) was made between the CSPs and the Purchaser and the rights to the interest under the terms of the S&P would belong to the CSPs only. In this respect CSPs would mean all owners who have executed the CSA or the letter of ratification binding themselves to the terms of the S&P;

2. *Non CSPs have no rights to enforce any of the terms of the CSA and accordingly shall have no rights to the interest under the terms of the S&P*;

3. The distribution of the interest would be given to the CSPs proportionately in accordance with the formula set out in clause 17.1(a). However if the Sale committee [*sic*] agrees, this formula has to be adjusted (in terms of share value area) such that only the units of the CSPs are aggregated and applied to the formula.

4. All disbursements accrued on an individual unit basis, for example CPF solicitors' aborted legal costs should first be aggregated and deducted from the interest before distribution to the CSPs. The reason is that as the collective sale was unsuccessful, these disbursements and costs were incurred as part of the expenses in trying to achieve the objective of a successful sale. For example, when the order of the STB [*ie*, Strata Titles Board] was obtained on 17th December 2007, title searches were conducted and redemption documents (where relevant) were prepared for ALL units including those owned by the minority and objecting owners.

…

[emphasis added]

41 We wish to express our disappointment that the respondents' conveyancing solicitors (who are not the same as counsel representing them in the Appeals) have failed to appreciate the clear thrust of our substantive decision as elaborated on in *Ng Eng Ghee* ([2] *supra*). Their advice has plainly failed to appreciate that the purchase consideration was paid by the intervener for *all* the units in Horizon Towers and not merely those owned by the consenting subsidiary proprietors. In a collective sale, the minority objecting proprietors have no choice in the sale of their flats, if all the requisite statutory conditions are met. Pending the completion of the sale, the sale committee will hold the purchase consideration (and the accrued interest) as the agent for *all* of the subsidiary proprietors. If completion is effected, the interest will be equitably distributed to all of them in accordance with the approved contractual arrangements. Whether or not the dissenting proprietors (or those who are not parties to the sale and purchase agreement) are entitled to enforce the agreement is irrelevant, because part of the purchase consideration was paid for *their* units. The conveyancing solicitors have confused beneficial rights with contractual rights. The setting aside of the sale to the respondents is also quite irrelevant, as the right to the interest is an accrued right, and not dependent on the actual performance of the sale and purchase agreement. The consenting subsidiary proprietors cannot be allowed to appropriate for themselves that portion of the interest held for the benefit of the objecting subsidiary proprietors.

42 Thus, the interest is to be shared by all the subsidiary proprietors. The present sale committee is not entitled to decide that only the consenting subsidiary proprietors are entitled to the interest.

Each subsidiary proprietor's entitlement is to be calculated based on the share value and strata area of each unit in equal weightage as illustrated in cl 17.1(a) of the CSA (*ie*, on the same basis as the apportionment of the sale proceeds if a successful sale had taken place). It is entirely up to each individual objecting subsidiary proprietor to decide how he wants to deal with the proportionate amount of the interest due to him.

Our costs orders

43 To conclude, our costs orders are as follows:

(a) No order as to the costs for the First Tranche of the Horizon Board Proceedings and OS 1269/2007.

(b) The appellants in CA 119/2008 (represented by HEP) are entitled to, *firstly*, one set of costs for the Second Tranche of the Horizon Board proceedings, to be taxed for two counsel and borne in full by the respondents; and, *secondly*, one set of costs for the High Court proceedings and one set of costs for CA 119/2008, each to be taxed on the basis of two counsel and borne equally by the respondents and the intervener. The appellants in CA 119/2008 are not entitled to recover any costs *apropos* the administrative and constitutional law arguments raised in the Horizon Board proceedings and the High Court proceedings. They are limited to recovering only 60% of the assessed costs of the aforementioned proceedings (see [28] above).

(c) The appellants in CA 120/2008 are entitled to, *firstly*, one set of costs for the Second Tranche of the Horizon Board proceedings, to be taxed on the basis of two counsel and borne fully by the respondents; and, *secondly*, one set of costs for the High Court proceedings and one set of reasonable compensatory costs for CA 120/2008, each pursuant to O 59 r 18A of the Rules and to be borne equally by the respondents and the intervener. They are limited to recovering only 80% of the assessed costs of the aforementioned proceedings (see [28] above), and the costs of the Second Tranche of the Horizon Board proceedings are to be shared equally with the non-appealing parties (see [28] above and (d) below).

(d) The non-appealing parties (*ie*, Then Khek Koon and Tan Kim Lian Jasmine) are entitled to, *firstly*, one set of costs for the Second Tranche of the Horizon Board proceedings, to be taxed on the basis of two counsel and borne fully by the respondents; and, *secondly*, one set of reasonable compensatory costs for the High Court proceedings pursuant to O 59 r 18A, to be borne equally by the respondents and the intervener. They are also limited to recovering only 80% of the assessed costs of the aforementioned proceedings (see [28] above), and the costs of the Second Tranche of the Horizon Board proceedings are to be shared equally with the appellants in CA 120/2008(see [28] above and (c) above).

(e) The interest on the deposit money is to be shared by all the subsidiary proprietors and each subsidiary proprietor's entitlement is to be calculated, based on the share value and strata area of each unit in equal weightage, as illustrated in cl 17.1(a) of the CSA. It is for each individual objecting subsidiary proprietor to decide how he wants to deal with the amount paid over to him.

[note: 1]Para 26 of the minority owners' Written Submissions to the Court of Appeal dated 8 April 2009

[note: 2]TRC's letter of 25 May 2009 addressed to the Registrar, Supreme Court.