

20. LAND LAW

TEO Keang Sood

LLM (Harvard), LLM (Malaya);

Advocate and Solicitor (Singapore and Malaya);

Professor, Faculty of Law, National University of Singapore.

Introduction

20.1 The decided cases in the review period helped to further clarify the law in the areas of, *inter alia*, landlord and tenant, easements, adverse possession and strata title. In the latter, the duty of good faith on the part of collective sale committees and marketing agents was further elaborated upon. In the area of conveyancing, the case law also dealt with the issue of, *inter alia*, when the remedy of specific performance is available to the vendor.

Leases

Holding over and double rent

20.2 Under s 28(4) of the Civil Law Act (Cap 43, 1999 Rev Ed), a landlord has the option of charging double rent or double value where a tenant holds over after the determination of his or her tenancy. In *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2013] SGHC 236, the High Court clarified further the law on holding over and double rent. The plaintiff (tenant) was found to have held over from 1 January 2011 (the day following the expiry of the lease) to the date of repossession of the premises by the defendant (landlord) on 4 March 2011. The court rejected the defendant's claim that the holding over period extended beyond 4 March 2011. As the plaintiff had surrendered possession on that date, they no longer had any control over the premises.

20.3 On the issue whether double rent is based on the rent last paid by the tenant or the rent that the tenant would have to pay during the holding over period, the High Court took the view that it was the former. Otherwise, it would be no different from the option of charging double the value.

20.4 *Sarawak Machineries Trading Co v Sii Hing Kung* [2004] 2 MLJ 213 was distinguished. In that case, as there was an option in the tenancy agreement for renewal at a higher rent, it was held that the relevant rent

was the higher rent in the option. In the instant case, there was no such provision.

20.5 In *Overseas Union Enterprise Ltd v Three Sixty Degree Pte Ltd* [2013] 3 SLR 1, the facts of which are noted below, the High Court held that the plaintiff (landlord) was entitled to recover double the prevailing rent under the relevant clause of the lease. The High Court noted that the only difference between the remedy claimable under s 28(4) of the Civil Law Act and that under the lease was that the latter permitted the plaintiff to recover not just the base rent but also the service charge. The service charge was used for the upkeep and maintenance of the building. The plaintiff incurred these expenses even when a tenant held over unlawfully. In the opinion of the High Court, if doubling the base rent was not a penalty, then doubling the service charge and adding it to the base rent did not make the relevant clause a penalty.

Distress for rent

20.6 This area of the law was further clarified by the High Court in *Orchard Central Pte Ltd v Cupid Jewels Pte Ltd* [2013] 2 SLR 667. The landlord (Orchard Central) had let two units in a commercial development to the tenant (Cupid Jewels) for the business of jewellery retailing. Subsequently, the parties entered into negotiations for a rental review and for the payment of the rental arrears in instalments. Later, the landlord obtained a writ of distress and seized all the goods found on the tenant's premises, including 576 items of jewellery. The tenant and Forever Jewels Pte Ltd ("Forever Jewels") applied for the release of all the distrained jewellery pursuant to ss 16 and 10 of the Distress Act (Cap 84, 1996 Rev Ed) respectively. The tenant's arguments were premised on the grounds, *inter alia*, that the landlord had failed to make full and frank disclosure to the assistant registrar when making the *ex parte* application for the writ of distress and that the goods were exempt from seizure under s 8(d) of the same Act. Forever Jewels argued that it was at all times the beneficial owner of the distrained jewellery and the landlord had actual knowledge of this fact.

20.7 In dismissing the applications, the High Court was of the view that the landlord's failure to disclose the background negotiations for a rental rebate and payment of the arrears in instalments would not necessarily justify a setting aside of the writ of distress on that ground alone. The landlord's omission was neither deliberate nor cynical. Furthermore, the subsequent negotiations were only commenced on a without prejudice basis and no unconditional agreement had been reached.

20.8 The procedural requirements in s 5 of the Distress Act were also satisfied. The words "due or payable" therein should be given a plain

linguistic construction to refer to a legal obligation to pay for rental under a tenancy agreement. The strict legal obligation to pay advance rental as specified in the lease agreement took effect on the first day of each calendar month without the issuance of a formal demand or notice. Until the offer for a rental rebate had been accepted by the tenant and the condition precedents for the offer satisfied, the accrued legal obligation to pay the full sum under the lease agreement had yet to be extinguished or varied. Based on the available evidence, the actual sum of rental arrears claimed for under the writ of distress was for less than 12 months. There was, accordingly, no substantive irregularity in the writ of distress that would render it void or invalid.

20.9 Although there was no reason in principle why the doctrine of promissory estoppel cannot arise to invalidate a writ of distress issued pursuant to the Distress Act, the High Court found that the doctrine was inapplicable based on the evidence in the case.

20.10 The distrained jewellery was also not exempt from seizure under s 8(d) of the Act. The phrase “otherwise dealt with” therein should be construed as subject to the preceding words “carried, wrought, worked up” under the *ejusdem generis* canon of construction. In the instant case, the High Court found that the sale of goods by the tenant on behalf of Forever Jewels did not come within the same genus of activities even if the tenant purports to be in the trade or business of “retailing”. No services in the course of the tenant’s business were actually provided in relation to the jewellery and no work was done on or with the jewellery. The tenant was merely displaying the jewellery for sale at the premises through a particular form of arrangement entered into with Forever Jewels. In the result, the distrained jewellery was not in the tenant’s possession “for the purpose of being ... otherwise dealt with in the course of its ordinary trade or business” within the meaning of s 8(d).

20.11 Similarly, Forever Jewels was not entitled to the release of the distrained jewellery under s 10 of the Distress Act. It had failed to discharge the burden of showing that the landlord had actual knowledge that the distrained jewellery belonged to Forever Jewels and not the tenant. In addition, in all the circumstances, the necessary inference that must have arisen to a reasonable customer was that the tenant was the owner of the jewellery displayed in the premises and sold solely by them. There was no fixed industry wide custom or practice to show that it was usual and customary in the jewellery retail trade to have goods on consignment.

Equitable set-off

20.12 In *Overseas Union Enterprise Ltd v Three Sixty Degree Pte Ltd* [2013] 3 SLR 1 (“*Overseas Union Enterprise Ltd*”), the plaintiff let to the defendant the 39th floor of its hotel, the Mandarin Orchard, and retained control of the rest of the hotel, including the 38th floor. Disputes subsequently arose between the parties because of the design feature of the 38th and 39th floors. The public passenger lifts in the hotel did not go all the way up to the 39th floor but stop at the 38th floor. The public gains access to the 39th floor only from and through the 38th floor. Owing to the design feature, the defendant could not obtain a fire safety certificate for the 39th floor alone and abandoned its plans to operate a bar/lounge at the said floor. It, however, retained possession of the 39th floor. The plaintiff commenced proceedings against the defendant for, *inter alia*, payments in arrears and possession of the 39th floor. The defendant did not comply with the plaintiff’s demand and counterclaimed for the losses it claimed to have suffered.

20.13 The defendant pleaded the defence of equitable set-off. In holding that equitable set-off was not available to the defendant, the High Court reiterated the principle that a tenant can assert equitable set-off against his landlord if the tenant’s cross-claim against the landlord is so closely connected to the landlord’s claim for rent as to go to the root of that claim. The tenant can even set up an unliquidated cross-claim for damages by way of equitable set-off. However, a clause in a lease which expressly or by clear words prohibits set-off will be effective to do so (see *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1996] 3 SLR(R) 563 at [12]; following *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137 and *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501).

20.14 Having regard to cll 4.1 and 6.1 of the lease which provided, *inter alia*, for the defendant to pay the base rent and service charge “without any demand, set-off, abatement or deduction whatsoever”, the High Court held that this was sufficient to exclude the right to equitable set-off as a substantive defence relying on the authorities of *Star Rider Ltd v Innpreneur Pub Co* [1998] 1 EGLR 53 and *Altonwood Ltd v Crystal Palace FC (2000) Ltd* [2005] EWHC 292 at [32].

Implied covenants

20.15 In *Overseas Union Enterprise Ltd*, the facts of which were noted above, the High Court also considered whether the plaintiff was in breach of the implied covenants of non-derogation of grant and of quiet enjoyment. The High Court distilled five principles from the case law as follows (at [60]):

- (a) the covenant against non-derogation from grant does not amount to an implied obligation on the landlord to underwrite the profitability of the tenant's business;
- (b) a landlord has no obligation to take measures outside the reasonable contemplation of the parties with regard to the demised premises unless those measures were specifically bargained for in the lease;
- (c) even non-physical interference can constitute substantial interference with the ordinary enjoyment of premises in the context of both covenants;
- (d) the existing use of adjoining premises is always a material consideration in considering whether either covenant has been breached; and
- (e) both covenants are prospective in nature: the covenants do not apply to acts of the landlord before the grant of the tenancy.

20.16 The defendants had argued that the plaintiff breached these two covenants in, *inter alia*, refusing to give to the defendant the full occupancy load permitted by the Singapore Civil Defence Force ("SCDF") of 120 persons for the 39th floor and that there were multiple and recurring serious defects on the 39th floor which the plaintiff either delayed in remedying or failed to remedy.

20.17 In holding that there was no breach of these covenants, the High Court noted, *inter alia*, that the defendant's consultants did not appear to have taken the necessary steps with each submission to the SCDF to ensure that the submission had the best chance of success. The defendant's consultants also did not attend key meetings with the SCDF. It also kept the plaintiff in the dark during significant portions of the application process. When the defendant asked the plaintiff for assistance, the latter rendered the assistance to the best of its ability.

20.18 The High Court also found on the actual facts that the plaintiff did nothing to prevent or substantially interfere with the defendant operating a bar/lounge on the 39th floor. All that happened was that it dawned on the defendant during its fiasco with the SCDF that it would be less profitable or even commercially unviable for it to do so.

20.19 In the result, the plaintiff was entitled to, *inter alia*, terminate the lease and to retake vacant possession of the premises.

Easements

Implied easement

20.20 In *Andrew John Hanam v Lam Vui* [2013] 4 SLR 554, the plaintiff had complained of leaks in his semi-detached property No 4 Thomson Green. The defendants who owned the adjoining house No 2 Thomson Green had refused to permit the plaintiff's contractor access to No 2 in order to inspect the party wall from the side of No 2. The plaintiff commenced proceedings against the defendants claiming to be entitled to enter No 2 to access the roof in order to inspect the party wall to determine the source of the leaks and to carry out necessary repairs. In essence, the plaintiff was asserting an implied easement "for party wall purposes" that was "necessary for the reasonable enjoyment" of his property pursuant to s 99 of the Land Titles Act (Cap 157, 2004 Rev Ed).

20.21 In dismissing the plaintiff's application, the High Court found that the party wall easements created by the execution of the relevant transfer instruments that were subsequently registered were only concerned with cross easements of support. It did not also confer a right to enter No 2 to inspect the party wall on the side of No 2 or to carry out repairs from No 2 without the consent of the defendants.

20.22 In any event, s 99(1A) pertaining to implied easements for right of way and other rights was not applicable in the instant case as the provision was excluded by s 99(7) given that the party wall easements were created before 1 March 1994.

20.23 In addition, the scope of s 99(1A) did not entitle the plaintiff to an implied easement of the nature claimed. The easement "for party wall purposes" only concerned the right to erect and maintain party walls under s 99(3). Accordingly, s 99(1A) did not confer by implication a right of way over the defendants' land for, *inter alia*, the purpose of inspecting the defendants' side of the party wall to determine the source of the leaks in No 4.

20.24 The phrase "as may be necessary for the reasonable enjoyment of the lot" in s 99(1A) also did not extend the scope of the party wall rights to include the right to enter the neighbour's property to inspect the party wall. Citing *Boglari v Steiner School & Kindergarten* [2007] VSCA 58 which dealt with a phrase in s 98 of the Victoria Transfer of Land Act 1958 which was almost identical to s 99 of the Land Titles Act, the High Court was of the view that the phrase serves a rather limited purpose of determining how the implied easements were to be exercised in the light of the circumstances.

20.25 Finally, a comparison of s 98 of the Land Titles Act with s 99 of the same Act reinforces the view that (at [36]):

[G]iven the similarity of the ancillary rights and obligations provisions in both s 98(2) and s 99(2) of the LTA, Parliament clearly could not have intended the ancillary rights implied under s 99(2) of the LTA to include rights of access and entry. Any interference with the servient tenement proprietor's *prima facie* right to exclusive use of his property by way of rights of entry would have been expressly provided for, as was the case in s 98 of the LTA.

20.26 The same goes for the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) ("LTSA"), ss 16 and 17 of which expressly include rights of entry to the servient tenement in the implied easements of support and shelter respectively, notwithstanding the implied ancillary rights and obligations in s 20 of the same Act. The High Court cautioned against applying English legislation on the issue in the absence of statutory enactment by the Singapore Parliament.

Acquisition by prescription

20.27 In *Fragrance Realty Pte Ltd v Rangoon Investment Pte Ltd* [2013] 2 SLR 1007 ("*Fragrance Realty Pte Ltd*"), the defendants sought to argue, *inter alia*, that they had acquired an easement by prescription over the encroached area. This would depend on whether they could show user of an easement over the encroached area for a continuous period of 20 years.

20.28 In the instant case, the facts in evidence showed that there were less than 20 years of continuous user of the encroached area before the property became registered land. The claim to an easement by prescription, accordingly, failed.

20.29 The High Court also found that the defendants could not claim an easement over the encroached area as their predecessors in title had possessory title to that parcel of land. An easement is a right over someone else's land and not one's own land.

20.30 The defendants had used the encroached area to park their cars and store their personal belongings. The High Court had to determine if these rights claimed by the defendants over the encroached area oust the possession of the plaintiff as the servient owner such that these alleged rights could not amount in law to an easement over the encroached area. While there are cases which recognised as easements rights that involved the exclusive occupation of the servient tenement (see *Moncrieff v Jamieson* [2007] 1 WLR 2620), in the instant case, no easement by prescription could be made out as the facts in evidence demonstrated that the plaintiff as servient owner had no beneficial use

of or control over the encroached area. In fact, the right claimed by the defendants would render the actual ownership of the plaintiff illusory.

Co-ownership

20.31 In *Yang Chun (Mrs) née Sun Hui Min v Yang Chia Yin* [2014] 1 SLR 1, one of the issues which arose for determination was whether under s 114 of the Land Titles Act all surviving joint tenants are required to execute and file a notice of death to the Registrar of Land Titles of the death of a joint tenant.

20.32 In the instant case, the deceased, the plaintiff and the defendant held the property as joint tenants. Following the death of the deceased, the plaintiff applied for orders to be made against the defendant for the latter's alleged failure to administer the deceased's estate in accordance with the deceased's wishes. The defendant was the sole executor and trustee of the deceased's estate. The defendant had not taken any steps to notify the Registrar of Land Titles of the deceased's death so as to ensure that the land register was updated to reflect the plaintiff's and the defendant's entitlement to the whole of the property as the surviving joint tenants.

20.33 The defendant argued that he had not done so because of the plaintiff's incapacity as a result of which the latter was unable to sign the notice of death. In rejecting the argument, the High Court explained thus (at [40]):

The filing of the Notice of Death did not serve the function of effecting a transfer of the property to the surviving joint-tenants. Rather, it served the administrative function of giving notice of the death of a joint tenant to the Registrar of Land Titles who was then obliged to update the land-register upon being satisfied of such a death. Further, there was nothing in s 114 that detracted from the right of survivorship of the remaining joint tenants.

20.34 Hence, it was not legally impossible for the property to be transferred to the plaintiff whose lack of capacity was irrelevant to the issue.

20.35 Counsel for the defendant had subsequently informed the court that a written reply from the Singapore Land Authority required both the plaintiff and defendant to execute the notice of death. In the circumstances, the plaintiff's solicitors would make arrangement for the plaintiff to do so. In the event that the defendant failed to execute the notice of death, pursuant to s 14(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), the court would order the Registrar of the Supreme Court to do so on his behalf.

Adverse possession

20.36 In *Fragrance Realty Pte Ltd* (above, para 20.27), the facts of which have been noted above, the defendants had also argued that they had possessory title to the encroached area by reason of adverse possession. The plaintiff had sought a declaration that the defendants' adverse title had been extinguished. In the earlier case of *Shell Eastern Petroleum (Pte) Ltd v Goh Chor Cheok* [1999] 3 SLR(R) 236 ("*Shell Eastern Petroleum*"), the High Court had found in favour of the defendants on the issue of adverse possession against the plaintiff's predecessor in title.

20.37 In the instant case, the High Court held that the decision in *Shell Eastern Petroleum* was an *in personam* judgment which was conclusive only as between the parties. Accordingly, the rights of the plaintiff and the defendants had to be determined afresh according to the current prevailing law under the Land Titles Act.

20.38 It was not disputed that no caveat had been lodged by the defendants to protect their interests as adverse possessors of the encroached area. Having regard to *TSM Development Pte Ltd v Leonard Stephanie Celine née Pereira* [2005] 4 SLR(R) 721 at [48] which laid down the correct position on the matter, the High Court explained thus (*Fragrance Realty Pte Ltd* at [25]):

Section 50 of the 2004 LTA applied such that the present defendants could only assert an adverse title if they fell within s 174(7) or s 174(8) of the 2004 LTA. As the present defendants did not lodge a caveat in respect of their interest in the encroached area within the requisite time period, they did not fall within the exceptions to s 50 of the 2004 LTA and thus did not acquire adverse title to the encroached area. Accordingly, *Fragrance Realty's* title to the encroached area has not been extinguished by the adverse possession of the present defendants ...

20.39 The High Court also correctly noted that for registered land, it matters not that the plaintiff knew of the defendants' encroachment before it purchased the property. This was borne out by s 47(1) of the Land Titles Act which provides that except in the case of fraud, a purchaser of registered land is not affected by notice of any unregistered interest, notwithstanding any rule of law or equity to the contrary. Further, both ss 47(2) and 49(2) clarify that knowledge of any unregistered interest does not itself amount to fraud. In the result, the plaintiff's knowledge had no bearing on the question of title to that parcel of land.

Strata title

By-laws

20.40 In *Automobile Association of Singapore v Management Corporation Strata Title Plan No 918* [2014] 1 SLR 164, the principal issue was whether certain by-laws governing the use of the car park at the AA Centre were valid and thus binding on the defendant management corporation. The plaintiff, a unit owner, applied for, *inter alia*, a declaration that the by-laws were valid and for injunctions restraining the defendant from implementing a new car park scheme.

20.41 The AA Centre comprised 30 strata units. The plaintiff owned and occupied two strata units which it used for commercial purposes. The remaining 28 strata units were residential units. The by-laws pertaining to the existing car park scheme were passed by special resolution at an extraordinary general meeting of the defendant on 25 July 2003. Under the by-laws, the 94 car park spaces in the AA Centre would be allocated among the unit owners in proportion to their respective share values. Twenty-eight car park spaces were allocated to the unit owners of the 28 residential units, *ie*, one car park space *per* residential unit, and the remaining 66 car park spaces were allocated to the plaintiff. Car park labels were issued for the purpose of putting this scheme of allocation into effect: one label for every car park space allocated to a unit owner, which meant, for instance, that 66 car park labels were issued to the plaintiff.

20.42 By a letter dated 21 August 2012, the defendant sought to implement a new car park scheme. Under the new scheme, the plaintiff would be allocated just two car park spaces and correspondingly be issued only two car park labels. The plaintiff complained that this contravened the existing by-laws under which it would enjoy an allocation of 66 car park spaces.

20.43 The defendant raised two arguments against the validity of the by-laws. First, since the by-laws were not lodged with the Commissioner of Buildings (“the Commissioner”) within 30 days of the passing of the special resolution as required by the then s 41(12) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) read with para 14(1) of the Fourth Sched to the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) (“BMSMA”), they were invalid/void. Second, in compliance with the BMSMA, it had terminated the by-laws, with reasonable notice given, by way of the letter of 21 August 2012.

20.44 The High Court rejected both arguments of the defendant and held that the by-laws were valid and binding on the defendant. The court found that the evidence was equivocal as to whether the by-laws

were lodged out of time, given that the first letter from the defendant's agent to the Commissioner relied on by the defendant, although marked with a "RECEIVED" stamp dated 12 September 2003, was dated 20 August 2003, a date within 30 days of the passing of the special resolution. A further letter was also not helpful since it merely restated the fact that the letter was dated 20 August 2003 but marked as received on 12 September 2003. Hence, in the light of s 108 of the Evidence Act (Cap 97, 1997 Rev Ed), the defendant had not discharged the burden of showing unambiguously that the by-laws were lodged more than 30 days after the special resolution was passed.

20.45 On a related issue, the High Court was of the view that even if it could be shown that the by-laws were lodged with the Commissioner after the expiry of the 30-day period, it was not necessary that the by-laws were, for that reason alone, void. As the court explained (at [17]):

On the one hand it can be argued that s 41(12) of the LTSA renders invalid any purported lodgment of a by-law after the expiry of the 30-day period, with the consequence under s 41(13) that the by-law never comes into force. On the other hand, while lodgment out of time might expose the management corporation and its council members to criminal sanctions and a fine under s 120(1) of the LTSA, it does not affect the validity of the lodgment and hence does not prevent the by-law from coming into effect whenever it is lodged, however late that might be. As neither party argued this point, I express no preference for either view.

20.46 With regard to the second argument, the High Court was of the view that the defendant's reliance on para 14(4) of the Fourth Sched to the BMSMA was misconceived. In its opinion, the by-laws did not grant the plaintiff a right of exclusive use and enjoyment of the common property that was the car park since no one particular space was earmarked for the exclusive use of any one unit owner. In effect, each unit owner could use the entire car park. Further, a scheme that allocated car park spaces to unit owners in a manner proportionate to their share values was not one which granted any unit owner "special privileges". It followed that the defendant was not entitled to terminate the by-laws with reasonable notice.

20.47 The High Court further noted that it was open to the defendant to implement the new car park scheme provided it complied with the requirement of a special resolution as stipulated in s 32(3) of the BMSMA. Until this was done, the existing by-laws were not superseded by any new scheme of allocation.

20.48 The dismissal of the defendant's application for a declaration that it "has the right, power and duty to manage and administer all the

common property comprised in the AA Centre, including the car park” must not be taken to mean that it did not have such right, power and duty which it undoubtedly had. What the defendant could not have was a *carte blanche* to manage the common property as it deemed fit as it must manage the property in accordance with all by-laws in effect, including the existing by-laws pertaining to the car park.

20.49 On the perceived inconsistency between the existing by-laws and the statutorily prescribed by-law 2 set out in the Second Sched to the Building Maintenance (Strata Management) Regulations 2005 (S 192/2005) pertaining to parking of vehicles, the High Court took the view that the latter must be interpreted as not applying to any part of the common property which had been designated as a car park so as to avoid an absurd position. Reference was made to *Poh Kiong Kok v Management Corporation Strata Title Plan No 581* [1990] 1 SLR(R) 617 at [16]. In the result, there was no inconsistency between the by-laws made by the defendant and that prescribed by the BMSMA regulations.

Meetings

20.50 Various aspects of the law on meetings under the BMSMA were clarified by the High Court in *Fu Loong Lithographer Pte Ltd v Mok Wai Hoe* [2014] 1 SLR 218 (“*Fu Loong Lithographer*”).

20.51 The plaintiffs had applied to invalidate certain rulings made by the first defendant in his capacity as chairperson of the second defendant (the management corporation) and to restrain the first defendant or any subsequent chairperson from making such rulings in the future. Certain motions, which were submitted by the plaintiffs at an extraordinary general meeting on 5 June 2013 (“5 June 2013 EGM”), were ruled “out of order” by the first defendant. The plaintiffs also applied for, *inter alia*, the following orders: (a) that the rejection of certain votes by the first defendant at the 5 June 2013 EGM on motion 2 – which called for the termination of Chancery Law Corp as legal representatives of the second defendant with immediate effect – on the basis that the voters were in conflict of interest be invalidated; and (b) that the first defendant, or any other chairperson subsequently elected, be restrained from rejecting votes by unit owners who were entitled to vote under the provisions of the BMSMA.

20.52 The plaintiffs’ application was stated to be in the matter of s 61 of the BMSMA and paras 4 and 5 of the First Sched thereto. However, the second defendant argued that the plaintiffs were not the proper parties to sue under s 61 of the BMSMA. It should be for the management corporation to commence the application and not the plaintiffs. In rejecting the argument, the High Court made the following observations (at [31]):

[N]either s 61(3)(a) nor the proper plaintiff rule was relevant as the Plaintiffs were not suing the 1st Defendant for damages or an account of profits resulting from a breach of duty. Nor were they suing the 1st Defendant for wrongs allegedly done to the MC. Rather, they were seeking to invalidate his rulings to the effect that certain motions submitted by them were 'out of order' and that they were not allowed to vote on Motion 2 because of a conflict of interest. These were rulings that affected them personally. Further, it is clear that individual subsidiary proprietors are entitled to apply to a STB for a determination of such issues [citing ss 101(1)(c) and 104(1)(a) of the BMSMA].

20.53 In determining whether the first defendant's rulings on the motions should be invalidated, the High Court made some preliminary observations on para 4 of the First Sched to the BMSMA pertaining to motions out of order. The phrase "if he considers" in the provision conferred on the chairperson the discretion to decide whether a motion would conflict with the BMSMA or the by-laws or would otherwise be unlawful or unenforceable. The burden was therefore on the plaintiffs to show that the chairperson's decision was made without rational basis or was in bad faith. The chairperson was entitled to seek legal advice and ask questions to inform himself of the background facts and the reasons for any proposed motion, so that he could decide whether a motion was "out of order" for any of the grounds stated therein. The other key phrase was "unlawful or unenforceable" therein. "Unlawful" would cover crimes and torts and might sometimes extend to breach of contract, breach of fiduciary duty, and perhaps even matters which merely made a contract unenforceable. The word's appropriateness was dependent on the legal context, citing *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174. With regard to the word "unenforceable", the High Court was of the view that, for the purposes of the First Sched, a motion, while not necessarily impossible to implement if carried, might nevertheless still be "unenforceable" in the sense that a court would consider it improper or undesirable to enforce it.

20.54 With regard to motions 1(b) and 1(e), *ie*, that the following matters be determined only by the management corporation in a general meeting: "(b) appointment of legal representatives"; and "(e) appointment of any contractors or consultants or processional [*sic*] which costs or fees exceed \$500 in total", the first defendant had ruled them to be unenforceable and out of order. Having regard to s 59 of the BMSMA, the High Court held that the first defendant's ruling was clearly unreasonable and invalidated it. In the High Court's opinion, the first defendant in doing so was depriving the unit owners of the second defendant of their right to reserve certain matters to be determined only by them in a general meeting. The inconvenience and impracticality of having such appointments being made only at a general meeting should not be equated with unenforceability. However, out of an abundance of caution and in part to address the concerns expressed by counsel for the

second defendant, the High Court further specified that the plaintiffs should not propose any future motions or amendments that touched on the lawyers already appointed by the second defendant to defend itself in Suit 311/2012. As the plaintiffs in the present case were also the plaintiffs in Suit 311/2012, the rules of natural justice (specifically, the second defendant's right to be heard) would be violated if the plaintiffs were allowed to terminate the second defendant's counsel in that suit.

20.55 Motion 3(a) purported to revoke a past resolution, passed at the 26th and/or 27th annual general meeting ("AGM"), for "the ratification of the Upgrading Work Expenses of about \$530,000 or any other sum". The first defendant had ruled this motion out of order for the following reasons (at [44]):

- (a) the proceedings at the 27th AGM had been found to be valid in STB 78/2011 and the matters of the 27th AGM should be considered to be final; and
- (b) there [was] no provision in the BMSMA for the revocation of such a resolution that [had] been passed.

The High Court disagreed with the reasons given by the first defendant. The Strata Titles Board's decision in STB 78/2011 was simply that the resolutions passed at the 27th AGM were valid but it did not render the resolutions so passed irrevocable. This was because para 13 of the First Sched to the BMSMA necessarily implied that it was possible to revoke an ordinary resolution by a subsequent ordinary resolution. Nonetheless, the High Court validated the first defendant's ruling on motion 3(a) for the simple reason that there was no resolution to ratify any previous upgrading work expenses passed during the 27th AGM. The minutes of the 27th AGM indicated that of all the resolutions that were passed, they were concerned with future upgrading work or the approval of financial accounts.

20.56 Motion 3(b), which was to revoke a past resolution for "the adoption of all Financial Reports ended 30 June in years 2009, 2010, 2011 and 2012 and the interim Financial Report from 1 July 2012 to 31 July 2012", was ruled out of order by the first defendant for the same reasons as that given for motion 3(a). The additional reason was that the accounts had been audited pursuant to s 45(1) of the BMSMA, and there would be no replacement set of audited accounts if the adoption of these accounts were revoked. While the High Court disagreed with the reasons also given for motion 3(a), it was of the view that the additional reason given was a legitimate concern. There was no allegation that the accounts contained any material misstatements or that the auditors had been remiss in any way. If the plaintiffs' reason for wanting to revoke the adoption of the audited accounts was to bolster their case in Suit 311/2012, this was not a valid reason.

20.57 As for motion 8 which was to revoke and credit to the accounts of certain unit owners the late payment interest charges levied on them, the High Court, having regard to ss 38(3), 40(6) and 40(7) of the BMSMA, agreed with the first defendant's view that the interest payments could not be refunded. If the interest charges had yet to be paid into the management fund, s 40(6)(b) allowed the management corporation to determine in a general meeting that the unpaid contribution shall bear no interest. However, once the interest charges had been paid, it became part of the management fund and could not be disbursed otherwise than for the purposes stated in ss 38(3)(a)–38(3)(c). A refund of late payment interest was not one of the stated purposes.

20.58 In regard to motion 9 which was to approve an application by some of the unit owners to subdivide their units and to authorise the managing agent to sign all relevant documents, forms and approvals required by the authority or statutory bodies, the first defendant had ruled the motion out of order on the grounds that it conflicted with the BMSMA and would be unenforceable. He did so after seeking and obtaining an architect's report stating that such a subdivision would require significant upgrading and modification work to be carried out in the common areas and that the Urban Redevelopment Authority would likely request for a 90% resolution before granting permission for the subdivision. As the plaintiffs had requisitioned the 5 June 2013 EGM to pass its motions by ordinary resolution, the High Court took the view that the first defendant had a reasonable basis to rule that motion 9 was out of order for being unenforceable, given that the proposed subdivision would likely require a 90% resolution.

20.59 As for motion 2 which called for the termination of Chancery Law Corp as the legal representatives of the second defendant with immediate effect, the first defendant allowed the motion to be voted on but rejected the votes of eight unit owners, including the plaintiffs, the reason being that those unit owners were involved in pending litigation against the second defendant, namely, STB 50/2012 and Suit 311/2012, and were therefore conflicted from deciding on the second defendant's legal representation. While there was no express provision granting a chairperson the power to reject votes for any reason from a unit owner who was *prima facie* entitled to vote, the High Court was of the view that in certain exceptional circumstances, it might be proper for a chairperson to do so. Having regard to s 104(1)(a) of the BMSMA, the High Court was not convinced that the only ground on which a person might be properly denied a vote was that he did not satisfy the requirements in para 2(1) of the First Sched to the BMSMA. The motion for the immediate termination of Chancery Law Corp as the legal representatives of the second defendant without a replacement would effectively deny the second defendant its right to be heard in Suit 311/2012. Accordingly, such a motion could not be voted on by

parties whose interests were adverse to the second defendant in that suit. It was immaterial that the plaintiffs were brought into Suit 311/2012 via a third-party notice issued against it. The fact remained that the interests of the plaintiffs and the second defendant in Suit 311/2012 were clearly inconsistent.

20.60 Finally, as the High Court had invalidated the first defendant's ruling on motions 1(b) and 1(e), the issue arose as to whether an injunction should be issued to restrain the first defendant or any other chairperson subsequently elected from making a similar ruling should the same or similar motions be submitted in the future. The High Court noted that the plaintiffs were essentially seeking a *quia timet* injunction but that there was insufficient evidence adduced by the plaintiffs to issue one. On the contrary, the evidence showed that the first defendant was a careful chairperson who sought legal and professional advice before making the rulings he did, and the High Court found no evidence of bad faith on his part. Consequently, there was no reason to believe that the first defendant would continue to make rulings similar to those that the High Court had invalidated.

Jurisdiction of Strata Titles Boards

20.61 In *Fu Loong Lithographer* (above, para 20.50), the High Court reiterated the position that unit owners are not obliged to first refer disputes to a Strata Titles Board for determination before resorting to the courts, citing *Kwok Wai Hon v Teo Kim Hui* [2008] SGMC 4 at [14]–[16]. As the High Court further elaborated (at [26]):

The mere fact that the BMSMA provides for the establishment of STBs to determine disputes under the BMSMA does not mean that the jurisdiction of the courts is thereby ousted. In the absence of a provision expressly ousting the court's jurisdiction or granting the STBs exclusive jurisdiction over strata management disputes, the position will simply be that a plaintiff has two possible forums to choose from. However, if he chooses to proceed before a STB in the first instance, then any appeal against the STB's decision to the High Court can only be on a point of law: s 98(1) of the BMSMA.

Collective sale

20.62 That the collective sale regime, provided in ss 84A–84G of the LTSA, is constitutional was re-affirmed in *Chan Kin Foo v City Developments Ltd* [2013] 2 SLR 895 (“*Chan Kin Foo*”). The High Court referred to the earlier case of *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754 at [7] which came to the same conclusion. In *Chan Kin Foo*, the appellant, a minority unit owner who opposed the collective sale, had sued the respondent on the ground that its purchase of the property was in violation of Art 12 of the Constitution of the

Republic of Singapore (1985 Rev Ed, 1999 Reprint) (“Constitution”) and Arts 1, 7 and 17 of the Universal Declaration of Human Rights (“UDHR”) as it discriminated against the rights of the minority to own property.

20.63 In dismissing the appellant’s arguments, the High Court in *Chan Kin Foo* noted (at [27]) that “the kinds of differences which Art 12 envisions are those relating to the nature of the individual and by reason of his or her identity in a particular class”. These categories related to characteristics inseparable from the individual’s identity and did not cover any class of objecting minority owners whose only distinguishing characteristic was that they voted a different way from the majority as their choice was not an essential part of their identity nor would they identify with that class in all contexts. As the High Court further elaborated (at [27]):

The only context in which a member of the minority would identify with his or her class is in relation to the specific choice which has been made ... Art 12 was clearly not intended to cover a situation where a minority class is created by vote, let alone in the collective sale context where there is due compensation and clear procedure to prevent fraud and ensure that the views of the minority are heard.

20.64 On the UDHR claim, the High Court observed that the Constitution does not protect a right to property and that the UDHR was not binding. For Art 17 of the UDHR to have any legal effect in Singapore, it must first form part of customary international law. However, there was no state practice or *opinio juris* which supported a right to property. In fact, state practice allowed for collective sales by majority vote and hence, the contention that Art 17 of the UDHR was customary international law was wholly untenable. Even if the right to property were customary international law, it was not incorporated into Singapore law and was, thus, wholly inconsistent with the LTSA.

20.65 The duty of good faith in a collective sale was considered in *Ngui Gek Lian Philomene v Chan Kiat* [2013] 4 SLR 694 (“*Ngui Gek Lian Philomene*”). One of the issues centred on whether the incentive payments offered by the marketing agent to some of the objecting unit owners amounted to bad faith in the transaction within the meaning of s 84A(9)(a)(i)(A) of the LTSA.

20.66 The case concerned Thomson View Condominium, a 99-year leasehold property that had 61 years left on its leasehold. In order to achieve the 80% consent threshold, the collective sale committee’s marketing agent offered incentive payments to four objecting unit owners who, but for the incentive payments, would not have signed the collective sale agreement. After the 80% consent threshold was satisfied, the collective sale committee (“CSC”) of Thomson View Condominium

proceeded with the launch of the public tender. It was only at the close of the third public tender that one formal bid of \$590m was submitted by the purchaser. A day later, the CSC awarded the tender to the purchaser on terms that were amended after negotiations between the CSC and the purchaser. These amendments included rider 11.2 which allowed the purchaser to rescind the contract if the lease upgrading premium was more than \$95m. The period for accepting the purchaser's offer was also amended from one month to three days.

20.67 The plaintiffs as the authorised representatives of the CSC applied for the sale of the development to the purchaser under s 84A(1) of the LTSA. The application was opposed by the defendants, the objecting minority unit owners.

20.68 The plaintiffs argued that the defendants were not entitled to raise objections based on the incentive payments because this had not been raised at the Strata Titles Board. In rejecting the argument, the High Court noted that the word "may" in s 84A(4A) of the LTSA referred to the option that a unit owner has in refiling his objections (that was previously made to the Strata Titles Board) to the High Court. It did not refer to an option to bring different grounds of objection to the High Court. While the intent behind the provision was to avoid new grounds of objection from delaying the collective sale process, this intention did not extend to shutting out legitimate grounds of objection that could not have been known to the objectors at that point in time. Otherwise, the section would prevent dissenting unit owners from raising an objection based on, for example, secret bribes paid by members of a collective sale committee to certain unit owners just because these bribes were discovered after objections were filed at the Strata Titles Board. As the High Court further explained (at [45]):

This interpretation of [s 84A(4A)] ensures that dissenting subsidiary proprietors are not unfairly barred on a technicality from raising a new objection. At the same time, this interpretation does not make the collective sale process unduly onerous because it would still prevent new objections from being raised at the High Court if the grounds for these objections were already known at the STB stage of proceedings. In my view, this interpretation strikes a fair balance between the competing policy objectives of the LTSA (see the 2007 Debates at col 2037) ... as articulated by the Minister for Law ...

20.69 The High Court also concluded that the CSC's behaviour during the sale and marketing of the property did not amount to bad faith in the sale transaction within the meaning of s 84A(9)(a)(i) of the LTSA. *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 ("*Horizon Towers*") was distinguished where the sale committee had committed multiple breaches of its duties.

20.70 The shortcomings of the valuation report did not result in the CSC breaching its duty to obtain the best price for the property. Even if the valuer had directed its mind to the announcement by the Government of the Thomson MRT line and the sale by the Government of a parcel of land nearby, there was no evidence to suggest that the valuation would have exceeded the purchaser's \$590m bid such as to cause the CSC to hold back acceptance of the bid. There was also no evidence to suggest that the CSC had been dishonest in accepting the valuation report.

20.71 With regard to the duty to review the reserve price, the CSC was entitled to accept the advice given by the marketing agent and there was no reason to conclude that the advice was obviously flawed. While property prices in the vicinity were indeed rising, the CSC was justified in maintaining the reserve price on the marketing agent's advice so that there would be a greater possibility of competing bids. In any event, the defendants did not adduce any expert evidence to contradict the marketing agent's advice not to increase the reserve price.

20.72 The CSC's failure to extend the third public tender was a breach of their duty to obtain the best price for the property. As the High Court explained (*Ngui Gek Lian Philomene* at [32]):

The MRT Announcement was undoubtedly a significant piece of news that came only six days before the close of the tender ... the CSC should have consulted experts in deciding whether to extend the tender. This might have given potential bidders more time to absorb the MRT Announcement and obtain the necessary approvals in order to submit a bid. Indeed, the CSC was under an obligation to 'market (through the property agent) the property for a reasonable period of time to the largest number of potential purchasers in order to create the widest catchment of offers' (*Horizon Towers* at [157]).

20.73 However, the CSC's failure to extend the third public tender was a genuine error not arising from bad faith, citing *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724 at [17] ("*Chua Choon Cheng*") and this error alone was not sufficient to taint the entire sale transaction with bad faith within the meaning of s 84A(9)(a)(i) of the LTSA.

20.74 The High Court also found that in accepting its solicitors' advice, the CSC honestly believed that there was no need to consult the unit owners regarding the amendments to the tender contract since, according to such advice, the amendments were not materially less favourable and were in line with market practice. There was no reason for the CSC to believe that the advice given by its solicitors was unreliable, biased or obviously erroneous. In fact, the CSC had asked for

an extension of time to accept the amended tender contract but their request was rejected by the purchaser.

20.75 The incentive payments made by the marketing agent amounted to bad faith in the transaction. The High Court took the view that the marketing agent owed duties to the unit owners as adviser to the CSC and these duties did not depend on the establishment of an agency relationship in law between the marketing agent and the CSC. In particular, the marketing agent had a duty to avoid any possible conflict of interest: citing *Horizon Towers* at [107] and *N K Rajarh v Tan Eng Chuan* [2013] 3 SLR 103 at [22], upheld on appeal in Civil Appeal No 42 of 2013. The context of the statement made in *Horizon Towers* at [107] showed that a marketing agent had a duty to avoid any possible conflict of interest even before the requisite statutory consent for a collective sale was obtained. As the High Court further observed (*Ngui Gek Lian Philomene* at [51]):

[The marketing agent] egregiously breached its duty to avoid any possible conflict of interest. [It] placed itself in a position of conflict by offering the Incentive Payments to a select group of objecting [unit owners], thereby preferring the interests of this select group of [unit owners] (and their own personal interest in a very substantial commission for a successful collective sale) over the interests of the other [unit owners] who opposed the sale; there is genuine doubt whether the requisite 80% consent threshold would have been reached if the Incentive Payments had not been offered. The offer of the Incentive Payments also gave rise to another anomaly, namely, that consenting [unit owners] owning similar units would receive unequal payments. Parenthetically, even within the select group of previously objecting [unit owners] who received Incentive Payments, some were offered a higher Incentive Payment than the others ...

20.76 The marketing agent also breached its duty of transparency by failing to disclose the incentive payments to the CSC or the other unit owners. The High Court referred to *N K Rajarh v Tan Eng Chuan* [2013] 3 SLR 103 at [38] where it was held that a marketing agent's assistance and participation in an incentive payment arrangement that was in breach of a sale committee's fiduciary duties constituted bad faith in the transaction. While the making of incentive payments *per se* to objecting owners would not constitute bad faith under s 84A(9)(a)(i)(A) of the LTSA, citing *Chua Choon Cheng* at [91], when these payments are made in breach of a payer's duties under the law, the court would not hesitate to dismiss the collective sale application on the ground of bad faith.

20.77 The method of distribution of the sale proceeds was also tainted by bad faith within the meaning of s 84A(9)(a)(i)(B) of the LTSA. The reduction of the marketing agent's commission through the offers of incentive payments would result in the net sale proceeds being increased *pro tanto*. However, the benefit of this reduction would not be shared by

all unit owners; the reduction would benefit only the few unit owners who were promised the incentive payments. The ultimate outcome was that, without the consent of all the unit owners who signed the collective sale agreement, the method of distributing the sale proceeds set out therein would be secretly departed from.

20.78 The High Court also pertinently observed that, in the light of s 84A(1)(b) of the LTSA, the method of distributing the sale proceeds specified in the sale and purchase agreement was not agreed to by the unit owners who were promised incentive payments. They agreed to a different method of distributing the sale proceeds and should therefore not be counted amongst the 80% majority. As the 80% consent threshold was not reached without them, the plaintiffs were not even in a position to apply for the court's approval under s 84A(1)(b) of the LTSA.

20.79 The dispute over the quantum of commission payable to the marketing agent was, in the opinion of the High Court, irrelevant to the decision whether to allow the application for sale as it did not fall within one of the grounds for refusing the sale under s 84A(7) or 84A(9) of the LTSA. In any event, the dispute was only a potential one which might well be resolved after the sale application had been approved. The dispute appeared to be a genuine oversight on the part of the CSC which did not indicate bad faith.

20.80 Following the decision in *Ngui Gek Lian Philomene*, the Court of Appeal in *N K Rajarh v Tan Eng Chuan* [2014] 1 SLR 694 ("*N K Rajarh*") gave its written grounds of decision where it upheld the High Court's dismissal (see [2013] 3 SLR 103) of an application for the collective sale of Harbour View Gardens. In *N K Rajarh*, an incentive payment was offered by the CSC to secure and achieve the 80% consent threshold. It was offered to only one of three objecting minority unit owners who was a member of the CSC. The marketing agent was intimately involved in the arrangements to facilitate the incentive payment. It entered into an agreement with the said objecting minority owners ("the Hans") for the incentive payment to be made in exchange for their consent to the collective sale of the property. The CSC knew of, and was involved in, the marketing agent's conduct.

20.81 In analysing the law on collective sales, the Court of Appeal took the opportunity to reiterate as follows (at [34]):

Procedural fairness is thus of fundamental importance, especially in the process by which the consent levels are achieved. It bears emphasising that the relationship and dealings between SC and its advisers must also be strictly policed and bear the test of close scrutiny. The collective sale scheme requires that the letter and spirit of the collective sale processes are observed by all who are intimately

involved in the proposed collective sale, and in particular, to ensure that the minority owners have not been prejudiced (see also [*Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724] at [77]). [emphasis in original]

20.82 The Court of Appeal re-emphasised the obligations of a CSC and its advisers/agents in facilitating the process of meeting the requisite consent requirements for a collective sale laid down in its earlier decision in *Horizon Towers* (above, para 20.69). Given that a CSC would ordinarily have an inherent inclination to sell rather than not to sell, there is an obvious need for high standards of accountability and conduct on the part of the committee *vis-à-vis* all unit owners. In this regard, the duty of even-handedness and the duty to make full disclosure of relevant information were especially pertinent in the instant case.

20.83 The duty of even-handedness requires the CSC to be impartial in dealing with the interests of the consenting and minority unit owners, akin to that of a trustee who has to hold an even hand between the interests of different classes of beneficiaries. Hence, a CSC, when faced with factions of unit owners whose interests conflict, cannot prefer the interests of one faction without regard to the interests of the other unit owners. As for the duty of disclosure and openness to all unit owners on whose behalf the sale committee acts, the effect of breaching a requirement for disclosure of conflict of interests would ultimately depend on the significance and consequences of the breach in relation to the transaction as a whole.

20.84 On the duties of advisers and agents of the CSC, the Court of Appeal elaborated as follows (*N K Rajarh* at [45]):

Marketing agents and legal advisers to the SC are agents of the SC and sub-agents of the subsidiary proprietors on whose behalf the SC acts ... *Consistent with the spirit of this collective sale scheme, marketing agents and legal advisers of the SC also have duties of transparency and openness in their dealings with the SC and all the subsidiary proprietors.* [emphasis in original]

20.85 In the instant case, the CSC patently breached its duty to act even-handedly as between the consenting unit owners and the objecting minority owners, having regard to the CSC's involvement in the manner in which the incentive payment was offered. The Court of Appeal distinguished its earlier decision in *Chua Choon Cheng* (above, para 20.73). In *Chua Choon Cheng*, the 80% consent threshold had already been met before the incentive payments were offered. The purchaser offered the incentive payments to secure unanimous consent and persuade the minority unit owners to withdraw their objections before the Strata Titles Board. In the instant case, the incentive payment

was offered to secure and achieve the 80% consent threshold. Further, in *Chua Choon Cheng*, the terms of the collective sale agreement and the sale and purchase agreement were such that the incentive payments did not alter the agreed method of distribution of the sale proceeds among the unit owners. In the instant case, the incentive payment would effectively result in a redistribution of the sale proceeds, inconsistent with the agreed method of distribution under the collective sale agreement.

20.86 The Court of Appeal noted that the incentive payment was not an offer that was equally open to each of the objecting unit owners to accept. The law, in determining whether the CSC held an even hand between factions of unit owners, was not concerned with what each unit owner subjectively deemed as a fair offer. The law was concerned with the CSC's treatment of the different factions of unit owners. As the Court of Appeal further elaborated (*N K Rajarh* at [50]):

In short, the CSC was privy to an arrangement that benefited only one of its members and furthered the interests of the consenting majority proprietors alone, and this infected the entire arrangement. The CSC members who participated in the Additional Payment allowed their individual interests as subsidiary proprietors to take precedence over their obligation to ensure an even-handed approach to the [other objecting unit owners]. Additionally, Mr Han was in breach of his duty as a CSC member in accepting an offer that was not open to the other Dissenting Proprietors.

20.87 The CSC also breached its duty of disclosure, transparency and openness. The CSC was privy to the involvement of the marketing agent in the arrangements to facilitate the incentive payment but this was not disclosed to the objecting unit owners. This was a material fact that would have revealed that the marketing agent had been interposed directly in the incentive payment arrangements in a manner which was not appropriate and which facilitated the CSC's breach of its duties to the unit owners. The CSC also did not comply with the requirements in para 2(3)(b) of the Third Sched to the LTSA to disclose any conflict of interest or potential conflict of interest with their duties as CSC members arising from an "interest in any contract, whether alone or together with any of his associates". In the result, the CSC acted in a manner that was not transparent, contrary to the spirit of the LTSA.

20.88 As for the marketing agent, the Court of Appeal found that it breached its duty of transparency and openness owed to all the unit owners, including the other objecting unit owners. It was inappropriate for the marketing agent to be so intimately involved in the incentive payment arrangements without full prior disclosure of this role to all the unit owners. It ought to have left it to the unit owners to make their own arrangements, instead of interposing itself into the arrangements.

20.89 The Court of Appeal rejected the argument that the other objecting unit owners did not suffer prejudice as a result of the CSC's and marketing agent's breaches of duty in regard to the arrangements for the incentive payment because they would still receive what they would be entitled to under the sale and purchase agreement with a sale price of \$33m and there was no evidence that a price higher than \$33m could have been obtained. Referring to its earlier decision in *Horizon Towers* at [131], the Court of Appeal reiterated that in assessing whether there was good faith in the transaction having regard to the sale price and method of apportionment of the sale proceeds, the court was not simply confined to an inquiry of whether the sale price was fair based on the market conditions, but the process by which the price and the consent for the collective sale was secured. As the Court of Appeal further explained (*N K Rajarh* at [53]):

Procedural fairness in arriving at the 80% threshold (or, in general, the requisite consent level) is crucial because the remaining minority proprietors would be obliged to sell their properties without having consented to the collective sale if that threshold is met. Thus the court would expect nothing less than strict compliance with the standards of accountability, fairness, openness and propriety consistent with the letter and spirit of the LTSA scheme, by the SC and its agents in facilitating the collective sale process. In the present case, we found that the process was tainted by elements of non-disclosure and lack of even-handedness on the part of the CSC, with one member of the CSC obtaining the most favourable offer and effectively, the only offer of an incentive payment, at the expense of the other minority proprietors. This amounted to an unacceptable inequality of treatment of the Dissenting Proprietors, and *a fortiori*, where a member of the CSC was favoured over the other minority proprietors. In the circumstances, the process by which the 80% threshold was achieved had been seriously tainted, and the [other objecting unit owners] suffered prejudice as a result.

20.90 The Court of Appeal also made it clear that implicit in the opening words of para 7(3) of the Third Sched to the LTSA, the requisite consent threshold under s 84A(1) of the LTSA should be met before the specified modes of sale under para 11 (namely, public tender and auction) could be launched. This irregularity in the instant case was consistent with finding that the CSC acted with undue haste and inadequate regard for the propriety of the process leading to the collective sale application. Stressing the importance of adhering to the procedural requirements laid down by Parliament in the LTSA by CSCs and their advisers and agents, the Court of Appeal made it categorically clear that if a breach of those requirements, including those specified in s 84A(3), result in prejudice, an application for a collective sale would not be allowed to proceed.

Conveyancing

Availability of specific performance

20.91 In *Liten Logistics Services Pte Ltd v ORG Powell Packaging Pte Ltd* [2013] SGCA 42, the Court of Appeal had to consider, *inter alia*, whether the remedy of specific performance was available to the purchaser so that the latter could be deemed the equitable or beneficial owner of the properties as at the date of the contract.

20.92 Simplifying the facts, the vendor (Liten Logistics Services) had granted an option to purchase the properties concerned to the purchaser (ORG Powell Packaging). The option provided that the sale and purchase of the properties was subject to the purchaser obtaining Jurong Town Council's ("JTC") approval and that either party could rescind the agreement should such approval not be obtained for reasons beyond their control.

20.93 Before the option became open for exercise, one of the properties was compulsorily acquired by the Government. The purchaser gave notice of its intention to proceed with the purchase of the properties nonetheless. It took the view that it did not require JTC's approval to be obtained in the circumstances since JTC would no longer have anything at stake in the disposition of the properties. However, the vendor took the position that the compulsory acquisition notice had frustrated the agreement for an option to purchase the properties.

20.94 Applying the reasoning in the earlier Court of Appeal case of *Chi Liung Holdings Sdn Bhd v Attorney-General* [1994] 2 SLR(R) 314, the court was of the view that specific performance was not available to the purchaser and, consequently, the purchaser had not obtained a proprietary interest in the properties. The option expressly provided that the sale and purchase of the properties was subject to the purchaser obtaining JTC's approval.

20.95 The issue as to whether the sale of the other property which was not affected by the compulsory acquisition could be proceeded with was rendered moot as the purchaser similarly did not have a proprietary interest in it. In addition, the sale was an integrated one for both properties. In the circumstances, it was not necessary for the court to consider the issues pertaining to the doctrine of frustration.

Obligation to complete sale

20.96 The Court of Appeal case of *Lim Hoe Heng v Poh Choon Kia* [2013] 1 SLR 152 was discussed in (2012) 13 SAL Ann Rev 377 at 392–393, paras 20.76–20.80.