COLLECTIVE SALES IN SINGAPORE

Selected Issues

Collective sales of strata developments have generated much discussion and disquiet in Singapore since they were first introduced in the late 1990s. The tension between facilitating public interest objectives and the rights of minority owners in respect of their properties is most pronounced in the area of collective sales. This paper looks at how the relevant collective sale provisions balance the competing interests involved and the judicial approach in this regard. The adequacy of some aspects of the collective sale statutory scheme is discussed. The impact of case law on the role of the Strata Titles Boards is also evaluated.

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I. Introduction

1 Collective sales[1] of strata developments by majority consent have been a unique feature of the strata title landscape in Singapore since being introduced in 1999.[2] The aims of the statutory scheme for

1 Also popularly referred to as *en bloc* sales. An *en bloc* sale is a sale, usually to a single purchaser, where completion of all the units is effected at the same time.

2 See the Land Titles (Strata) (Amendment) Act 1999 (No 21 of 1999), ss 8, 10–12 and 21 (with effect from 11 October 1999 *vide* S 445/1999). For comments on the 1999 collective sale provisions, see Teo Keang Sood, "Collective Sales of Strata Developments – The Singapore Approach" (2000) 8 APLJ 157. See further Teo Keang Sood, *Strata Title in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2009) ch 1 at pp 8–9 and ch 16 at pp 632–634. For an earlier account which covers generally developments prior to 2008, see Ter Kah Leng, "A Man's Home is [Not] His Castle – *En Bloc* Collective Sales in Singapore" (2008) 20 SAcLJ 49. See also by the same author, "*En Bloc* Sales in Singapore – Critical Developments in the Law" (2009) 21 SAcLJ 485. The equivalent of Singapore's collective sale regime can also be seen in some states in the US and provinces in Canada (see Teo Keang Sood, *Strata Title in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2009) ch 16 at p 633) and more recently in the Dubai Strata Title Law (DIFC Law No 5 of 2007), Arts 31 and 32.

collective sales set out in the Land Titles (Strata) Act[3] ("LTSA") are two-fold: to facilitate the optimal use of prime land to build more quality housing in land-scarce Singapore and to promote the rejuvenation of older estates by moving away from the strict and cumbersome regime which formerly obtained under the Act.[4] The basic idea is to enable the majority unit owners to sell the development to a purchaser without the consent of the minority unit owners, subject to the approval of a Strata Titles Board.[5] In essence, the collective sale is not a contractual sale, but a new form of statutory sale as it takes effect by virtue of the Board's order and not by virtue of the sale and purchase agreement.[6]

2 The property boom years of 2007 and the early half of 2008 saw collective sales of strata developments taking place at a frenzied pace. In a number of instances, majority unit owners single-mindedly worked towards achieving a collective sale of their developments and hitting jackpot earnings.[7] There is no doubt that a sale of the entire development negotiated by the unit owners collectively will often bring a higher price than one where the unit is sold individually. Minority unit owners were seen to be sidelined in the sale process. It has been aptly remarked that:

> The lure of 'windfall profits' has been a siren song for many (especially absent landlords and speculators), to the detriment of those who do not want to lose their homes at any price. As a result, bitter acrimony and strained relationships have often arisen between owners who want to sell and those who do not want to sell their units[;][8]

and

> It is no secret that collective sales of developments continue to strike raw nerves, especially from those who do not view their property as investments but as homes to be kept regardless of price.[9]

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3 Cap 158, 2009 Rev Ed, Part VA. The collective sale provisions therein are *in pari materia* with those contained in the 1999 Revised Edition dealt with in the decided cases discussed in this paper.

4 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [5] and *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR 109 at [1]. See also *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at col 601 (Assoc Prof Ho Peng Kee, Minister of State for Law).

5 Constituted under Part VI of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) to hear applications for, *inter alia*, orders for collective sales under Part VA of the LTSA.

6 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [7]. See also LTSA, ss 84B(1)(*a*), 84B(1)(*b*) and 84B(4).

7 See also Mak Yuen Teen, "En bloc sales: Consider wider interests of society, not just economic payoffs", *The Business Times* (15 April 2008).

8 *Per* V K Rajah JA in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR 109 at [2].

9 *Per* Paul Tan AR in *Sim Lian (Newton) Pte Ltd v Gan Beng Cheng Raynes* [2007] SGHC 84 at [101]. See also Susan Prior, "En bloc sales eroding our 'sense of

(*cont'd on the next page*)

3 Newspaper reports were also awash with stories of how minority unit owners were subjected to underhand tactics in the sale process[10] and had their cars scratched, property vandalised and families threatened.[11]

4 This paper will undertake a broad overview of some of the main features of the statutory scheme which seek to balance the competing interests involved and will consider some of the pertinent issues in the light of case law developments. In the process, some modest suggestions for reform will also be made.

II. Balancing the competing interests

5 The statutory scheme of collective sales is here to stay, at least in the foreseeable future, as it results in a public interest being met, namely the creation of more homes for Singaporeans in prime freehold areas. It is therefore imperative that the rights and interests of all affected parties are taken into account[12] and adequately protected, especially those of minority unit owners who oppose a sale. As observed by the Court of Appeal in *Ng Eng Ghee v Mamata Kapildev Dave*:[13]

> As a class, [the minority unit owners] have to be adequately protected from bullying and underhand tactics as well as any potentially collusive or improper conduct on the part of any of the majority owners.[14]

6 That protection of the minority unit owners' interests is paramount in the collective sale statutory scheme was again emphasised in the later Court of Appeal decision in *Chua Choon Cheng v Allgreen*

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kampung'", *The Straits Times* (17 March 2008); Lydia Lim, "Count the social impact of en bloc sales", *The Straits Times* (21 September 2007); and Mak Yuen Teen, "En bloc sales: Consider wider interests of society, not just economic payoffs", *The Business Times* (15 April 2008).

10 Michelle Quah, "Horizon minorities say sale done in bad faith", *The Business Times* (20 March 2008).

11 Jessica Cheam, "En bloc sales bring out the worst in Singaporeans", *The Sunday Times* (1 June 2008); Carolyn Quek, "Vandals keen on en-bloc sale damage cars", *The Straits Times* (24 July 2008); Carolyn Quek, "Laguna Park vandals strike again", *The Straits Times* (28 July 2008); Chong Chee Kin, "Condo's MC chairman nabbed", *The Straits Times* (28 August 2008); and Elena Chong & Kimberly Spykerman, "Ex-condo chief scoffs at fine for mischief", *The Straits Times* (22 April 2009), with the initial fine subsequently quadrupled by the High Court on appeal by the Prosecution (see Selina Lum, "Laguna Park man's fine quadrupled", *The Straits Times* (19 November 2009)).

12 See *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at cols 635–636 (Assoc Prof Ho Peng Kee, Minister of State for Law).

13 [2009] 3 SLR 109.

14 [2009] 3 SLR 109 at [3].

Properties Ltd,[15] when dealing with the contention of the majority unit owners that the legislative intent of the LTSA is for the protection of all owners:

> However, viewed in its proper context, the [Minister of State for Law]'s overriding concern is plainly the protection of the interests of the minority owners. This must be so, given that in every successful collective sale, it is the minority owners who lose their homes, despite their objections, as a result of the majority's decision to enter into a collective sale. If, indeed, the interests of all parties were an overriding consideration in every collective sale, Parliament would have provided that an application to the STB would be necessary even if unanimous consent was obtained. The following excerpts of the same speech by Minister Ho vividly illustrates [*sic*] this point (at coll 601–603, 634 [of *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69]): …[16]

7 At the same time, the measures put in place must not make it unduly onerous to bring about or realise a collective sale so as to ensure that the public interest objective in optimising the use of prime land in land-scarce Singapore is achieved.[17]

8 The safeguards and prerequisites originally enacted in 1999 have been further refined[18] to provide additional safeguards and greater transparency in the collective sale process. The changes also addressed concerns over the lack of clarity and certainty in the collective sale procedure. Below are some of the main prerequisites and safeguards in the collective sale process.

A. Required consent level: LTSA, s 84A(1)

9 The majority consent level of 80% or 90%, as the case may be, is pegged to the age of the development.[19] For a development which is ten or more years old, the consent of unit owners with at least 80% of the

15 [2009] 3 SLR 724.

16 [2009] 3 SLR 724 at [80].

17 *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 2001 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law).

18 See Land Titles (Strata) Act (Amendment of Fourth Schedule) Order 2004 (S 243/2004) and Land Titles (Strata) (Amendment) Act 2007 (No 46 of 2007). See also *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 1994 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law). For some comments, see Teo Keang Sood, "Strata Title: Protecting Minority Interests in a Collective Sale" (2009) 83 ALJ 288.

19 In the case of the Dubai Strata Title Law (DIFC Law No 5 of 2007), Art 31(2) (read with Sch 2 "Defined terms") requires a collective sale resolution to be passed at a duly convened meeting of the body corporate, being an extraordinary resolution supported by at least 90% of the unit owners present and entitled to vote at the meeting.

share values[20] as well as the total area of all the units is required for a collective sale to go through.[21] In the case of a development which is less than ten years old, the majority consent level is higher at 90%.[22] The percentage requirement seeks to strike a balance between the interests of the majority and minority unit owners, taking into account the policy objectives of the collective sale statutory scheme. It may also be noted that the percentage requirement applies to all unit owners alike.[23] For example, it makes no distinction between resident owners and investors in units in a development, thus maintaining consistency with the present general regime of property ownership, which does not discriminate on this basis. The percentage requirement in terms of area of units will mitigate the bias against residential unit owners in a mixed development who may hold lesser share values but own a substantial floor area.[24]

10 The ten-year criterion is a reasonable time-frame which sets apart the older developments which are more likely to be sub-optimally utilised, have higher repair bills and have more unit owners in favour of collective sales.[25] This will enable the land to be better exploited and its

20 The share value is a figure that represents the proportionate share entitlement assigned to each unit in a strata development. The general principle in allocating share value is based on the floor area of the units, such as for single-use residential and non-residential developments. For a mixed-use development, the use of weight factors for each type of unit is also considered. The share value determines, *inter alia*, the voting rights of the unit owners, the quantum of their undivided share in the common property and the amount of their contributions to the management or sinking fund levied by the management corporation (LTSA, ss 30(2)(*a*)–30(2)(*c*)).

21 LTSA, s 84A(1)(*b*). In Hong Kong, there are plans to lower the threshold limit for making an application for compulsory sale under the Land (Compulsory Sale for Redevelopment) Ordinance (Ord No 30 of 1998) from 90% to 80% of the undivided shares in a development, but only in cases where all but one unit has been acquired by one party and where the development is at least 50 years old. See also Tan Hui Yee, "En bloc debate, HK style", *The Straits Times* (10 August 2009).

22 LTSA, s 84A(1)(*a*).

23 Other jurisdictions which have adopted a similar approach include Ontario (Condominium Act 1998 (Cap 19), s 124), New Brunswick (Condominium Property Act 1973 (Cap 16), s 19) and Nova Scotia (Condominium Act 1989 (Cap 85), s 40) in Canada and Hawaii (Condominium Property Regimes (Cap 514A), s 21(a) and Condominium Property Act (Cap 514B), s 47(a)) in the US, all of which require 80% of the unit owners to vote in favour of the sale of the strata scheme.

24 *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 1997 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law).

25 The average age of all developments applying for collective sale between January 2005 and August 2007 was 25.9 years, which indicates that the collective sale process is being used for urban renewal (see *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 2036 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law) in line with the national objective of maximising scarce land resources in the public interest.

economic potential maximised.[26] It might be argued that in place of the ten-year criterion a longer time-frame, say 20 years or 30 years, should be used instead. Buildings would be much older and in greater need of repairs, and so a stronger case can be made for redevelopment. However, this argument overlooks the point that the land in question may have already been assigned a higher plot ratio some years after the completion of the development, which means that the land concerned can be used even more intensively. It defeats national objectives if changes reflected in the Urban Redevelopment Authority's[27] Master Plans cannot be translated into better utilisation of scarce prime land resources in Singapore to meet a growing population.[28]

11 For the purpose of determining the consent requirement for a collective sale, the age of a development is calculated with reference to the latest temporary occupation permit or certificate of statutory completion issued for any building therein.[29] As worded, s 84A(1) of the LTSA does not cover privatised HUDC housing estates[30] where no temporary occupation permit or certificate of statutory completion had been issued. It was correctly observed by the Court of Appeal in *Kok Chong Weng v Wiener Robert Lorenz*[31] that the provision suffers from drafting defects. In the case before the Court of Appeal, the development in question ("Gillman Heights") was exempted from the requirements of the Building Control Act 1973[32] upon completion, such that no temporary occupation permit or certificate of statutory completion was issued for it. The minority unit owners who objected to the collective sale argued, *inter alia*, that since s 84A(1) used the temporary occupation permit or the certificate of statutory completion as the means to determine the age of a strata development, it could not apply to any strata development which was not issued with such a permit or certificate. Given that such an argument would defeat the

26 *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at cols 633–634 (Assoc Prof Ho Peng Kee, Minister of State for Law) and *Report of the Select Committee on the Land Titles (Strata)(Amendment) Bill (Bill No 28/98)* (Parl 2 of 1999, 19 April 1999) at iii–iv.

27 This is the national land use planning and conservation authority regulating and facilitating the physical development of Singapore.

28 With a projected population of 6.5m in future and new economic growth sectors, Singapore would need to optimise land use and explore new ways to create space (see *Singapore Parliamentary Debates, Official Report* (27 February 2007) vol 82 at col 1546 (Mr Mah Bow Tan, Minister for National Development).

29 LTSA, ss 84A(1)(*a*) and 84A(1)(*b*).

30 These are public housing estates governed by the HUDC Housing Estates Act (Cap 131, 1985 Rev Ed), which will cease to apply once these estates are privatised. The legal framework for conversion of these estates to strata title is provided for in the Land Titles (Strata) (Amendment) Act 1995 (No 27 of 1995).

31 [2009] 2 SLR 709 at [22], [31] and [61(d)]. See also *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [32].

32 Pursuant to the Building Control (Exemption) Order 1984 (S 329/84).

legislative purpose of privatising HUDC estates, the court was of the view that it was proper to interpret s 84A(1) purposively. The court therefore approved[33] of the purposive construction formulation laid down by Lord Nicholls of Birkenhead in *Inco Europe Ltd v First Choice Distribution*[34] in adding words to a statute to achieve the purpose intended by Parliament. In the result, the words to be read into s 84A(1) in a situation where there was neither a temporary occupation permit nor a certificate of statutory completion should refer to the date when the building authority would have regarded the development as having been completed and fit or ready for occupation, a matter that could easily be determined by a certificate from the Housing and Development Board.[35] As the development was completed more than 20 years before the date of the application for its collective sale, the requisite consent level was 80%.

12 It is now made clear that the percentage requirements above equally apply to HUDC estates which have been converted to strata titles.[36] Given that the object or purpose of the statutory scheme is to rejuvenate old estates and to improve the quality of housing in Singapore, such privatised HUDC estates would need rejuvenation sooner than private strata developments and would, thus, be prime candidates for the scheme.[37]

B. Prerequisites pertaining to holding of meetings, collective sale committee, publicity of sale, etc*: LTSA, First to Third Schedules*

13 No application for a collective sale may be made by the majority unit owners unless they have complied with the requirements specified in the Schedules to the LTSA.[38] A detailed account of these requirements is discussed elsewhere.[39] These requirements seek to ensure clarity, transparency and certainty in the collective sale process.[40] Before applying to a Strata Titles Board for an order for sale, it is mandatory for the collective sale committee to convene one or more general meetings of the management corporation for all the unit owners to discuss the

33 [2009] 2 SLR 709 at [57].

34 [2000] 1 WLR 586 at 592. See also *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105–106.

35 [2009] 2 SLR 709 at [58].

36 LTSA, ss 126A(6A)–126A(6C).

37 *Kok Chong Weng v Wiener Robert Lorenz* [2009] 2 SLR 709 at [25].

38 LTSA, s 84A(3) (including providing an undertaking to pay the costs of the Strata Titles Board).

39 See Teo Keang Sood, *Strata Title in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2009) ch 16 at pp 642–672.

40 *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at cols 1994–1995 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law).

issue of collective sale of the development.[41] At the meetings, the unit owners will not only get to know the details of the sale but will also have the opportunity to scrutinise the marketing and property agents involved in the collective sale. The formation, function and proceedings of a collective sale committee are regulated to enhance procedural clarity in this regard.[42] Provisions are also made in respect of the drafting and signing of the collective sale agreement so that unit owners are apprised of the important information[43] contained therein to enable them to make an informed decision before they sign it. To guard against any duress or misrepresentation, a solicitor appointed by the collective sale committee must be present to explain the terms contained therein and address any doubts that a unit owner may have.[44] To address the issue of intimidation or harassment, a five-day cooling-off period after the signing of the collective sale agreement is provided to enable a unit owner to rescind his or her agreement to be a party thereto.[45] The mode of sale is also regulated to enhance transparency in this regard.[46]

(1) Some possible areas for reform

14 That the review of the collective sale provisions in the LTSA is an on-going one was emphasised by the Deputy Prime Minister and Minister for Law at the second reading of the Land Titles (Strata) (Amendment) Bill 2007.[47] If it is felt that further changes are needed in the light of subsequent experience, then extra refinements will be made to the applicable provisions concerned.[48] Since the enactment of the Land Titles (Strata) (Amendment) Act 2007,[49] calls have been made to look again at the law on collective sales.[50]

15 Some aspects of collective sales which come to mind that may warrant a review are discussed below. These suggestions will promote greater transparency in the collective sale process and ensure a better balance of the competing interests involved.

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41 LTSA, s 84A(3) and Third Schedule, paras 7(1)–7(4).

42 LTSA, Second and Third Schedules.

43 LTSA, First Schedule, paras 1B(*a*)–1B(*f*).

44 LTSA, First Schedule, para 1C.

45 LTSA, First Schedule, paras 1D and 1E. See also The Schedule to the Land Titles (Strata) (Notice of Rescission) Regulations 2007 (S 570/2007).

46 LTSA, Third Schedule, para 11(1).

47 No 32 of 2007.

48 See *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 2038 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law).

49 No 46 of 2007.

50 Wong Hwei Ming, "En-bloc sales: Review law on sales committees", *The Straits Times* (17 December 2008); Susan Prior, "Relook en bloc rules", *The Straits Times* (4 April 2009); and Narayana Narayana, "Not collectively speaking", *Today* (26 June 2009). See in the New South Wales context, Cathy Sherry, "Termination of Strata Schemes in New South Wales – Proposals for Reform" (2006) 13 APLJ 227.

16 As noted above, it is mandatory for the collective sale committee to convene one or more general meetings of the management corporation to discuss the issue of collective sale of the development. It is possible that this requirement may be abused. An overly enthusiastic sale committee may be tempted to call as many meetings as possible in the hope of convincing the unit owners to go for a collective sale of their development. The expenses of holding the meetings will have to be borne out of the management fund,[51] further depleting the financial resources of the management corporation. This is not to mention the stress, agony and uncertainty that unit owners have to go through at the meetings, not knowing if their development will ultimately be put up for collective sale. While the rationale mandating the holding of general meetings to discuss a possible collective sale is logical, safeguards will have to be put in place to prevent abuse and unnecessary wastage of moneys in the management fund. It may be sensible that further general meetings are not to be permitted within a certain time-frame unless a certain minimum percentage, say 50%, of unit owners had voted in favour of a collective sale at the relevant general meeting held.

17 Currently, it is possible for a unit owner or owners who own just 20% of the aggregate share value to requisition for the convening of a general meeting to consider a potential collective sale of the development.[52] There is also no limit to the number of times they may requisition for the convening of general meetings for such a purpose. For example, if they fail to have a sale committee set up, there is nothing to stop them from trying until they succeed. As can be seen, these rules cater to a specific group of unit owners who are particularly interested in pushing for a collective sale of the development even though they do not own a substantial percentage of the aggregate share value. Again, this will be a drain on the finances of the management corporation. The percentage requirement to requisition for the convening of a general meeting should, accordingly, be raised to a level which will give the process more credibility and legitimacy. This is arguably justified since the end result concerns the deprivation of the private property of owners in a development.

18 Under the LTSA, the members of a management council assist the management corporation in the upkeep, maintenance and management of the development.[53] Given the nature of the role played by members of the management council, a pertinent question arises as to whether members of the council should, at the same time, also serve

51 Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA"), s 38(9A).

52 LTSA, Second Schedule, para 2(1)(*a*).

53 BMSMA, ss 29(1)(*a*) and 29(1)(*b*).

as members of the collective sale committee. It is clear that the role played by the latter is the direct opposite of the management council, namely, to effect a sale of the development. Their roles are different. Because of the conflicting interests and duties arising from the different roles played by a management council and a sale committee, it might be preferable to disallow members of a management council from serving at the same time as members of the sale committee.[54] Given the potential collective sale of the development, the management council may not upkeep and maintain it. Not doing so may result in the development being in a dilapidated state. This will be an additional reason for the sale committee to "induce" the uncommitted unit owners to sell the development given the state of disrepair. There is an "incentive" for members of the management council to not maintain and upkeep the development where they also serve, at the same time, as members of the sale committee. Hence, the suggestion above that they should not be permitted to serve on both committees at the same time. While complaints may be lodged with the Commissioner of Buildings in respect of the "neglect" of duties,[55] the management council may, nonetheless, take the practical view that to incur additional maintenance expenses would be a waste in light of the imminent sale of the development. Legislation to clarify the grey areas in respect of these duties of the management council in the collective sale process would be helpful.

19 There is much to be said in respect of the make-up of the collective sale committee. Ideally, it should include representatives of the minority unit owners who stand to be persuaded that a collective sale of the development is in the best interest of the unit owners as a whole. Such a composition will enable the sale committee to hear the arguments of both sides on matters pertaining to the viability of a collective sale. It will ensure a full airing of views as to matters pertaining to the sale and the concerns of minority unit owners. Opportunities for abuse by those in favour of a collective sale will also be minimised and kept in check. However, the issue of minority

54 This was part of the feedback received by the Ministry of Law in a public consultation held from 2 April to 12 May 2007 on the Ministry's proposed changes to the collective sale legislation (see "Response to Feedback Received from Public Consultation on Proposed Changes to the En Bloc Sale Legislation" para 5.1, published on the Ministry of Law's website on 23 November 2007) <http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=96> (accessed 20 March 2009). No legislative provision has since been enacted to deal with this issue.

55 "Response to Feedback Received from Public Consultation on Proposed Changes to the En Bloc Sale Legislation" para 11.2, published on the Ministry of Law's website on 23 November 2007) <http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=96> (accessed 20 March 2009).

representation[56] on the sale committee has become less pressing given the stringent duties imposed on the sale committee by the courts (as seen below), the committee being required to meet high standards of accountability.

20 The relationship of the purchaser and the marketing agent for the development must also be scrutinised. This is to ensure that there is no conflict of interest or collusion between them. A marketing agent may arrange with a purchaser to obtain a commission from the latter in the event of a successful sale, a factor which may not operate in the best interest of the unit owners. In fact, any possible conflict of interest situations between any of the parties involved in a collective sale, including property consultants and legal firms, should be addressed.

21 These suggested changes, together with the duties of the collective sale committee as laid down by the courts and in the legislation, will hopefully go some way toward conferring greater protection on the interests of the minority unit owners and ensuring transparency of the collective sale process without compromising the policy objectives of the collective sale statutory scheme.

(2) Duties of collective sale committee

22 The Deputy Prime Minister and Minister for Law made it clear at the second reading of the Land Titles (Strata) (Amendment) Bill 2007 that the changes brought about by the Land Titles (Strata) (Amendment) Act 2007 with regard to collective sale committees do not, in any way, change the substantive law in respect of their duties or liability, whether under common law or otherwise.[57] The legal position remains the same. The changes are more to enhance procedural clarity with regard to their formation, function and proceedings.

23 Earlier, in *Tsai Jean v Har Mee Lee*,[58] the High Court had rejected as misconceived the minority unit owner's submission that a court, in determining the duties of a sale committee in a collective sale transaction, should be guided by the principles underlying a mortgagee's duties in exercising the power of sale. The court was of the view that the sale committee's position is not the same as that of a mortgagee. In its opinion, members of the sale committee are not just

56 As the collective sale agreement will require the signature of all members of the sale committee, appropriate legislative amendments will have to be made in respect of the formation of a sale committee to enable minority representation.

57 See *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 2042 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law). See also Glen Koh, "The Duty of Care in Collective Sales of Strata Developments" (2008) 20 SAcLJ 227.

58 [2009] 2 SLR 1.

selling property of the minority unit owners or that of the majority unit owners. As they are also selling their own property, the members of the sale committee have an interest as owners as much as the other unit owners. They are not merely interested as creditors in the property being sold. Thus, unlike a mortgagee who, as a creditor, has an interest in recouping the sum owed to him under the mortgage, the members of the sale committee are also selling their own units. Their interest as owners would mean that they would be inclined to try to obtain the best price available. Thus, under the LTSA, the sale committee's express duty is to see that the sale transaction goes through for a price that is obtained in good faith. In other words, there is no express statutory duty on the sale committee other than this: they need only ensure that the sale transaction is in good faith.[59]

24 The duties of a collective sale committee and the relationship between it and the unit owners were authoritatively delineated in the subsequent landmark Court of Appeal decision in *Ng Eng Ghee v Mamata Kapildev Dave*.[60] The duties laid down are far-reaching and onerous and depart from those articulated earlier in *Tsai Jean v Har Mee Lee*. The Court of Appeal made the following pertinent observations on the relationship between a collective sale committee and the unit owners:

> … the SC is the agent of the subsidiary proprietors collectively in relation to the collective sale of their strata units. At the point when an SC is appointed to carry out the collective sale (*inter alia*, obtaining consent to the collective sale agreement; advertising, negotiating and finalising the terms of the collective sale with potential purchasers; and completing the sale), there is no question of it being appointed to represent the consenting subsidiary proprietors only, since at that point the process of signing up to the collective sale agreement has not yet begun. The SC therefore carries out the collective sale process on behalf of all the subsidiary proprietors collectively and has the power to affect the legal relations of all the subsidiary proprietors with third parties. The common law requirement of express or implied assent by the principal…is not relevant in the context of a statutory scheme, the very purpose of which is to allow the sale of the strata development against the wishes of the objecting subsidiary proprietors.
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> Section 84(1A) of the LTSA constitutes statutory confirmation of an SC's status as agent for all subsidiary proprietors collectively …[61]
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> …
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> As the SC is the agent of the subsidiary proprietors collectively, there is no point at which the SC may act solely in the interests of any group

59 [2009] 2 SLR 1 at [22] citing *Mamata Kapildev Dave v Lo Pui Sang/Kuah Kim Choo* [2008] SGSTB 7 at [58].

60 [2009] 3 SLR 109.

61 See also LTSA, Second Schedule, paras 1 and 3(4).

> of subsidiary proprietors, whether they are consenting or objecting proprietors. When an SC is first appointed, it is with a view to achieving a collective sale for *the benefit of* all the subsidiary proprietors. At this stage, the interests of the subsidiary proprietors are not yet clearly differentiated. Thus, the SC's initial paramount responsibility is simply to obtain the requisite consent for the collective sale as well as appoint competent professional advisers. The SC's members and advisers also have the duty to avoid any possible conflict of interest … However, once the requisite consent is obtained and the interests of the objecting subsidiary proprietors become distinguishable from those of the consenting subsidiary proprietors, the SC's role becomes that of an impartial agent acting for both camps. In other words, the SC must hold an even hand between these interests. …[62] [emphasis in original]

25 Based on the underlying agency relationship noted above, a fiduciary relationship arises between the collective sale committee and the unit owners.[63] This, in turn, imposes on the sale committee fiduciary obligations to all the unit owners independently of its contractual obligations as set out in the collective sale agreement.[64]

26 The rationale for imposing high standards of accountability and conduct upon the collective sale committee *vis-à-vis* not only the majority, but also the minority, unit owners – standards which are even more demanding than in the case of ordinary common law agency – was explained by the Court of Appeal in the following terms:

> … Obviously, as a matter of principle and policy, an agent who has the potential power to cause greater damage to his principal's interest should be held to a higher degree of accountability. In the present case, the SC's power to sell the Property collectively is a strong power as it may result in the objecting subsidiary proprietors losing their units without their consent (in exchange for compensation which may not be their preferred right). The objecting subsidiary proprietors (who may have objected to the appointment of the SC) are invariably placed in a vulnerable position as the SC usually comprises the very same consenting subsidiary proprietors whose objective is to sell the property contrary to the wishes of the objectors. There would naturally be an in-built inclination (or bias) on the part of an SC to sell rather than not to sell. …[65]

27 Given, as seen above, that the collective sale committee owes fiduciary duties *qua* agent to the unit owners in a strata development collectively, it has obligations that are akin to those of a trustee with a

62 [2009] 3 SLR 109 at [104], [105] and [107].
63 [2009] 3 SLR 109 at [108].
64 [2009] 3 SLR 109 at [109] and [117]. See also, generally, *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98.
65 [2009] 3 SLR 109 at [113].

power of sale. The collective sale committee represents the interests of all unit owners and must therefore exercise the power of sale granted to it in the same way as a similarly empowered trustee. The collective sale committee is a neutral agent, even though its members are, to an extent, entitled to have regard to their own personal interests in the collective sale. The collective sale committee's duties *qua* agent, fiduciary and trustee of the power of sale include, among others, (a) the duty of loyalty or fidelity; (b) the duty of even-handedness; (c) the duty to avoid any conflict of interest; (d) the duty to make full disclosure of relevant information; and (e) the duty to act with conscientiousness.[66]

28 The core elements in the duty of loyalty or fidelity require that: (a) a fiduciary must act in good faith; (b) he must not make an unauthorised profit out of his trust; (c) he must not place himself in a position where his duty and his interest may conflict; and (d) he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.[67] However, mere incompetence does not amount to a breach of this duty. The duty of even-handedness is a duty of impartiality needed to safeguard the interests of the minority unit owners in a collective sale. A sale committee has to hold an even hand between the interests of the two groups of majority and minority unit owners in selling their properties collectively.[68] The duty to avoid any conflict of interest is a facet of the duty of fidelity. It is targeted against potential, not merely actual, conflict.[69] The duty is breached wherever there is any reasonable perception of a conflict of interest arising, since it is impossible to conduct an inquiry into the subjective motives which influenced a fiduciary's conduct to determine whether an actual conflict of interest has occurred. As for the duty of full disclosure, the fiduciary must disclose any personal interest as soon as a possible conflict arises or as soon after as practicable.[70] The duty to act conscientiously in exercising the power of collective sale requires a sale committee to take all precautions that an ordinary prudent man of business would take in his own affairs. This duty, combined with the duty to act even-handedly in the collective interest of all the unit owners, gives rise to the duty to obtain the best sale price for the development (an outcome which is particularly crucial for the minority

66 [2009] 3 SLR 109 at [124] and [134].

67 These were laid down by Millet J in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18 and cited by the Court of Appeal in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR 109 at [135].

68 [2009] 3 SLR 109 at [136].

69 *Boardman v Phipps* [1967] 2 AC 46 at 111.

70 See also LTSA, Third Schedule, para 2 which requires persons standing for election to a sale committee to disclose particular conflicts of interest, namely, any direct or indirect interest in any property developer, property consultant, marketing agent or legal firm, being an interest that could conflict with the proper performance of their functions as members of a collective sale committee, should they be elected.

unit owners).[71] As will be discussed below, these general law duties assist in determining the scope of the statutory duty of good faith required of a collective sale committee under the LTSA in a collective sale transaction. Needless to say, in light of the statutory duty of good faith under the LTSA, a sale committee is required to discharge its general law duties in good faith in the five specific areas mentioned.

(3) Non-compliance with prerequisites in Schedules to LTSA

29 It should be noted that an application for collective sale will not be invalidated by a Board by reason only of non-compliance with any requirement in the Schedules mentioned above if the Board is satisfied that such non-compliance or irregularity, being purely technical or procedural in nature, does not prejudice the interest of any person.[72] In this regard, the Board is empowered to make such order as may be necessary to rectify the non-compliance (*eg* allowing amendments to be made to the application) as well as for costs.[73] Such a provision will ensure greater certainty in the collective sale application process. It must also mean that minority unit owners will have fewer opportunities to successfully challenge a collective sale on technical grounds.

30 Having regard to the policy objective of the collective sale scheme to facilitate *en bloc* sales, the courts will not allow what is a truly technical breach of the LTSA which causes no prejudice to the minority unit owners to frustrate the wishes of the majority unit owners who wish to obtain a collective sale order.[74] This certainly reflected the approach taken by the courts before the provision above was enacted by the 2007 Amendment Act.[75] The general guiding principle is that each objection should be examined on its own facts and that the particular requirement breached should be set against the overall purpose of the legislation. One then considers whether a strict construction and the invalidation of the Board's order is what Parliament would have intended, taking into account any prejudice to the rights of the parties and the public interest.[76] The judicial attitude to this aspect of the

71 [2009] 3 SLR 109 at [154].

72 LTSA, s 84A(7C).

73 LTSA, s 84A(7C).

74 See *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [35] (failure to state method of distribution of sale proceeds in sale and purchase agreement with purchaser held to be not fatal in the circumstances).

75 LTSA, s 84A(7C) was introduced by the Land Titles (Strata) (Amendment) Act 2007 (No 46 of 2007).

76 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR 522 at [55]. See also *Siow Doreen v Lo Pui Sang* [2008] 1 SLR 213 at [9] (omission of three pages in collective sale agreement executed by three consenting unit owners which were to be included with collective sale application could have been rectified by the Board without prejudice as the requisite 80% consent requirement had been satisfied even without the missing pages).

collective sale process is best summed up by the High Court in the latest decision on this point in *Lim Choo Suan Elizabeth v Goh Kok Hwa Richard*,[77] where Woo Bih Li J concluded thus:

> … While a strict approach may arguably lead to some certainty, I was of the view that it would be too harsh to invalidate every application for any non-compliance however slight and inconsequential. The reality is that there are many procedural requirements to be complied with before and when an application is made for a collective sale order. I am driven to conclude from the many cases that have come before the courts that, notwithstanding the assistance of marketing agents and solicitors, such requirements are observed more in the breach than in the compliance. The result then would be that it will be virtually certain that many applications will fail for technical reasons alone. I did not think that was what Parliament intended before the 2007 amendments. I am glad to note that it has since shown, going forward, that that is not its intention.[78]

C. Collective sale to be conducted in good faith and at arm's length

31 A collective sale takes effect by virtue of a Strata Titles Board's order, and not by virtue of the sale and purchase agreement. In essence, the collective sale is not a contractual sale, but a new form of statutory sale.[79] A Board's order binds all the unit owners, including the minority unit owners who opposed the sale, who are required to sell the development in accordance with the sale and purchase agreement entered into with the purchaser of the development.[80]

32 Accordingly, before allowing a collective sale, a Board must be satisfied, among other things,[81] that the transaction is undertaken in good faith after taking into account such factors as the sale price obtained for the development.[82] Thus, it is not only financial objections[83]

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77 [2009] 4 SLR 193 (failure to affix notice of collective sale application to a conspicuous part of every building in development (although notice served on minority unit owners by registered post and by placing a copy thereof under main door of their respective units) held not to be prejudicial to minority unit owners). See also *Chang Mei Wah Selena v Wiener Robert Lorenz* [2008] 4 SLR 385 at [31] where one of the complaints made was identical.

78 [2009] 4 SLR 193 at [38].

79 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [7].

80 LTSA, ss 84B(1)(*a*) and 84B(1)(*b*).

81 For the other situations where a Board will not allow a collective sale, see LTSA, ss 84A(9)(*a*)(ii) and 84A(9)(*b*) discussed in Teo Keang Sood, *Strata Title in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2009) ch 16 at pp 721–722.

82 LTSA, s 84A(9)(*a*)(i)(A). The only other two factors which a Board is mandated to take into account when considering the good faith of the transaction are: (a) the method of distributing the proceeds of sale; and (b) the relationship of the purchaser to any of the unit owners (LTSA, ss 84A(9)(*a*)(i)(B) and 84A(9)(*a*)(i)(C)). For a

(*cont'd on the next page*)

that a Board must consider but also whether the transaction was undertaken in good faith. This is to ensure that there is no fraud, collusion or conflict of interest on the part of the parties concerned, that they have exercised due diligence in arriving at the sale price, and so on. In fact, the rights and remedies under general law are expressly preserved.[84]

33 A transaction will not be in good faith if there is some dishonesty or improper motive in relation, *inter alia*, to the sale price obtained for the development. For this purpose, recklessness and negligence *per se* are not sufficient.[85] In the landmark decision in *Ng Eng Ghee v Mamata Kapildev Dave*,[86] the Court of Appeal further clarified the meaning of the words "transaction" and "good faith" in s 84A(9)(*a*)(i) of the LTSA. The court was of the view that the word "transaction" is wider than the word "sale" or "agreement for sale". In the court's opinion, it embraces the entire sale process, including the marketing, the negotiations and the finalisation of the sale price (all of which steps ought to be evaluated in the context of prevailing market conditions), culminating in the eventual sale of the development.[87] Similarly, the concept of "good faith" is not confined to whether the sale price is fair or not, but also concerns how the price is arrived at. This is because the collective sale agreement is governed by the common law. Its formation, validity, expiry and renewal are subject to the common law. The duties of a collective sale committee are subject to the general law (common law and equity) to the extent that they have not been supplanted by the LTSA. Accordingly, in considering whether there is good faith in the transaction, regard should be had to what is good faith at general law, given that Part VA of the LTSA, which sets out the collective sale statutory scheme, does not abrogate or purport to abrogate all general law principles.[88] Thus, in determining whether a

detailed discussion of these factors, see Teo Keang Sood, *Strata Title in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2009) ch 16 at pp 710–718.

83 See LTSA, ss 84A(7)(*a*) and 84A(7)(*b*).

84 LTSA, s 115. The Australian equivalent provision was considered in the following strata title cases which dealt with the doctrine of fraud on the power: *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 52–53, followed in *Young v Owners of Strata Plan No 3529* (2002) NSW Titles Cases 80–067 at [16] and [43]–[54]. See also Lindsey Alford & Jasmine Sommer, "Protection of Minority Owners in a Body Corporate" (2005) 11 APLJ 141.

85 *Dynamic Investments Pte Ltd v Lee Chee Kian Silas* [2008] 1 SLR 729 at [20]–[23], citing *Medforth v Blake* [1999] 3 WLR 922 at 937–938 (quoted with approval in *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR 237); *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48 at 55 and *Mogridge v Clapp* [1892] 3 Ch 382 at 391. See also *Liu Chee Ming v Loo-Lim Shirley* [2008] 2 SLR 764 at [19] and *Tsai Jean v Har Mee Lee* [2009] 2 SLR 1 at [19].

86 [2009] 3 SLR 109.

87 [2009] 3 SLR 109 at [130].

88 [2009] 3 SLR 109 at [131].

collective sale transaction is in good faith, a breach of duties by the collective sale committee is a relevant consideration.

34 In *Ng Eng Ghee*, prior to their appointment to the original collective sale committee[89] and unknown to the other members of that committee and the majority unit owners, the chairman and a member of the committee had purchased, with the assistance of substantial financing, additional units in the development concerned ("Horizon Towers"). The eventual sale of the development to HPPL at the reserve price of $500m was concluded notwithstanding that a neighbouring property had just increased by 25% the reserve price for its collective sale. The sale price to HPPL was also lower than the offer of $510m made by another potential purchaser, Vineyard Holdings Ltd. In addition, no disclosure of the purchase of additional units was made by the chairman and the member concerned prior to the decision to sell to HPPL, nor was any independent valuation of the development obtained. The minority unit owners who objected to the sale contended that the transaction was not in good faith. The Court of Appeal set aside the decision of the Strata Titles Board[90] and that of the High Court,[91] which had allowed the collective sale application. As discussed earlier, the Court of Appeal held that the original sale committee owed fiduciary duties *qua* agent to the unit owners collectively and must exercise the power of sale granted to it in the same way as a trustee of a power of sale. These duties are more onerous than those of an ordinary property agent or a mortgagee in relation to the power of sale, given that the collective sale committee had the power to sell the units of objecting owners against their wishes.[92]

35 Whatever the general law duties may be, the primary statutory duty imposed on the collective sale committee under the LTSA is that of good faith. Since the price of the collective sale is an ingredient of good faith in the transaction, the collective sale committee must act with conscientiousness to obtain the best price reasonably obtainable for the development and must, in this respect, behave as a prudent owner would.[93] Thus, the requirement of good faith in the transaction goes beyond the mere question of whether the price is fair and can refer more generally to the conduct of the collective sale committee in the entire sale process.[94] As the Court of Appeal elaborated:

89 Following the sale of the development to the purchaser, a new collective sale committee was appointed.

90 See *Mamata Kapildev Dave v Lo Pui Sang/Kuah Kim Choo* [2008] SGSTB 7.

91 *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754.

92 [2009] 3 SLR 109 at [113].

93 [2009] 3 SLR 109 at [154] and [168].

94 [2009] 3 SLR 109 at [208].

> In our view, the term 'good faith' under s 84A(9)(*a*)(i) must be read in the light of the SC's role as fiduciary agent (at general law and, now, under s 84A(1A)), and whose power of sale is analogous to that of a trustee of a power of sale. Thus, in our view, the duty of good faith under s 84A(9)(*a*)(i) requires the SC to discharge its statutory, contractual and equitable functions and duties faithfully and conscientiously, and to hold an even hand between the consenting and the objecting owners in selling their properties collectively. *In particular, an SC must act as a prudent owner to obtain the best price reasonably obtainable for the entire development.* …[95] [emphasis in original]

36 In this regard, the duties of the collective sale committee in respect of the sale price included the following:

(a) acting with due diligence in appointing competent professional advisers;

(b) marketing the property for a reasonable period of time to the largest number of potential purchasers in order to create the widest catchment of offers;

(c) following up on all expressions of interest and offers, including carrying out sufficient investigations and due diligence to determine their genuineness (if any doubt exists);

(d) creating competition (where reasonable) between interested purchasers;

(e) obtaining independent expert advice on matters relevant to the decision to sell the property (including when and at what price to sell the property), such as an independent valuation, in particular:

(i) prior to settling on the final sale price;

(ii) when the market is in a state of flux;

(iii) when there are divergent views within the SC; or

(iv) where the property is of an unusual nature or has mixed uses, *eg*, it is not purely residential or purely commercial, but is a mix of many types of use;

(f) waiting for the most propitious timing for the sale in order to obtain the best price;

(g) disclosing any personal interests on the part of its members that might conflict with the duty to obtain the best sale price, either prior to the appointment of the member

95 [2009] 3 SLR 109 at [133].

having the interest (in the case of pre-existing interests) or well before the SC makes a decision to sell the property (in the case of post-appointment interests);

(h) ensuring that it has been properly informed of all potential conflicts of interests that may affect the advice it receives from any of its professional advisers; and

(i) seeking fresh instructions or guidance from the consenting subsidiary proprietors where it entertains a reasonable doubt that its original mandate no longer reflects the consensus of the consenting subsidiary proprietors (*eg*, due to a change in the prevailing circumstances).[96]

37 In relation to the process of application to a Board, the collective sale committee or its representatives ought to act in a transparent manner and provide all relevant information to all unit owners, including those objecting to the application. It should also assist the Board by making full disclosure of all relevant facts and circumstances that would explain how the decision to sell was reached and refrain from acting in an adversarial role against the objecting unit owners.[97]

38 Having regard to all the circumstances that might have had a bearing on the price of the property, the court concluded that the collective sale committee did not act in good faith in the transaction in the manner and at the time it did in selling the development to HPPL at $500m. In particular, the collective sale committee had committed breaches of its duties by:

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

(b) failing to proactively follow up on the Vineyard offer and the other expressions of interest …;

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

(d) failing to obtain advice from an independent property expert prior to the sale;

(e) acting with undue haste in proceeding with the sale to [HPPL] in a surging property market when there was no legal, or even moral obligation, to do so;

96 [2009] 3 SLR 109 at [168].
97 [2009] 3 SLR 109 at [169].

> (f) deciding to sell the Property to [HPPL] notwithstanding the conflicts of interest involving two key members of the SC …; and
>
> (g) failing to consult (or even update) the consenting subsidiary proprietors despite the price surge in the property market since those subsidiary proprietors first gave the original SC its mandate.[98]

39 A number of comments may be made in relation to the Court of Appeal decision. The court was of the view that, in regard to the unit owners as a whole, the sale committee owed fiduciary duties to them on account of the underlying agency relationship. These duties were similar to the obligations of a trustee with a power of sale and were more onerous than those of an ordinary property agent or a mortgagee in relation to the power of sale. The reason for imposing such a high standard of accountability and conduct upon the collective sale committee *vis-à-vis* all the unit owners is understandable and logical. The collective sale committee has the power to sell the development against the wishes of the minority unit owners so long as the requirements of the collective sale statutory scheme are satisfied. The fact that the members of the collective sale committee are not remunerated for carrying out their duties in selling the property is immaterial. In the circumstances, the collective sale committee is a fiduciary given that it is subject to fiduciary obligations. The court left open the issue, which was not raised or argued before it, whether a clause in the collective sale agreement which made the sale committee the agent only of the majority unit owners for the purpose of negotiating and finalising the collective sale, was null and void as being repugnant to the duty of the sale committee to act in the interests of all unit owners in a collective sale.[99] In any event, as noted above,[100] a collective sale committee's fiduciary obligations to all the unit owners arise independently of its contractual obligations.

40 In regard to the duty to act with conscientiousness to obtain the best price reasonably obtainable for the development, it should be noted that it is not open to the collective sale committee to raise the objection that the sale price is too low. This issue may arise where the committee has made a deliberate decision in respect of the sale price and seeks to back out of the collective sale after realising, in hindsight, its own mistake. In such a situation, there would have been no lack of good faith when it settled the sale price with the consent of the majority unit owners. This can be seen in *Chua Choon Cheng v Allgreen Properties*

98 [2009] 3 SLR 109 at [176].

99 [2009] 3 SLR 109 at [116].

100 [2009] 3 SLR 109 at [109] and [117]. See also, generally, *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98.

Ltd,[101] discussed in greater detail below. Here, the Court of Appeal took the view that the Board should not have entertained the sale committee's objection based on the sale price when there were no other legitimate complaints. This was not a case where the sale committee had displayed a lack of conscientiousness in arriving at the sale price. It had made its decision consciously and deliberately after it received input from its professional advisers. It was not as if the sale committee had neglected considering the issue of the development charge in its objectives to save costs and achieve certainty of sale with the purchaser. Not all errors made by a sale committee evidence a lack of good faith.[102]

41 On the issue of conflict of interest, the Court of Appeal in *Ng Eng Ghee* confirmed that the test to be applied to the members of the collective sale committee is the stricter test that concentrates on the "mere possibility" of conflict.[103] In this regard, the Board had applied the wrong legal test by focusing on actual conflict and concluding that there was no real conflict of interest because it would have been in the interest of the sale committee members concerned to sell the property at the best price for themselves, and therefore for the other unit owners as well.[104] Instead, the correct question to ask was whether there was a *possible* conflict of interest arising out of the additional purchases of units. This must be the correct approach as it serves to remove all possibility of temptation and deter fiduciaries from abusing their position. As it is virtually impossible to know what considerations have gone into a fiduciary's act or a decision, the law sensibly does not require proof of an actual conflict of interest where an allegation of conflict is made. In addition, any non-disclosure of a conflict of interest may affect the requirement of good faith in the transaction, especially if the collective sale committee member concerned has played a decisive, influential or leading role in the sale committee's decision to enter into the transaction. The duty of full disclosure to all unit owners, including the minority, should apply to any interest acquired before or after the member concerned becomes a member of the sale committee.[105]

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101 [2009] 3 SLR 724.

102 [2009] 3 SLR 724 at [17].

103 [2009] 3 SLR 109 at [138]–[145]. The Court of Appeal preferred the stricter approach adopted by the majority in *Boardman v Phipps* [1967] 2 AC 46 at 111. Among the reasons for adopting the stricter test is the difficulty of inquiring into a person's state of mind or motives, and therefore of ascertaining whether an actual conflict of interest has occurred. There is also the difficulty of detecting actual conflicts of interest, given the ease with which fiduciaries may conceal them ([2009] 3 SLR 109 at [144] and [145]).

104 [2009] 3 SLR 109 at [197(c)]–[197(d)].

105 In the case of acquisition of additional units, full disclosure should include the terms of the sale and any existing loan arrangements ([2009] 3 SLR 109 at [164]). The burden of proving full disclosure lies on the fiduciary (*Dunne v English* (1874) LR 18 Eq 524).

42 In *Ng Eng Ghee* it was laid down that a collective sale committee should try and create competition between interested purchasers. In the case itself, the public tender exercise had closed on 15 August 2006 with no bids. On 3 January 2007 a sale committee member received a written offer of $510m from Vineyard Holdings Ltd. On 4 January 2007 some members of the sale committee met with representatives of HPPL who orally suggested a price of $500m. An agreement was eventually entered into with HPPL to sell the development to it for $500m. It was in these circumstances that the Court of Appeal held that the sale committee had breached its duties not only by failing to proactively follow up on the Vineyard offer and the other expressions of interest, but also by failing to make use of the existence of the Vineyard offer as leverage in negotiations with HPPL, the eventual purchaser. Much would depend on the circumstances of each case in determining whether the sale committee had breached its duty in this regard. The sale committee's duty in present respects is not an absolute duty, the Court of Appeal making it clear that the committee is bound to take only such steps as are reasonable.[106] This can be seen in the subsequent High Court case of *Lim Choo Suan Elizabeth v Goh Kok Hwa Richard*,[107] where an opposite conclusion was reached in the light of rather different circumstances. In this case, competition and interest had already been created by the property consultant before the close of the expressions of interest exercise. There were four advertisements in three newspapers and the senior marketing director of the property consultant had contacted 19 developers and met with 17 of them. In the circumstances, while there were points in favour of each side of the argument as to whether there should have been follow-up with the other bidders, no one approach could be said to be categorically right or wrong. What was crucial was whether the overall conduct of the process resulting in the sale price demonstrated an absence of good faith. In the result, the court ruled that the sale committee was not obliged to follow up with the other bidders given that, on the evidence, each of them knew that its bid was not the highest one at the material time and none, in fact, came up with a higher offer.

43 Another principle derived from *Ng Eng Ghee* is that a collective sale committee has a duty to obtain an independent valuation prior to settling on the final sale price, as otherwise there would be no way to gauge whether or not it is obtaining a fair (not to mention the best) price for the property.[108] The stated rationale is the need to take account, *inter alia*, of erratic and sudden movements in the market.[109] However,

106 [2009] 3 SLR 109 at [159].
107 [2009] 4 SLR 193.
108 [2009] 3 SLR 109 at [160].
109 [2009] 3 SLR 109 at [160], citing Alec Samuels, "The Duty of Trustees to Obtain the Best Price" (1975) 39 Conv 177 at 178.

on closer scrutiny, there is no statutory requirement as such for the sale committee to obtain an independent valuation before the sale and purchase agreement is entered into. Having regard to the applicable provisions in the LTSA[110] before the Land Titles (Strata) (Amendment) Act 2007, the majority unit owners were merely required to serve a copy of the various specified documents, including a valuation report that was not more than three months old. Even the 2007 Amendment Act only requires the valuation report to detail the value of the development concerned as at the date of the close of the public tender or auction.[111] This suggests that the valuation report may be obtained after that date but the point of reference must be the date of the close of the public tender or auction.

44 The decision in *Ng Eng Ghee* may also be viewed as compensating for the absence of a fundamental right to one's property, a right not enshrined in the Constitution of the Republic of Singapore.[112] As will be seen below, case law has reiterated that there is no constitutional protection of property given the scarcity of land in Singapore.[113] In light of this, additional protection for the property rights of minority unit owners has emerged by way of the stringent duties required of a collective sale committee as laid down in *Ng Eng Ghee*.

45 Will unit owners shy away from serving as members of sale committees because of the high standards of accountability and conduct required of them? Given the powers and obligations of a sale committee, the onerous duties imposed on it are understandable and logical. The duties to which a sale committee is subject strike a careful balance between the interests of the majority and minority unit owners without making it unduly difficult for a collective sale to be carried out. As can be seen in *Lim Choo Suan Elizabeth v Goh Kok Hwa Richard*, whether there is a breach of these duties also depends very much on the circumstances obtaining in a given case. With proper professional advice it is unlikely that unit owners will be discouraged from serving in sale committees as navigating these duties and complying with them should, hopefully, not prove too difficult.

46 As will be seen below, the high standards of accountability and conduct imposed on the sale committee have implications for the present set-up of the Strata Titles Boards and the conduct of their proceedings in the context of a collective sale and beyond.

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110 LTSA, The Schedule, para 1(*e*)(vi) (then in force).

111 LTSA, First Schedule, para 1(*e*)(v).

112 1999 Rev Ed.

113 *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 (decision reversed on other grounds in [2009] 3 SLR 109).

D. Financial loss and incentive payments by purchaser of development

47 In the collective sale statutory scheme, even if the transaction is conducted in good faith, a Board will still not approve the application for collective sale if the Board is satisfied that any objector, being a unit owner, will incur a financial loss or the proceeds of sale to be received by any objector, being a unit owner or mortgagee, are insufficient to redeem any mortgage in respect of the unit concerned.[114] There will be a financial loss if the proceeds of sale for a unit, after such deduction as a Board may allow,[115] are less than the price the unit owner paid for it.[116]

48 In some instances, to ensure that a collective sale can be successfully effected, the majority unit owners have welcomed and consented to the purchaser's offer to the objecting minority unit owners of more money to make up for the shortfall. The question arises whether the additional payment can be taken into account as part of the proceeds of sale in the determination of financial loss. In *Mohamed Amin bin Mohamed Taib v Lim Choon Thye*,[117] the purchaser bought the development ("Regent Court") for $34m. An application for approval of the collective sale of the development was made to the Strata Titles Board. Two of the minority unit owners had objected to the collective sale on the ground, *inter alia*, that they would suffer a financial loss of $93,935.75, being the difference between the proceeds of sale under the collective sale and the price that they had paid for their unit together with the stamp fees and legal costs incurred by them. The purchaser furnished an undertaking that it would top up the difference, ensuring that the objectors would not suffer a loss. In addition, the sale committee entered into a supplemental agreement with the purchaser under which the purchaser agreed to pay the objectors, on completion of the collective sale, the sum of $93,935.75 and such additional deductions as the Board might allow. The Board disallowed the collective sale on the ground of financial loss suffered by the objectors. The essence of the Board's decision was that the "proceeds of sale" referred to in s 84A(8)(*a*)[118] of the LTSA meant strictly the proportion of

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114 LTSA, ss 84A(7)(*a*) and 84A(7)(*b*).

115 Some of the permitted deductions are specified in the Fourth Schedule to the LTSA, such as the stamp duty paid on the purchase of the unit and the legal fees paid in relation to its purchase. The guiding principle appears to be that the allowable deductions or expenses that may be made from the sale price of the unit should be narrowly construed having regard to the legislative intent and policy considerations.

116 LTSA, s 84A(8)(*a*). However, there is no financial loss by reason only that a unit owner's net gain from the sale of his unit will be less than that of other unit owners.

117 [2009] 3 SLR 193.

118 The material part of this provision reads: "… a subsidiary proprietor (a) shall be taken to have incurred a financial loss if the proceeds of sale for his lot, after such

(*cont'd on the next page*)

the sale price in the collective sale agreement which was payable to the objectors and would not include any additional amount not mentioned in the sale and purchase agreement which the purchaser had agreed to pay to them.[119]

49 On appeal, the High Court disagreed with the Board's interpretation, adopting instead a purposive approach to statutory interpretation.[120] Having regard to the relevant ministerial statements and speeches made in Parliament,[121] the court concluded that the main purpose of the provisions relating to collective sale in the LTSA was to make it easier for collective sales to go through in order to promote urban redevelopment and the better utilisation of scarce land resources in Singapore.[122] As Prakash J, who delivered the judgment of the court, further elaborated:

> … I considered that the legislature would not have intended the adverse consequences to future en-bloc sales that would arise from a strict construction of 'proceeds of sale'. I also agreed that the interpretation propounded by the plaintiff was not a strained interpretation of the Act. There was no reason why 'proceeds of sale' should be limited to simply looking at the 'purchase price' set out in the sale and purchase agreement. Adopting the wider interpretation would further the legislative purpose of the Act by taking into account efforts to make good the financial loss of individual subsidiary proprietors and to ensure that no individual subsidiary proprietor would be prejudiced by the collective sale. If the objecting subsidiary proprietor would still suffer a financial loss despite the compensation sum offered, then the Board would have to dismiss the application and none of the other subsidiary proprietors could complain about this. On the other hand, if the objecting subsidiary proprietor's financial loss would be fully met by the compensation sum, then there would be no basis to continue to object to the en-bloc sale. As the Act is structured, it does not require that all the subsidiary proprietors should make a profit from the en-bloc sale. It only mandates that no one should make a financial loss. This is plain from s 84A(8)(b) which provides that it is not a financial loss if any subsidiary proprietor makes less profit from the sale of his lot than the others do.

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deduction as the Board may allow (including all or any of the deductions specified in the Fourth Schedule), are less than the price he paid for his lot …".

119 [2009] 3 SLR 193 at [13].

120 See Interpretation Act (Cap 1, 2002 Rev Ed), s 9A(1). This approach is to be applied even if the statutory provision in question is unambiguous and consistent with the rest of the statute (see *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201 at [49]).

121 See *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at cols 601–607 (Assoc Prof Ho Peng Kee, Minister of State for Law). Section 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) permits the court to refer to extrinsic materials.

122 [2009] 3 SLR 193 at [21].

> Adopting such an interpretation means that the Board would be entitled to consider not only the sale and purchase agreement but also the Undertaking and the supplemental agreement in deciding whether or not the ninth and tenth defendants had suffered 'financial loss' under the Act. In my view, the Board was, accordingly, wrong in law to decide that it could not look at these additional documents simply because they were extrinsic to the sale and purchase agreement.[123]

50 The court also rejected the argument that the Board could not consider the undertaking as it was not enforceable by the objectors. In the court's opinion, s 84A(11)[124] of the LTSA empowers the Board to facilitate the collective sale in any way necessary. Therefore the Board would have had the power, had it wished to exercise it, to allow the sale to go through subject to the purchaser (which had already indicated its willingness to compensate the objectors) entering into a binding agreement with the objectors to make good the financial loss sustained by them. It could also order the purchaser to pay the compensation moneys to someone to hold as stakeholder pending the completion of the sale and purchase so that there would be no worry about default on the part of the purchaser.

51 As the payment of additional money by the purchaser was with the consent of the majority unit owners, the questions whether the method of distribution was still fair and whether the latter could object, did not arise in *Mohamed Amin bin Mohamed Taib v Lim Choon Thye*. Would the position be any different if there were no consent from the majority unit owners to the additional payments?

52 This happened in *Chua Choon Cheng v Allgreen Properties Ltd*.[125] Subsequent to its application for a collective sale of a development ("Regent Garden Condominium"), the sale committee discovered that it had overestimated the development charge payable and that it could have sold the property to the purchaser for more than the sale price of $34m. In effect, it sold the development for a sale price below the market value of the property. The sale committee had earlier made a considered decision in preferring the certainty of a sale to the uncertainty of renegotiating the sale. The latter alternative, while allowing the unit owners to receive any savings in the development charge if the actual development charge turned out to be lower than originally estimated, would have given the purchaser the option of walking away from the deal if the actual development charge payable was greater than estimated. The sale committee informed the Board that

123 [2009] 3 SLR 193 at [27] and [28].

124 This provision empowers the Board to make all such other orders and give such directions as may be necessary or expedient to give effect to any order approving or disallowing the application for collective sale.

125 [2009] 3 SLR 724.

the revised valuation was a higher sum and this led the Board to intimate that it was not inclined to make an order for sale on the basis that the property was worth more than the sale price of $34m. On learning about this, the purchaser offered the objecting minority unit owners an additional payment over and above what was contemplated for their units in the sale and purchase agreement so as to secure the latter's consent to the collective sale. The objectors then signed up to the agreement and withdrew their objections to the application for collective sale. The Board subsequently heard and dismissed the application. In their application to the High Court, the majority unit owners sought to be discharged from the sale and purchase agreement. The purchaser, on the other hand, sought specific performance of the agreement. The High Court held, *inter alia*, that there was no express term in the sale and purchase agreement or the collective sale agreement which prohibited the purchaser from making additional payments to the minority unit owners.[126] Neither was there a term implying the same.[127] Unanimous consent had also been obtained since the minority unit owners had executed a copy of the collective sale agreement within 12 months from the date of the sale and purchase agreement. There was also nothing in either agreement requiring the minority unit owners to obtain approval from the sale committee before they could become a party to the collective sale agreement.[128] In the circumstances, the High Court ordered specific performance of the sale and purchase agreement.

53 In dismissing the appeal, the Court of Appeal agreed with the High Court that unanimous consent had been obtained[129] and that the agreements could not be construed as prohibiting the making of additional payments to the minority unit owners.[130] Further, there was nothing therein which supported the sale committee's contention that there was an express term that the additional payments were to be distributed in accordance with the agreements or that the term "Sale Price" included the additional payments. The distribution method, as contemplated under the agreements, related only to the distribution of the $34m sale price and no more.[131] Nor was it possible to imply a term in fact prohibiting the making of such additional payments. It was far from clear or obvious that the purchaser would have agreed, without prior negotiations, not to make additional payments directly to the minority unit owners if such were necessary to complete the sale. A purchaser will usually do whatever it sensibly takes to finalise a sale

126 *Wong Lai Keen v Allgreen Properties Ltd* [2009] 1 SLR 148 at [45].
127 *Wong Lai Keen v Allgreen Properties Ltd* [2009] 1 SLR 148 at [48].
128 *Wong Lai Keen v Allgreen Properties Ltd* [2009] 1 SLR 148 at [60].
129 [2009] 3 SLR 724 at [49] and [50].
130 [2009] 3 SLR 724 at [57].
131 [2009] 3 SLR 724 at [60].

transaction after an agreement has been entered into.[132] Having regard to the sale and purchase agreement, the parties must have contemplated that continuing efforts could be made to obtain the minority unit owners' consent. In cases such as these where the main objection was centred on the inadequacy of the financial consideration being received, it was difficult to see how the minority unit owners' consent to the collective sale could be secured without providing additional inducements in exchange for that consent. The Court of Appeal concluded that what the sale committee was seeking to do under the guise of invoking an implied term was to persuade the court to rewrite the sale and purchase agreement to rescue it from an improvident bargain, which the court would not do.[133]

54 On the matter of implying a term in law that no additional payments should be permitted without the prior consent of the majority unit owners, considerations of fairness and policy are paramount rather than the intentions of the parties *per se*.[134] Courts ordinarily exercise considerable restraint in implying a term in law, given that such a term extends and applies to all future like cases, rather than to the particular contract at hand and to the immediate parties only (as in the case of terms implied in fact).[135] The sale committee had argued for the implication of a term in law as the practice of condoning additional payments, if left unchecked, would encourage some unit owners to hold out in the hope of receiving a premium for their units later. Furthermore, it was said, such additional payments would lead to heightened tensions and, in turn, increase the prospects of conflict between both camps. This could frustrate the intent of the collective sale regime, which is primarily meant to facilitate urban renewal. In rejecting the contention of the sale committee, the court was of the view that the implication of such a term in law was unsound for the following reasons:

> First, such a term would mean that even if some of the majority owners, who might for personal, or even noble, reasons be keen to ensure that the sale is carried through, they would be unable to incentivise any or all of the minority owners to alter their stances for the wider common good. Second, it cannot be gainsaid that there will be instances where even the majority owners will welcome the

132 The Court of Appeal approved of the observation in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 at [36] that for terms implied in fact, both the officious bystander and business efficacy tests are but different facets of the same coin in that the former test is the practical mode by which the latter test is implemented ([2009] 3 SLR 724 at [63]).

133 [2009] 3 SLR 724 at [64].

134 [2009] 3 SLR 724 at [68] citing, *inter alia*, *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 307.

135 See *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 at [44].

> purchaser's offer of more money to the minority owners to ensure that the deal can be completed. One such illustration can be found in the recent case of *Mohamed Amin bin Mohamed Taib v Lim Choon Thye* [2009] 3 SLR 193 [discussed above] …[136]

55 While the practice of some developers in making direct payments to minority unit owners to secure their consent is potentially divisive and might sometimes even be ethically challenged, the fact remains that the LTSA itself does not prohibit such incentive payments.

56 The sale committee had also argued that such a term should be implied as it would otherwise deprive the majority unit owners of the Board's protection from a sale at an undervalue. The court disagreed with the contention that the legislative intent of the LTSA is to protect all unit owners and not just the minority unit owners. Relying on case law,[137] the relevant report of the Select Committee[138] and the relevant ministerial statements and speeches in Parliament,[139] the court held that the safeguards in the LTSA were included specially to protect the minority's interests and not the interests of all unit owners. The court also made the following pertinent observations:

> In our view, the STB's primary roles are to ensure that both the letter and spirit of the *en bloc* processes are observed, and in particular, to ensure that the minority owners are not prejudiced. Ms Lim [counsel for the sale committee] could not persuade us that the majority owners needed protection from the minority owners and/or the purchaser when the [LTSA] itself makes no express provision for this. Incongruously, it seems to us that what in essence Ms Lim was really arguing was that the majority owners needed *protection from themselves*, in case they made errors. This is an unacceptable argument. It should not be forgotten that it is invariably the majority owners who both initiate and implement the sale process. The majority owners have both the means and wherewithal to protect their interests in a typical collective sale when, in consultation with their advisors, they settle the terms of the CSA among themselves, and the terms of the SPA with the potential purchaser. …[140] [emphasis in original]

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136 [2009] 3 SLR 724 at [72].

137 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [7] and *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR 109 at [154].

138 See *Report of the Select Committee on the Land Titles (Strata) (Amendment) Bill (Bill No 28/98)* (Parl 2 of 1999, 19 April 1999), paras [18]–[19], [22(a)] and [22(c)].

139 See, for example, *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at cols 601–603 and 634 (Assoc Prof Ho Peng Kee, Minister of State for Law).

140 [2009] 3 SLR 724 at [77].

57 Notwithstanding that some ministerial statements and speeches in Parliament also indicated that the legislative intent was for the protection of all unit owners,[141] the court was, however, mindful that, viewed in proper context, the overriding concern was plainly the protection of the interests of the minority unit owners. This must be so, given that in every successful collective sale, it is the minority unit owners who lose their homes, despite their objections, as a result of the majority's decision to enter into a collective sale. If, indeed, the interests of all parties were an overriding consideration in every collective sale, Parliament would have provided that an application to the Board would be necessary even if unanimous consent was obtained.[142] The court also made it clear that its finding that the safeguards were put in place with the aim of protecting the interests of the minority unit owners was not inconsistent with its decision in *Ng Eng Ghee v Mamata Kapildev Dave*.[143] As the court further explained:

> … The SC [sale committee], as agent of all subsidiary proprietors, must act in the interests of *all* the subsidiary proprietors, as opposed to any particular group thereof. This is a rule grounded in fairness and logic, since the SC has the power to affect the legal relationship of all subsidiary proprietors with third parties. It should not come as a surprise that the rule is therefore reflected within the statutory scheme, insofar as the SC is to be constituted to 'act jointly on behalf of the subsidiary proprietors' within the [LTSA]. While the [LTSA] was amended in 2007 to provide 'additional safeguards and greater transparency for *all* owners' [emphasis added], we do not think that the amendments passed detract from the original purpose of the collective sale regime.[144]

58 The court noted that the only instance under the LTSA where the sale committee's consent is required for the making of additional payments to minority unit owners is where the additional payments are to be made from the sale proceeds due to all the owners as the agreed sale price. The Board's order to so increase the sale proceeds of an objecting minority unit owner must be made with the consent of the sale committee.[145] Given that the Board's order will affect the interests of the majority unit owners, the sale committee who represents them at the hearing of the application has to agree to it. This provision in the LTSA does not cover the situation, as in the present case, where the additional payments are made directly by the purchaser to the minority unit

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141 *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at cols 604 and 635–636 (Assoc Prof Ho Peng Kee, Minister of State for Law).

142 [2009] 3 SLR 724 at [80]. See also *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at cols 601–603 and 634 (Assoc Prof Ho Peng Kee, Minister of State for Law).

143 [2009] 3 SLR 109.

144 [2009] 3 SLR 724 at [81].

145 LTSA, s 84A(7A).

owners without a Board's order or the consent of the majority unit owners. In light of this legislative intent, a term to prevent the purchaser from making additional payments to the minority unit owners without the consent of the majority unit owners should not be implied in law.[146]

59 In its concluding remarks, the court made the following helpful observations:

> SCs that do not want to find themselves in a similar predicament *vis-à-vis* incentive payments made by purchasers to minority owners are far from helpless. Any SC can easily make provision for similar contingencies by expressly providing for them in the SPA, in particular, by including all those terms which have been argued before us in this appeal as being implied in law and or in fact. In the final analysis, it seems to us that the [majority unit owners] have attempted to belatedly rectify their mistake in agreeing to the Sale Price without taking into account the true amount of the development charge. They have attempted to mask this by passing it off as the consequence of legal defects in the SPA and the [LTSA] that the law must remedy by reference to the collective sale regime, and by the imposition of additional obligations on a purchaser. We reject this attempt.[147]

60 It would appear from this decision that issues pertaining to the continued fairness of the method of distribution and the right of the majority unit owners to object to the incentive payments made hinge ultimately on the terms of the agreements entered into between the purchaser and the unit owners. This must be rightly so given that the majority unit owners, as noted above, have the means to protect their interests in a typical collective sale when, in consultation with their advisors, they settle the terms of the collective sale agreement among themselves and the terms of the sale and purchase agreement with the potential purchaser. In any event, they are the ones who initiate and implement the collective sale process and should not be permitted to seek relief from the courts for what is clearly their own mistake.

61 Much had been said in the judgment about whether the legislative intent of the collective sale regime is to protect the interests of the minority unit owners or the interest of all unit owners. The Court of Appeal concluded in favour of the former. It cannot be denied that the

146 The Court of Appeal further held that it was not necessary to imply a continuing duty of good faith in law on the part of the purchaser toward the majority unit owners outside that stipulated in the LTSA statutory scheme. Their relationship was governed by the terms of the sale and purchase agreement ([2009] 3 SLR 724 at [85]). In addition, as between the majority unit owners and the purchaser, there was nothing peculiar about their relationship, even in a collective sale setting, which warranted the implication in law of a continuing duty of disclosure by the latter to the former in regard to the additional payments made ([2009] 3 SLR 724 at [89]).

147 [2009] 3 SLR 724 at [92].

procedural steps and substantive safeguards in the collective sale process are meant mainly for the protection of the minority's interests. However, at the same time, there are also provisions in the LTSA which seek to protect the interests of the majority unit owners. For example, there is the provision stipulating that an application for collective sale will not be invalidated by a Board by reason only of non-compliance with any requirement in the Schedules to the LTSA if the Board is satisfied that such non-compliance or irregularity, which is purely technical or procedural in nature, does not prejudice the interest of any person.[148] This provision can be seen as providing for greater certainty in the collective sale process for the majority unit owners. Minority unit owners will not be able to forestall a collective sale application on technical grounds. There is also the provision discussed above requiring the consent indirectly of the majority unit owners to the making of additional payments to the minority unit owners from the sale proceeds under a Board's order.[149] Furthermore, there are the relevant ministerial statements and speeches made in Parliament, already referred to above, which suggest that the concerns and interests of all unit owners, both majority and minority unit owners, are to be taken into account.[150] It is respectfully submitted that, granted that the interests of all unit owners are to be taken into account, the same conclusion can still be reached as to whether a term in law should be implied in respect of the incentive payments. Such a term cannot be implied in law as it will go against the paramount policy objectives of the collective sale statutory scheme of facilitating the optimal use of scarce land resources in Singapore and also urban redevelopment. In addition, the implication of such a term in law will conflict with the legislative intent that it should not be made unduly onerous to bring about a collective sale,[151] especially where, as in the present case, the unhappy predicament the majority unit owners found themselves in had been brought about by their own deliberate conduct.

62 The suggestion of the Court of Appeal that it might be possible for the sale committee to prohibit the purchaser contractually from making incentive payments to minority unit owners would appear, at first blush, to be inconsistent with the legislative intent of safeguarding the minority's interests. However, there is, in reality, no such inconsistency. The safeguards in the LTSA in favour of minority unit

148 LTSA, s 84A(7C).

149 LTSA, s 84A(7A).

150 See *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at cols 604 and 635–636 (Assoc Prof Ho Peng Kee, Minister of State for Law) and *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at cols 1994–1995 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law).

151 *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 1995 (first para) (Prof S Jayakumar, Deputy Prime Minister and Minister for Law).

owners do not deal with such incentive payments to them. This should be a matter properly left to the parties to decide, after taking into account all relevant factors and potential risks involved. Accordingly, parties are free to negotiate on it in the agreements and such a contractual prohibition will not run foul of any safeguards in the LTSA conferring protection on the minority's interests.

III. Role of Strata Titles Boards

63 The principal function of a Board in the collective sale scheme is to consider and decide whether or not to approve any application for a collective sale. Under the LTSA, minority unit owners who do not want a collective sale of the development in question may file objections with a Board.[152] The Board is required to have the objections first resolved through mediation.[153] Should mediation fail, the Board will proceed to hear the parties, arbitrate the matter and allow the application for collective sale if satisfied that the procedure and prerequisites for such a sale have been complied with.[154]

64 Where the minority unit owners who have not agreed in writing to the sale do not file any objections, a Board is still required to determine if the collective sale transaction is just and fair on the basis of the facts available to it.[155] As there is no unanimous consent, the majority unit owners would still require an order for sale from a Board notwithstanding that no objection has been filed. Is the position the same if unanimous consent is achieved after an application has been made to a Board? It would appear from *Chua Choon Cheng v Allgreen Properties Ltd*,[156] discussed above, that the position is substantially the same. The minority unit owners, who had initially objected to the sale on the ground of lack of good faith, had subsequently withdrawn their objection. In doing so, they also withdrew their allegation of lack of good faith. The Court of Appeal had no hesitation in holding that the Board still had jurisdiction over the application for approval. There was no reason why the Board's jurisdiction should cease simply because the minority unit owners had withdrawn their objection and signed the sale and purchase agreement, thus making the sale unanimous.[157] The position is different where there is unanimous consent at the very

152 LTSA, s 84A(4).

153 BMSMA, s 92(1)(*a*). See also LTSA, s 84A(5)(*a*). "Mediation" is defined as a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute (BMSMA, s 2(1)).

154 LTSA, ss 84A(7) and 84A(9). See also BMSMA, s 92(1)(*b*).

155 LTSA, ss 84A(6) and 84A(10).

156 [2009] 3 SLR 724.

157 [2009] 3 SLR 724 at [17].

outset, in which case a Board has no power to prohibit a collective sale[158] as the LTSA has no application.[159]

65 In *Ng Eng Ghee v Mamata Kapildev Dave*,[160] discussed above, the Court of Appeal, having noted that a Board's duty is more onerous in a case where there is an objection than in a case where there is no objection, made the following critical observations on the functions and duties of the Boards when considering an application for collective sale:

> In our view, the difference in the treatment of cases where objections have been filed signifies that the STB must play a proactive role in determining applications for a collective sale in such cases, rather than simply listening to the evidence and arguments of both sides and then ruling on their differences (in the event that mediation has failed). Despite the reference to its 'mediation-arbitration' function, the STB has a significant inquisitorial role to play. It is not confined to what is presented to it by the contending parties, but must seek out the facts whenever there is evidence that the SC has not disclosed everything about the transaction to the STB. Under s 84A(5)(*b*) of the LTSA, the STB has the power to call for a valuation report *or other report* and to require the majority subsidiary proprietors to pay the costs. Pursuant to reg 18(1) of the Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S195/2005), it is not bound by the normal rules of evidence. …
>
> Crucially, under s 96(1) of the BMSMA, the STB has the power to summon any relevant witnesses and to call for evidence. It must not shy from exercising this power whenever the occasion calls for it. In other words, combined with its mediative-arbitrative function, the STB has certain powers (and responsibilities) to act in an inquisitorial manner to call for such evidence as it considers necessary whenever objections are raised. Ultimately, the applicants must adduce sufficient evidence to convince the STB that the transaction was in good faith. For example, in cases where *prima facie* evidence of a potential conflict of interest has been adduced, the applicants must in turn produce sufficient evidence to disprove that conflict of interest (assuming this can be done) or to prove that such conflict is not material, and satisfy the STB of the good faith of the transaction.
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> …
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> The objectors to an application for collective sale cannot be thought of as 'plaintiffs' in the conventional sense, nor the applicants as

158 See *Wong Lai Keen v Allgreen Properties Ltd* [2009] 1 SLR 148 at [27].

159 See *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at col 603 (Assoc Prof Ho Peng Kee, Minister of State for Law) ("… I should add that no application needs to be made to the Strata Titles Board if all the owners agree to the sale. In other words, application to the Board is not a pre-requisite to all en-bloc sales but only when there is no unanimous consent." *per* Assoc Prof Ho Peng Kee, Minister of State for Law).

160 [2009] 3 SLR 109.

> 'defendants'. The objectors are not seeking recompense for violation of their personal rights; rather, they are objecting to the collective sale because the sale is in breach of the statute in that the transaction is not in good faith. To the extent that the STB's decisions affect the interests of contending subsidiary proprietors, proceedings before the STB may be said to be analogous to private litigation. However, there is a wider public interest involved in the implementation of the collective sale scheme …[161]
>
> [emphasis in original]

66 The Court of Appeal held that the Board in the instant case had erred in law in the following respects. The Board had misconceived its role under Part VA of the LTSA by restricting itself to playing the traditional role of a court of law or an arbitral tribunal determining private disputes in an adversarial setting. Collective sale proceedings should not be viewed as merely involving private litigation as there is also a wider public interest consideration, namely, managing scarce land resources in Singapore. As can be seen above, the Court of Appeal opined that the Board is a statutory tribunal vested with inquisitorial powers to ensure that all the relevant facts are before it where an objection has been made to an application for collective sale. Once the Board became aware that the chairperson of the sale committee had purchased an additional unit in the development immediately prior to being appointed to the sale committee, the Board should of its own motion have summoned him to explain his role in the ultimate decision to sell the property. Instead, it disallowed on dubious technical grounds the application to subpoena him to testify.[162] The Board had also applied the wrong legal test for conflict of interest by focusing on actual conflict when the correct test was whether there was a possible conflict of interest arising out of the additional purchases of units. In this regard, the Board had wrongly placed the burden of proof on the objectors given that once *prima facie* evidence of bad faith was produced, the applicants had the task of disproving such bad faith and establishing that the transaction was in good faith.[163] In addition, the Board had applied the wrong legal test of good faith. The question was not whether the price was fair, but also how the price was arrived at, and in particular whether it was the best price reasonably obtainable in the prevailing circumstances.[164] In this connection, the Board should have examined the entire sale process.[165] The Board was also wrong in holding that the sale committee acted in good faith in the collective sale transaction because it had received and relied on legal advice. Ultimately, the sale

161 [2009] 3 SLR 109 at [173] and [175].
162 [2009] 3 SLR 109 at [199].
163 See Evidence Act (Cap 97, 1997 Rev Ed), s 113.
164 [2009] 3 SLR 109 at [133].
165 [2009] 3 SLR 109 at [130].

committee had to reach its decision in good faith, responsibly and reasonably.[166] It was also wrong of the Board to allow the sale committee to assert legal privilege to deny the minority unit owners information which they were entitled to receive. The sale committee represented the unit owners collectively and was, after all, an agent for all the unit owners, and its solicitors were therefore sub-agents for all the unit owners.[167]

67 Prior to the Court of Appeal decision in *Ng Eng Ghee*, the Boards have invariably conducted collective sale hearings in an adversarial manner,[168] consistently with the arbitration approach required in the legislation.[169] A Board will leave it to the contending parties to produce the necessary evidence and substantiate their arguments to convince it that a case has been made out for or against a collective sale application. In holding that a Board has a significant inquisitorial role to play in determining applications for a collective sale, a conclusion not unsupported by the relevant legislative provisions,[170] the Court of Appeal unfortunately did not, at the same time, make clear the precise nature of the role required of a Board. Must a Board undertake an independent probe into every aspect of a collective sale application to satisfy itself of the good faith of the transaction notwithstanding the evidence presented to it by the contending parties? What is the extent of the inquiry that is required? Is the enactment of formal procedures to reinforce such an inquisitorial role necessary? Based on the judgment and having regard to the duties required of a sale committee, it would appear that a Board would have to be proactive and enquire into, for example, the entire sale process;[171] whether market conditions have changed and if so, whether the sale committee has obtained a fresh mandate from the majority unit owners to proceed with the sale;[172] and whether the sale committee has chosen the most propitious timing for the sale of the property by waiting on a rising market or for a falling market to recover.[173] The issue of timing is not exactly easy since a sale effected earlier may be taken to be reasonable in the circumstances in light of the independent expert advice then obtained. The wide definition of good faith to include the sale committee discharging all its statutory, contractual and equitable

166 See *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1625–1626.
167 [2009] 3 SLR 109 at [199].
168 See also the recent case of *Lim Choo Suan Elizabeth v Goh Kok Hwa Richard* [2009] 4 SLR 193 at [173].
169 BMSMA, s 89(2) and ss 92(1)(*b*), 92(2), 92(3)(*b*), 92(4) and 92(7)–92(8). See also LTSA, s 86(3) (then in force).
170 See LTSA, s 84A(5)(*b*); BMSMA, s 96(1) and Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S 195/2005), reg 18(1).
171 [2009] 3 SLR 109 at [130] and [131].
172 [2009] 3 SLR 109 at [168(i)].
173 [2009] 3 SLR 109 at [163].

functions and duties effectively[174] requires a Board to take into account virtually any factor in making its determination. Undoubtedly, much would depend on the facts and evidence presented in each case. Although a sale committee ought to, *inter alia*, assist a Board by making full disclosure of all relevant facts and circumstances that would explain how the decision to sell was reached,[175] it cannot be denied that to require a Board to play a comprehensive inquisitorial role would invariably result in protracted proceedings.[176] It may also make it difficult for a Board to render a decision expeditiously on the collective sale application within the statutorily mandated time-frame of six months from the date it is constituted.[177] Having regard to the relevant legislative provisions,[178] there is no reason to suggest that the inquisitorial role required of a Board applies only to collective sale proceedings. Accordingly, the consequences mentioned above (*ie* protracted proceedings and the inability of a Board to make decisions expeditiously) will similarly affect other contentious proceedings before it.

68 The legislative intent underlying the introduction of the collective sale statutory scheme is to entrust the Boards, rather than the courts, with the task of dealing with collective sale applications. At the second reading of the Land Titles (Strata) (Amendment) Bill[179] in 1998, the Minister of State for Law stated the rationale as follows:

> … the Board comprises senior professionals in the various fields which are relevant to what the Strata Titles Boards will have to do, *not decide on the law*, but decide on whether the sale price is one where there is no collusion, decide on the method of distribution, whether it is unfair to the minority owners. The composition of the panel will ensure that this task is better done, *rather than a judge sitting in court fettered by the rules of evidence*.
>
> The other point, of course, … is the mediatory role of the Board, which again a court will be less suited to do. …[180]
>
> [emphasis added]

174 [2009] 3 SLR 109 at [133].

175 [2009] 3 SLR 109 at [169(b)].

176 This may also have the effect of making it difficult for a Board to render a decision.

177 BMSMA, s 92(9), unless, as provided therein, an extension of time has been granted by the Minister concerned.

178 BMSMA, s 96(1) (general power of a Board to summon any relevant witnesses and to call for evidence in proceedings) and Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S 195/2005), reg 18(1) (Board not bound by the normal rules of evidence applicable to civil proceedings in court but may inform itself on any matter in such manner as it thinks fit).

179 No 28 of 1998.

180 *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at col 634 (Assoc Prof Ho Peng Kee, Minister of State for Law).

69 That the Boards are the more appropriate body to hear objections to collective sale applications was reiterated some nine years later in 2007 by the Deputy Prime Minister and Minister for Law at the second reading of the Land Titles (Strata)(Amendment) Bill 2007:[181]

> … When we first enacted the provisions on en bloc sales by majority consent, … we decided then that the Strata Titles Board, not the courts, would be the appropriate body to hear the application and objections as they would invariably be non-legal issues which lend themselves more to mediation rather than adjudication by the courts. We think this is still the case. As most objections relate to claims of financial loss or transactions not made in good faith, they are not really legal issues which lend themselves to adjudication by the courts. …[182]

70 Consistently with this approach, the Board in *Thevathasan Gnanasundram v Khaw Seng Ghee*[183] has made it clear that a Board is not a court of equity with powers to grant remedies based in equity in respect of any breach of fiduciary duty or any fraud on the minority unit owners. A Board cannot assist in such cases as its powers are limited to approving or disapproving a collective sale on the grounds specified in the LTSA and no more.[184] If there had indeed been a breach of fiduciary duty or fraud on the minority unit owners committed in the course of a collective sale, the aggrieved minority should institute proceedings in the courts.[185] The rights and remedies of unit owners under the general law are expressly preserved in the LTSA.[186] The Board in *Mamata Kapildev Dave v Lo Pui Sang/Kuah Kim Choo*[187] has also declined to deal with and decide on constitutional issues in relation to collective sale provisions in the LTSA. Given the collective sale statutory scheme, a Board is not empowered to decide these issues and the proper forum for determining them is the High Court.[188]

71 Going by the decision in *Ng Eng Ghee* as discussed above, the Court of Appeal has now made it clear that there are indeed substantive

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181 No 32 of 2007.

182 *Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 at col 2052 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law).

183 [2000] SGSTB 4.

184 Judicial review of a Board's decision is available in appropriate cases, such as where a Board's order is *ultra vires* the statute and/or where there is illegality, irrationality or procedural impropriety in the manner in which it made its decision: see *Sim Lian (Newton) Pte Ltd v Gan Beng Cheng Raynes* [2007] SGHC 84 at [53] and *Mir Hassan bin Abdul Rahman v Attorney-General* [2009] 1 SLR 134 at [14], [20], [21] and [26].

185 [2000] SGSTB 4 at [40].

186 LTSA, s 115.

187 [2008] SGSTB 7 at [18].

188 *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [5] (decision later reversed on other grounds in [2009] 3 SLR 109).

legal issues to be considered by a Board when dealing with collective sale applications. Such issues include, *inter alia*, the determination of the correct legal test for conflicts of interest[189] and the general law duties of a sale committee.[190] In fact, the Court of Appeal held that the Board erred in law in many respects:

> In summary, we find:
>
> (a) The Horizon Board erred in law in:
>
> (i) misconceiving its statutory role and function in making a decision under s 84A(9)(*a*)(i) of the LTSA, in particular, failing to appreciate that its role was to ensure that all relevant evidence was placed before it;
>
> (ii) applying the wrong legal test in assessing the relevance and admissibility of certain evidence;
>
> (iii) applying the wrong test for conflicts of interest;
>
> (iv) misapprehending the duties of the original SC (*eg*, its duty to obtain the best sale price);
>
> (v) misinterpreting the meaning of 'good faith' under s 84A(9)(*a*)(i) of the LTSA; and
>
> (vi) exonerating the original SC on the basis of its reliance on legal advice.
>
> …[191]

72 In light of the Court of Appeal decision in *Ng Eng Ghee*, it is no longer possible to take the view that, in dealing with collective sale applications and objections, the Boards are generally concerned with non-legal issues. Collective sale proceedings are becoming increasingly contentious, involving complex legal issues, with more appeals being made to the highest court of the land. Given that this scenario is no longer consistent with the legislative intent of preferring the Boards to the courts in dealing with collective sale applications, it might be pertinent and timely to review the function that a Board can properly discharge in the matter and to ascertain if it is the appropriate body to undertake the task of hearing objections arising from such applications.[192] There is no doubt that a Board can continue to play a useful mediatory role in collective sale applications, as is the case now, given that its panel comprises experienced senior professionals and experts in the relevant fields who have served on the Board in their

189 [2009] 3 SLR 109 at [138]–[145].
190 [2009] 3 SLR 109 at [134]–[167].
191 [2009] 3 SLR 109 at [210].
192 See also Dharmendra Yadav, "Let judges decide", *Today* (5 January 2008) and Conrad Raj, "Time to revamp the Strata Titles Boards", *Today* (22 June 2009).

capacity as mediators for many years.[193] In the event that mediation fails, the matter should be heard by the courts. This will also lessen the burden on the courts as the Boards act as a filtering mechanism to ensure that collective sale applications are heard by the courts only as a last resort.

IV. Constitutionality of collective sale scheme

73 The decision which dealt with this issue for the first time is that of the High Court in *Lo Pui Sang v Mamata Kapildev Dave*.[194] Here, it was contended that the relevant provisions[195] of the LTSA providing for the collective sale of strata developments violated Arts 9(1) and 12(1) of the Constitution of the Republic of Singapore.[196] In particular, it was argued that the provisions in the LTSA had the effect of depriving the minority unit owners of their personal liberty to contract in violation of Art 9(1).[197] In rejecting the contention, the court was of the view that the phrase "personal liberty" in Art 9 has always been understood to refer only to the personal freedom of the person from unlawful incarceration or detention. In addition, if any fundamental right was violated in the instant case, it was not one's personal liberty to contract, but one's right to property, which is not a fundamental right entrenched in the Singapore Constitution.[198] The reference to decisions of the American Supreme Court cited by counsel for the minority unit owners was of no assistance given the differences in the language used in the American and Singapore Constitutions. As the court further elaborated:

> … The difference is that in America, the State may not make any law depriving a person of his personal liberty 'without due process of law', but in Singapore, our Constitution, while prohibiting the deprivation of personal liberty, expressly permits such deprivation if the deprivation 'was in accordance with law'. 'In accordance with law' must mean law passed by Parliament. The LTSA provisions in question are clearly 'law' within the meaning of the Constitution. The words 'save in accordance with law' in Art 9(1) of our Constitution may incline liberally in favour of legislative power, but the clear words cannot be altered by the court. That is what constitutional supremacy means. If

193 To avoid conflicts of interest, the Boards have instituted a set of internal rules which prohibit a member from mediating in cases in which he or she has a vested interest. Parties to a dispute may similarly object to a member with a vested interest from mediating in their case (BMSMA, s 89(4) and Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S 195/2005), reg 6(3)).

194 [2008] 4 SLR 754 (reversed on other grounds in [2009] 3 SLR 109).

195 LTSA, ss 84A(1)(*b*) and 84B(1)(*b*).

196 1999 Rev Ed.

197 This Article provides that no person shall be deprived of his life or personal liberty save in accordance with law.

198 [2008] 4 SLR 754 at [6].

> the Legislature and the Executive must follow what it says, so must the Court. Everyone obeys it.[199]

74 The second constitutional argument was that the LTSA provisions in question violated Art 12(1)[200] as the 80% majority consent rule discriminated against the minority, given that the majority had a choice as to where they wished to live while the former would be deprived of that choice. In dismissing this contention, the court explained that the right to equal protection under Art 12(1) must be determined from the outset, *ie* when a law is passed, it must apply to everyone equally. On this analysis, the opportunity of selling a condominium by way of a collective sale is an equal opportunity to all unit owners. Neither the legislature nor the Boards decide who the minority would be. Instead, the minority is decided by a vote of all the unit owners. In addition, the law founded upon a majority vote in such circumstances is consonant with the democratic ways of condominium living. Furthermore, the omission of a provision in the Singapore Constitution that would have entrenched a fundamental right to own property was a deliberate omission given the scarcity of land in Singapore and the court must therefore recognise that there is no such fundamental right under the Singapore Constitution.[201]

75 The approach of the High Court in adopting a narrow construction of "personal liberty" is in line with the conservative position of Singapore courts.[202] Any other view would introduce a high degree of subjectivity into the judicial process and undermine the legislative intent of Parliament.[203] Judicial legislation is frowned upon as the judicial role is merely to give effect to parliamentary intention as expressed in the Constitution and legislation.[204] As can be seen above, the High Court also took a formalistic and narrow meaning of "law" in Art 9(1). It has been made clear that the phrase "in accordance with law"

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199 [2008] 4 SLR 754 at [6].

200 Article 12(1) provides that all persons are equal before the law and entitled to the equal protection of the law.

201 [2008] 4 SLR 754 at [7]. See also *Singapore Parliamentary Debates, Official Report* (17 March 1967) vol 25 at cols 1424–1425 (Mr E W Barker, Minister for Law and National Development). It may also be noted that the Land Acquisition Act (Cap 152, 1985 Rev Ed), ss 5 and 6 in fact allow the government to acquire any land in Singapore for specific purposes so long as it provides due compensation.

202 *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR 815 at [21] (dealing with the right to counsel). See also Thio Li-ann, "Protecting rights" in *Evolution of a Revolution – Forty Years of the Singapore Constitution* (Thio Li-ann & Kevin Tan eds) (Routledge-Cavendish, 2009) at p 213.

203 *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR 815 at [21].

204 *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR 815 at [21]. See further Thio Li-ann, "Protecting rights" in *Evolution of a Revolution – Forty Years of the Singapore Constitution* (Thio Li-ann & Kevin Tan eds) (Routledge-Cavendish, 2009) at p 218.

in Art 9(1) connotes more than just Parliament-sanctioned legislation[205] and that the reference to "law" incorporates the fundamental rules of natural justice.[206] However, the comments of the High Court on the meaning of "law" must be regarded as *obiter*, given that the court held that there was no breach of Art 9(1). Its decision on Art 12(1) is undoubtedly on a stronger footing and less objectionable. Elsewhere, the compulsory buy-out of objecting unit owners could, in some circumstances, be viewed as a violation of the European Convention guarantee of "peaceful enjoyment" of possessions.[207]

76 The constitutionality of the collective sale legislative framework under Art 12 may also be questioned by the majority unit owners in a proper case. This possibility was alluded to by the Court of Appeal in *Kok Chong Weng v Wiener Robert Lorenz*,[208] a decision discussed in an earlier part of this paper. The court had suggested that a constitutional issue, which was not raised in the proceedings, might arise in the context of privatised HUDC housing estates where it is sought to argue that the collective sale statutory scheme did not apply to such estates. In light of Art 12(1), this might "result in the discrimination of one type of property owners, *viz*, privatised HUDC flat owners, even though they have the same rights and privileges as owners of any other strata developments (including 99-year leasehold developments)".[209] Parliament, if it had deliberately excluded privatised HUDC estates from the collective sale scheme, would have to justify the discriminatory legislation or otherwise risk its nullification for unconstitutionality. Given the danger involved, this could not have been the intention of Parliament as it "had nothing to lose but everything to gain in terms of achieving the objectives of the collective sale scheme". The constitutionality argument, as can be seen, is indeed a double-edged sword depending on the circumstances of the case.

V. Conclusion

77 Given the scarcity of land in Singapore, collective sale by majority consent will remain a feature of the strata title landscape in the foreseeable future, especially in the light of the public interest in ensuring optimal use of land resources and promoting urban

205 *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR 103 at [82].

206 *Ong Ah Chuan v Public Prosecutor* [1980–1981] SLR 48 at [26]. See also Thio Li-ann, "Protecting rights" in *Evolution of a Revolution – Forty Years of the Singapore Constitution* (Thio Li-ann & Kevin Tan eds) (Routledge-Cavendish, 2009) at pp 215–216.

207 Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at p 235, citing ECHR Protocol No 1, Art 1.

208 [2009] 2 SLR 709.

209 [2009] 2 SLR 709 at [60].

redevelopment. In order to achieve these objectives, the statutory scheme seeks to balance the interests of the majority and minority unit owners in facilitating the collective sale of strata developments. By and large, the legislative framework for collective sale is fairly satisfactory, although it leaves some room for improvement. The case law further builds on the statutory framework and, in the process, remedies any shortcomings and weaknesses therein[210] and generally clarifies the law on collective sale. The growing body of case law not only aids our understanding of the law in this area but also instils public confidence in the collective sale regime – an outcome which, in view of the public interest involved, is a welcome development.

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210 See, for example, *Kok Chong Weng v Wiener Robert Lorenz* [2009] 2 SLR 709 at [22], [31] and [61(d)] and *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [32].