EN BLOC SALES IN SINGAPORE

Critical Developments in the Law

It is well known that the numbers of *en bloc* or collective sales reached their peak in 2007. The policy supporting collective sales is linked to Singapore's severe land constraints and the need to realise the full development potential of old estates. The main incentive for sellers is the exceptional premium to be gained from the *en bloc* sale rather than if a unit were to be sold individually on the open market. Not surprisingly, *en bloc* sales fell dramatically in 2008 along with the economic downturn. Of the collective sale applications submitted to the Strata Titles Board ("STB") for approval, an increasing number of its orders have been challenged in the Supreme Court. The cases involve recurrent issues which the STB has had to grapple with and which are best clarified and resolved by the courts. The judgments on statutory interpretation, statutory non-compliance, constitutional issues, role of the STB, the relationship between the sale committee and the subsidiary proprietors and the nature, form and effect of the sale and purchase agreement will provide helpful guidelines of particular relevance when *en bloc* sales pick up again.

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I. Statutory interpretation

1 Of most recent significance is the Court of Appeal's decision on the applicability of the Land Titles (Strata) Act[1] ("LTSA") to HDB-HUDC estates[2] (referred to in the judgment and hereinafter as "privatised HUDC estates") and in relation to computing their age for

1 Cap 158, 2009 Rev Ed.

2 These were originally sold by HUDC Pte Ltd but taken over and completed by the HDB under the Housing and Development Act (Cap 129, 2004 Rev Ed), and like any other HDB estate, were managed by the respective Town Councils. Upon privatisation, they ceased to be subject to the Housing and Development Act and came under the Land Titles (Strata) Act (Cap 158) as amended by the Land Titles (Strata)(Amendment) Act 1995 (Act 27 of 1995).

the purpose of determining the requisite majority consent for their collective sale. Other significant legal developments are the Supreme Court's interpretation of "good faith", "point of law", "financial loss" and "subsidiary proprietor" in the context of the LTSA. The meaning of these words is pivotal to the outcome of applications to the Strata Titles Board ("STB") and appeals to the Supreme Court.

A. Section 84A(1) of the LTSA as amended in 1999[3] and its application to privatised HUDC estates

2 The test case on the applicability of s 84A(1) of the LTSA[4] to privatised HUDC estates is *Kok Chong Weng v Wiener Robert Lorenz*[5] ("*Gillman Heights*"). There, the requisite majority consent of 87.54% for collective sale was obtained prior to 4 October 2007. Hence, the 2007 Amendments[6] did not apply to the case. The application for sale was approved by the STB. Against this order, the minority owners appealed to the High Court[7] and ten of them (the appellants) went up to the Court of Appeal. In both instances, the appeals were dismissed. Before the Court of Appeal, the appellants argued that s 84A(1) did not apply to privatised HUDC estates (the "Applicability Argument") and alternatively, if it did, that the 90% and not the 80% consent

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3 Land Titles (Strata) (Amendment) Act 1999 (Act 21 of 1999).

4 Section 84A of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) then provided that:

> (1) An application to a Board for an order for the sale of all the lots and common property in a strata title plan may be made by–
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> (*a*) the subsidiary proprietors of the lots with not less than 90% of the share values where less than 10 years have passed since the date of the issue of the latest Temporary Occupation Permit on completion of any building comprised in the strata title plan or, if no Temporary Occupation Permit was issued, the date of the issue of the latest Certificate of Statutory Completion for any building comprised in the strata title plan, whichever is the later; or
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> (*b*) the subsidiary proprietors of the lots with not less than 80% of the share values where 10 years or more have passed since the date of the issue of the latest Temporary Occupation Permit on completion of any building comprised in the strata title plan or, if no Temporary Occupation Permit was issued, the date of the issue of the latest Certificate of Statutory Completion for any building comprised in the strata title plan, whichever is the later,
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> who have agreed in writing to sell all the lots and common property in the strata title plan to a purchaser under a sale and purchase agreement which specifies the proposed method of distributing the sale proceeds to all the subsidiary proprietors (whether in cash or kind or both), subject to an order being made under subsection (6) or (7).

5 [2009] 2 SLR 709.

6 Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007). See Ter Kah Leng, "A Man's Home is [Not] His Castle – *En bloc* Collective Sales in Singapore" (2008) 20 SAcLJ 49.

7 *Chang Mei Wah Selena v Wiener Robert Lorenz* [2008] 4 SLR 385.

requirement was needed, having regard to the age of the development (the "Reference Date Argument").

3 A brief history of Gillman Heights ("GH") is essential to a proper understanding of the arguments raised. As an HDB development, it was not required to be issued, upon its completion, with a Temporary Occupation Licence ("TOL") and the Certificate of Fitness ("COF").[8] These were subsequently replaced[9] by the statutory equivalent of the Temporary Occupation Permit ("TOP")[10] and the Certificate of Statutory Completion ("CSC").[11] GH was ready for occupation in December 1984, and in 1996, following its privatisation, it was issued with a strata title under the LTSA.[12] A CSC was issued in October 2002, and in November 2002, a TOP was issued for the newly completed clubhouse and swimming pool in GH.

4 In 1999, s 84A(1) of the LTSA was amended[13] to reduce the unanimous consent requirement to majority consent when it became apparently difficult to obtain unanimous consent in freehold and 999-year leasehold strata developments. The percentage majority consent was pegged to the age of the development calculated by reference to the date of issue of the latest TOP or CSC, as the case may be. As this reference date could not apply to privatised HUDC estates which sought to go *en bloc*, the LTSA was amended in 2007[14] to allow the reference date for such estates to be the date of completion of the construction of the last building (not being any common property) comprised in the strata title plan as certified by the relevant authority. In the case of privatised HUDC estates, it is the HDB.[15]

5 Before the High Court, the appellants contended that the 2007 Amendments[16] showed that Parliament had deliberately excluded privatised HUDC estates from the ambit of s 84A(1) of the LTSA (the "Applicability Argument"). Even if Parliament had not intended to exclude privatised HUDC estates, the reference date to determine the age of GH under the section was the latest TOP or the latest CSC. In the case of GH, these were issued only in 2002 which made the estate less than ten years old at the time the majority consent was obtained. This meant that 90% consent was required as opposed to the 87.54% that

8 Building Control Act 1973.
9 Building Control Act 1989 (Cap 29, 1999 Rev Ed).
10 TOP indicates that the building for which it is issued is ready for occupation.
11 CSC indicates that the building has satisfied all the requirements of the Building Control Act (Cap 29, 1999 Rev Ed) and is "completed" in terms of that Act.
12 Land Titles (Strata) Act (Cap 158, 1988 Rev Ed).
13 Land Titles (Strata) (Amendment) Act 1999 (Act 21 of 1999).
14 Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).
15 Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) s 126A(6A).
16 Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).

was in fact obtained (the "Reference Date Argument"). The High Court rejected both arguments and upheld the STB's order.

6 Before the Court of Appeal, the appellants contended that s 84A(1) of the LTSA[17] should be interpreted literally to ascertain the intention of Parliament not to apply s 84A(1) to privatised HUDC estates. However, they did not dispute the purposive approach to the construction of s 84A(1) as advocated in s 9A of the Interpretation Act.[18]

7 The appellants argued that there were four pointers or indications that Parliament had not thought of providing for the collective sale of privatised HUDC estates, such as GH, in s 84A(1) of the LTSA.[19] They were as follows: (a) when the 1999 Amendments[20] were passed, the rejuvenation of only freehold and 999-year leasehold estates was contemplated. Parliament did not have 99-year leaseholds, such as GH, in mind; (b) the Government had no motivation to encourage HUDC dwellers to go *en bloc* and reap the profits of resale after it had heavily subsidised the privatisation scheme; (c) s 84A(1) deliberately used the TOP and CSC to determine the reference date in order to exclude privatised HUDC estates which were not issued with these; and (d) Parliament must know or be deemed to know that HUDC estates were exempted from the requirement of TOP and CSC and that privatised HUDC estates would similarly not have these certifications.

8 The Court of Appeal dismissed the four arguments above as indicators of legislative intent. Chan Sek Keong CJ, delivering the judgment of the court, held that there were no credible indications of Parliament's intent in the Parliamentary Debates in 1995, 1998/1999 and 2007 to support the appellants' claims. In the court's view, the Applicability Argument rested on only one factor, which was the reference to TOP and CSC in s 84A(1) of the LTSA.[21] This, the court said, was reverse logic: that because the TOP and CSC were used as the means to determine the age of a strata development, the section cannot apply to any strata development which does not have a TOP or CSC. This, the court felt, was not necessarily correct. Instead, it would be more appropriate to rely on the legislative objective to determine whether the means is appropriate to achieving that objective. Thus, since the objective of s 84A(1) is to facilitate *en bloc* sales, the court held that the section must be construed in such a way that would achieve that objective. To confine it to TOP and CSC as the only means of calculating the age of the development and the consent requirement would not

17 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
18 Cap 1, 2002 Rev Ed.
19 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
20 Land Titles (Strata) (Amendment) Act 1999 (Act 21 of 1999).
21 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

achieve the legislative objective of facilitating *en bloc* sales. In that sense, the court concluded, s 84A(1) was wanting in many respects.

(1) Comment

9 Chan Sek Keong CJ asked why Parliament would wish to exclude privatised HUDC estates from the collective sale scheme when the object of the scheme was the rejuvenation of old estates. He was prompted to so ask by the appellants' submission that Parliament intended to exclude such estates. It is apparently a weak submission that is difficult to substantiate, given the overriding policy objective of facilitating collective sales, and the absence of any express exclusion of privatised HUDC estates from the scheme in any of the relevant Land Titles (Strata) (Amendment) Acts.

10 Is there a difference, *albeit* a subtle one, between a scheme that is excluded by Parliament and one that is not within its contemplation? If so, a possible alternative argument might be that in 1999 it was not within the contemplation of Parliament that privatised HUDC estates would go *en bloc* and therefore no express provision was made in s 84A(1) of the LTSA. Perhaps the privatisation history of GH may throw some light on this.

11 In his Second Reading speech to the Land Titles (Strata) (Amendment) Bill 1995,[22] the Minister for National Development, Mr Lim Hng Kiang, revealed that a pilot project was needed to test the full complexity of the privatisation scheme and to iron out any problem which might arise. For this purpose, GH and Pine Grove were selected for the pilot project. If successful, the Government would extend the conversion scheme to other HUDC estates batch by batch.[23] The HDB was tasked to progressively identify which estates were ready for privatisation and it was up to HUDC residents to obtain at least 75% support for the conversion from HDB to strata title developments.[24] This would give them the freedom to upgrade their estates if they wished to enhance their assets further. However, the Minister pointed out that the 1995 Amendments[25] did not mean the automatic conversion of all estates. They would be taken batch by batch and would require the 75% consent.[26]

12 The Court of Appeal took the view that, upon privatisation, HUDC residents would be able to enjoy all the legal attributes and

22 *Singapore Parliamentary Debates, Official Report* (7 July 1995) vol 64.
23 *Singapore Parliamentary Debates, Official Report* (7 July 1995) vol 64 at col 1391.
24 *Singapore Parliamentary Debates, Official Report* (7 July 1995) vol 64 at col 1390.
25 Land Titles (Strata) (Amendment) Act 1995 (Act 27 of 1995).
26 *Singapore Parliamentary Debates, Official Report* (7 July 1995) vol 64 at col 1393.

benefits of a private strata title development, including the eligibility for collective sale. Since GH had obtained its strata title in 1996, it became a strata title plan within s 84A(1) of the LTSA[27] which allowed the requisite majority to apply for a collective sale order. Given this interpretation, it would be to no avail to argue that since only selected HDB estates could be converted in batches, this indicated that privatised HUDC estates as a whole could not have been within the contemplation of Parliament in 1999. There appears to be some indication that collective sale was furthest from the mind of the Minister when he said that the aim of conversion was to allow Singaporeans to enjoy the *status* and *privileges* of owning private property *without having to uproot themselves and move elsewhere*.[28] However, it is clear from the Court of Appeal's line of reasoning that this statement is unlikely to be regarded as an expression of legislative intent to exclude newly privatised HUDC developments such as GH from exercising the privilege of going *en bloc*.

B. Reference to TOP and CSC in s 84A(1) of the LTSA

13 The appellants' arguments (c) and (d) above were dismissed on the basis that the use of TOP and CSC was more likely the "product of faulty or inappropriate drafting" since these were new names for the TOL and COF under previous corresponding legislation. It is difficult to see how this is so. The court went on to state that since the appellants had conceded that the TOL and COF were statutory equivalents of the TOP and CSC for the purpose of s 84A(1) of the LTSA,[29] it implied that, to this extent, those references to TOP and CSC in s 84A(1) could not be applied literally.[30]

(1) Comment

14 What the court possibly had in mind was that the references to TOP and CSC are not the exclusive means of computing the age of the development and that there are other ways of doing so. This would be consistent with the views of the High Court and the Court of Appeal that Parliament clearly intended s 84A(1) of the LTSA[31] to apply to strata developments, whatever their tenures may be. The Court of Appeal drew support from the Second Reading speech of the Minister of State[32] stating that the new scheme would apply to three types of strata developments, including those registered under the LTSA. No doubt

27 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
28 *Singapore Parliamentary Debates, Official Report* (7 July 1995) vol 64 at col 1391.
29 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
30 [2009] 2 SLR 709 at [30].
31 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
32 *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at col 605.

when GH was issued with a strata title in 1996, it became a strata development.

15 It is apparent that nothing in the relevant parliamentary materials reveals Parliament's intention of excluding privatised HUDC estates from the collective sale process. Although the terms "TOP" and "CSC" are clearly inappropriate in the case of privatised HUDC estates, once the court decided that s 84A(1) of the LTSA as amended in 1999[33] applied to GH, only then could it be said that not providing for more appropriate reference dates was a drafting omission. In this case, the Court of Appeal used purposive interpretation to fill the *lacuna* or gap in the law to carry out Parliament's intent. This will be discussed further below.

C. Reference date argument

16 This would only be relevant if s 84A(1) of the LTSA[34] applied to GH. It will be recalled that the appellants argued that the latest TOP and CSC were only issued in 2002 which made the estate less than ten years old for the purpose of the section and hence a majority consent of 90% was required under s 84A(1)(*a*) and not the 87.54% which was in fact obtained. The Court of Appeal took the view that the CSC issued in 2002 was not a CSC within the meaning of s 84A(1) because it was not issued on completion of any building comprised in the strata title plan issued for GH in 1996. It was a CSC issued on the completion of upgrading works to a completed building. Similarly, the TOP was issued in 2002 only for the clubhouse and swimming pool which did not exist when the strata title plan was issued in 1996. Hence, it was not a TOP within the meaning of s 84A(1). If so, what is the reference date for determining the age of GH? The court filled the *lacuna* in s 84A(1) by referring to the new s 126A(6A)[35] which allowed the age to be determined by a certificate issued by the relevant authority, in this case, the HDB.

(1) Meaning of "latest" TOP and "latest" CSC in s 84A(1)

17 CSCs are issued for upgrading works and new TOPs for new buildings and other facilities. The Court of Appeal gave its views on this important issue even though it was not necessary to consider it in the light of the above findings. It clarified that the references in s 84A(1) of the LTSA[36] to TOP and CSC related to the completion of the entire strata development, and not for building works carried out in the

33 Land Titles (Strata) (Amendment) Act 1999 (Act 21 of 1999).
34 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
35 Added by Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).
36 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

development from time to time. In the case of development in phases or with multiple buildings, it is the latest TOP or CSC that is issued for the completion of the last phase or the last building, respectively. Thus, the issue of a TOP or CSC cannot reset the age of the estate unless it is for the completion of a new development which would be a question of fact to be decided on a case by case basis depending on the extent of the changes made to the existing development. The Court of Appeal endorsed the views of the STB that "the birth date of the development cannot be rejuvenated merely because some structure is built which required a TOP or a CSC. Not every single shed or toilet built for the common good of all would restart the time line".

18 Another issue on which the Court of Appeal felt compelled to comment, although not necessary to the disposal of the present appeal, was the meaning of "strata title plan". The previous s 84A(1) of the LTSA[37] (before the 2007 Amendments) stated that the relevant date is the date of the issue of the latest TOP on completion of *any building comprised in the strata title plan* or, if no TOP is issued, the date of issue of the latest CSC of *any building comprised in the strata title plan*.

19 In the High Court, the respondents submitted that the 2007 Amendments[38] excluded the common property comprised in the strata title plan. The relevant words in the amended s 84A(1) of the LTSA[39] are: "the latest TOP on completion of any building (*not being any common property*) comprised in the strata title plan" [emphasis added] or, if there is no TOP, "the latest CSC for any building (*not being any common property*) comprised in the strata title plan, whichever is the later" [emphasis added]. The respondents used this amendment to show that in the previous s 84A(1), the TOP and CSC for GH could not be used as reference points as they were issued for common property and not for any building.

20 It is clear that the 2007 Amendments[40] were intended to prevent the setting of the reference date to zero whenever any works were carried out on the common property.

21 In the Court of Appeal's view, the exclusion by the new s 84A(1)[41] of common property from any building comprised in a strata title plan was not an amendment but a clarification of the words "strata title plan". However, said the court, it was not intended to have prospective effect and was intended to apply to TOPs or CSCs issued for

37 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
38 Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).
39 Land Titles (Strata) Act (Cap 158, 2009 Rev Ed).
40 Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).
41 As amended by Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).

buildings or other parts of the strata development that were common property. In this sense, it may be said to be an amendment but it does not affect the meaning of the words "strata title plan" in the previous s 84A(1).[42]

(a) Comment

22 It is submitted, with respect, that the new s 84A(1)[43] clarifies the meaning of "building" comprised in a strata title plan. It does not include any common property in a development[44] for the purpose of setting the reference date for determining the age of the development. It has nothing to do with the meaning of "strata title plan".

(2) GH had no TOP or CSC

23 The problem of a privatised HUDC estate not having any CSC was addressed in the new s 126A(6A) of the LTSA as amended in 2007[45] which provides another reference date which is "the date of completion of construction of the building as certified by the relevant authority". The Court of Appeal said that this phrase may not be factually or legally the same as a CSC, unless there is evidence that this date has always been the same as the date of the COF.[46] Accordingly, the court thought that s 126A(6A) was more of an amendment for future cases rather than a clarification of past cases. In the court's view, the draftsman did not have in mind a privatised HUDC estate like GH which had no TOP or CSC for the purposes of s 84A(1). If, according to the court, s 126(6A) is an amending provision and the draftsman did not have in mind a case like GH, then how is the age of the estate to be calculated when the new provision applies prospectively and not retrospectively? The previous s 84A(1) provided for only the latest TOP or CSC. However, the court emphasised that the enactment of s 126(6A) did not show, as the appellants contended, that Parliament had in 1999 deliberately excluded privatised HUDC estates from the operation of s 84A(1). On the contrary, the court felt that it was not legitimate to infer past parliamentary intention in this way.

(a) Comment

24 In setting the reference date to the time GH was completed in 1984, the Court of Appeal appears to have applied the new s 126A(6A) retrospectively. The provision appears to be more of an amendment

42 [2009] 2 SLR 709 at [43].
43 As amended by Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).
44 See Explanatory Statement to the Land Titles (Strata) (Amendment) Bill 2007.
45 Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).
46 [2009] 2 SLR 709 at [46].

than a clarification of the existing law. A declaratory provision would usually state, as the appellants contended, that "for the avoidance of doubt, it is hereby declared that …". A declaratory provision would have retrospective effect whereas s 126A(6A) applies prospectively and should not apply to GH. Apparently, the *lacuna* or gap in s 84A(1) with regard to the reference date for GH was filled via s 126A(6A) through purposive construction, as will be seen below.

D. Purposive interpretation

25 Section 9A of the Interpretation Act[47] provides that an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

26 Thus, the Court of Appeal used purposive interpretation to correct what it called drafting flaws for the purpose of giving effect to and promoting Parliament's overriding intention of facilitating *en bloc* sales. It agreed with the High Court's approach that the parliamentary materials and the wording of s 84A(1) confirm that the LTSA[48] was intended to apply to all strata developments, including GH; that the age of the development was the determinative criterion of the consent requirement; that the TOP and the CSC were merely a convenient and reliable means to determine the age of a strata development and that the lack of means should not be allowed to defeat or frustrate the legislative purpose of the 1999 Amendments.[49] Thus, applying the TOP and CSC as the only means of determining the age of a strata development would falsify Parliament's intention (in the words of Bennion).[50] A literal application of the TOP and the CSC prescribed by s 84A(1) would frustrate the 1995 Amendments[51] (to privatise HUDC estates and accord flat owners all the privileges enjoyed by owners of private developments) and the 1999 Amendments (to apply to all strata developments and to facilitate *en bloc* sales). The Court of Appeal was of the view that it was a drafting omission that deprived privatised HUDC estates of the very means prescribed in s 84A(1) of determining their age. This was a rare case and a rare example of a *casus omissus* created by faulty or inappropriate drafting which was within the legitimate bounds of purposive interpretation to correct. The availability of other means not expressed in the section for determining the age of a development

47 Cap 1, 2002 Rev Ed.
48 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
49 Land Titles (Strata) (Amendment) Act 1999 (Act 21 of 1999).
50 Francis Bennion, *Bennion on Statutory Interpretation* (Lexis Nexis, 5th Ed, 2008) at p 458.
51 Land Titles (Strata) (Amendment) Act 1995 (Act 27 of 1995).

confirms the TOP and CSC as the only reference points was a drafting flaw which, if not corrected by the court, would defeat the legislative purpose of the 1999 Amendments.

27 The implication is that the court is entitled to use purposive interpretation to cure drafting defects if to do so will promote the objective of the statute. In the case of GH, it is to peg the age of the estate from the date of its completion and occupation in 1984. Noting that very recent English decisions have adopted a purposive construction to add words to a statute to achieve the purpose intended by Parliament,[52] the Court of Appeal was quick to remark that English decisions are still useful guides, but the basis for purposive interpretation in Singapore is s 9A of the Interpretation Act.[53]

28 The Court of Appeal also made the observation that an interpretation of s 84A(1) to exclude only privatised HUDC estates might infringe Art 12 of the Constitution of the Republic of Singapore[54] as discriminating against the owners of GH. If Parliament had this intent, it would run the risk of the collective sale scheme being nullified for unconstitutionality. Given such a risk, the Government had nothing to lose but everything to gain in terms of achieving the objectives of the *en bloc* scheme by including privatised HUDC estates within s 84A(1).

(1) Comment

29 The Court of Appeal's decision settles once and for all the applicability of the LTSA[55] to privatised HUDC estates in the same position as GH. This will no doubt facilitate the collective sale and rejuvenation of such old estates. Other privatised HUDC estates which decide to go *en bloc* after 4 October 2007 will be governed by LTSA as amended by the 2007 Amendments[56] which have filled the gaps in the law and brought greater certainty to the position of such estates.

E. Good faith

30 The STB must dismiss an application for a collective sale order if it is satisfied that the transaction is not in good faith after taking into account *only* the following factors: the sale price, the method of distributing the sale proceeds and the relationship of the purchaser to any of the subsidiary proprietors of the development.[57]

52 [2009] 2 SLR 709 at [54].
53 Cap 1, 2002 Rev Ed.
54 1985 Rev Ed, 1999 Reprint.
55 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
56 Land Titles (Strata) (Amendment) Act 2007 (Act 46 of 2007).
57 Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) s 84A(9)(*a*).

31 It is apparent that the factors for determining good faith are expressly limited. Andrew Ang J's views on the scope of s 84A(9)(*a*) of the LTSA[58] in relation to the sale price are helpful. In *Tsai Jean v Har Mee Lee*[59] ("*Cairnhill Heights*"), he reasoned that to give the subsection such a strict and literal interpretation would be to render it unworkable. It would be impossible for STB to be satisfied on the issue of good faith if only the sale price (*ie*, a dollar amount) is to be taken into account. This cannot have been Parliament's intention as other facts relevant to the sale price, such as the valuation of the property and the background to the acceptance of the sale price would be material to the STB's finding. In particular, if the valuation could not be taken into account, there would be no point in Schedule 4 to the LTSA requiring a valuation to be produced before the STB and s 84A(5) empowering STB to call for a valuation report.

(1) Comment

32 The implication of Ang J's remarks is that other facts relevant to the distribution method or the relationship of the subsidiary proprietors to the purchaser (*eg*, conflict of interest) may be taken into account in determining whether or not the transaction is in good faith.

33 Take the case of a subsidiary proprietor who owns more than half the number of units and hence the voting power in a development. It signs the sale and purchase agreement and subsequently becomes a joint purchaser of the development, but before the STB makes the order for sale. This comes to the knowledge of the objecting minority owners only after the STB has approved the sale. This apparent conflict of interest appears relevant to the issue of bad faith. In *Gillman Heights*, the objectors came to know of NUS's commercial venture with the purchaser only after the sale order was made by the STB and hence did not raise this objection before the STB. Choo Han Teck J accepted that the NUS-purchaser relationship was publicly available and was not persuaded to allow this evidence to be adduced afresh. "A court deliberates only on the basis of the evidence before it."[60]

(2) Meaning of good faith

34 Lord Denning MR[61] considered "good faith" to require the presence of honesty and with no ulterior motive. Kekewich J defined it in terms of "the absence of bad faith or mala fides".[62] After referring to

58 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
59 [2009] 2 SLR 1 at [24].
60 [2008] 4 SLR 385 at [33], *per* Choo Han Teck J.
61 In *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48 at 55.
62 In *Mogridge v Clapp* [1892] 3 Ch 382 at 391.

various precedents, Ang J noted[63] that the core meaning of good faith is honesty or absence of bad faith and restated the test to be whether the majority owners are "actuated by dishonesty or bad faith".[64] The suggestion by the objecting minority owners in *Cairnhill Heights*[65] that it is not necessary to show outright dishonesty or bad faith as this would set Parliament's safeguard for the rights of minority owners too high was dismissed. The legislative intent was to facilitate collective sales. To construe good faith in any other manner would lower the threshold for objectors to cross and thus undermine the legislative intent.[66]

(3) Burden of proof

35 The burden of showing bad faith lies on the objectors to the collective sale and the applicable standard of proof will be on a balance of probabilities.[67]

(4) Standard of good faith

36 The objectors in *Cairnhill Heights* contended that the duties of the sale committee are similar to those of a mortgagee's duties in exercising his power of sale, namely, to act in good faith and to obtain the true market value or the proper price for the mortgaged property. The High Court dismissed this as misconceived. The members of the sale committee, unlike the mortgagee who is selling the property as a creditor to recoup the amount owing, are also selling their own properties as owners. There is no express duty on the sale committee other than to ensure that the sale transaction is in good faith as defined above. Thus, if the sale committee sold the development above the reserve price, the STB may conclude that there is no bad faith.[68] However, the Court of Appeal has ruled in *Ng Eng Chee v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener)* ("*Horizon*

63 *Dynamic Investments Pte Ltd v Lee Chee Kian Silas* [2008] 1 SLR 729 at [17] ("*Holland Hill Mansions*").

64 This supersedes the STB's interpretation of "good faith" in *Between Wee Chong Yeow and Ong Guek Kim Valerie/Chia Hiang Kiat* STB 17 of 2007 ("*Finland Gardens*"). Ang J's test was adopted by the STB in *Leong Soh Har v Tjeng Hie Min/Rina Pangastuti Adidharma* [2008] SGSTB 6 ("*Oakwood Heights*"), followed by Woo Bih Li J in *Liu Chee Ming v Loo-Lim Shirley* [2008] 2 SLR 764 at [19] and approved by the Court of Appeal.

65 [2009] 2 SLR 1.

66 [2009] 2 SLR 1 at [21].

67 Applied in *Wee Chong Yew v Ong Guek Kim Valerie/Chia Hiang Kiat* [2008] SGSTB 3 ("*Finland Gardens*").

68 $20m above the reserve price in the case of *Kok Chong Weng v Wiener Robert Lorenz* ("*Gillman Heights*") [2009] 2 SLR 709, or if the sale price is not far off the valuation as in the case of *Tsai Jean v Har Mee Lee* [2009] 2 SLR 1 ("*Cairnhill Heights*").

Towers")[69] that the sale committee must act as a prudent owner to obtain the best price reasonably obtainable for the entire development.

(5) Good faith: a question of law or fact?

37 The question of good faith is partly one of law and partly one of fact.[70] Andrew Ang J considered the question as to what meaning should be ascribed to the word "good faith" a question of law.[71] It is also a question of fact since whether a transaction is lacking in good faith requires an application of the primary facts to the legal criteria as to what good faith is. The question of good faith is to be decided only in the context of the facts of each case.[72] Hence, it is traditional to describe it as a question of fact. Thus, if the STB is satisfied that the transaction is in good faith, that is a decision on the facts of the case and cannot be challenged unless there is an error of law.

38 To challenge the STB's decision with regard to good faith, the STB must have made an error of law either *ex facie* or the finding of the STB must be such that "no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal".[73] The cases show an uphill task in the attempt to overturn the STB's finding of fact that the collective sale is in good faith. Exceptionally, in the first case before the Court of Appeal, the minority subsidiary proprietors succeeded in their claim that the transaction was carried out in bad faith.

39 The issue in *Horizon Towers*[74] (was essentially whether the STB had made errors in law in holding that the sale committee acted in good faith in the transaction in selling the property to HPL at $500m in the manner and at the time it did, having regard to all the circumstances that might have had a bearing on the price of the property. Since the STB was required to take into account the sale price for the development,[75] the Court of Appeal held that a duty to obtain the best price is part of the duties of the sale committee. "Good faith" is not merely confined to whether the sale price is fair or not, but also how the price was arrived at. This is because the duty of "good faith" requires the sale committee to discharge its statutory, contractual and equitable

69 [2009] SGCA 14.
70 Plowman J in *Smith v Morrison* [1974] 1 WLR 659; Andrew Ang J in *Tsai Jean v Har Mee Lee* ("*Cairnhill Heights*") [2009] 2 SLR 1.
71 *Dynamic Investments Pte Ltd v Lee Chee Kian Silas* ("*Holland Hill Mansions*") [2007] 1 SLR 729 at [12].
72 Choo Han Teck J in *Lo Pui Sang v Mamata Kapildev Dave* ("*Horizon Towers*") [2008] 4 SLR 754.
73 *Edwards v Bairstow* [1956] AC 14, *per* Lord Radcliffe.
74 [2009] SGCA 14.
75 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) s 84A(9)(*a*)(i).

functions and duties faithfully and conscientiously and to act impartially towards both the consenting and objecting subsidiary proprietors. Thus, facts showing that a better sale price could have been obtained should be taken into account in determining whether the transaction was in bad faith. In particular, the Court of Appeal said that "an SC must act as a prudent owner to obtain the best price reasonably obtainable for the entire development".[76] This requires the sale committee to carry out a long list of functions including 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, (c) following up on all expressions of interest and offers, (d) creating reasonable competition between interested purchasers, (e) obtaining independent expert advice on matters relevant to the decision to sell the property, such as when and at what price to sell, and an independent valuation, in particular prior to settling on the final price, when the market is in a state of flux, when there are divergent views within the sale committee or where the property has mixed uses or is of an unusual nature, (f) waiting for the most propitious timing to sell in order to obtain the best price, (g) disclosing any conflict of interest with the duty to obtain the best sale price, (h) ensuring that it has been properly informed of all potential conflicts of interest that may affect the advice it receives from its professional advisers and (i) seeking fresh instruction or guidance from the consenting subsidiary proprietors where it has reasonable doubts as to its original mandate with regard to the consensus of the consenting subsidiary proprietors.

40 Applying the above propositions, the Court of Appeal concluded that the STB had erred in law in several respects and thereby overturned the STB's order for the collective sale of Horizon Towers. These errors included failing to ensure that all relevant evidence was placed before it, misunderstanding the role of the original sale committee in obtaining the best sale price and misinterpreting the meaning of good faith. The original sale committee had breached its fiduciary duties as agent of all the subsidiary proprietors in failing to follow up on the Vineyard offer and other expressions of interest and leveraging on these to obtain a better sale price, concluding the sale to HPL with undue haste and when there were undisclosed potential conflicts of interest on the part of two key members of the original sale committee and failing to revert to the subsidiary proprietors when there was a surge in property prices since the time of its original mandate. This judgment illustrates the extensive scope of duties owed by the sale committee to all subsidiary proprietors and the high standard required in the discharge of these duties.

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76 [2009] SGCA 14 at [133].

41 The fairness of the distribution method and the lack of good faith were also raised in *Dynamic Investments Pte Ltd v Lee Chee Kian Silas*[77] ("*Holland Hill Mansions*"). Dynamic, which owned the largest unit, appealed against the STB's order on the ground that it would have been paid more if a different distribution method had been used. The appeals were dismissed by the High Court and the Court of Appeal.[78] It was affirmed that it is a question of fact whether the method selected was made in good faith. In this case, it was not actuated by dishonesty or bad faith.

42 The STB has dismissed a handful of applications for collective sale. In the case of *Tampines Court*,[79] the application was dismissed on the ground that the transaction was not in good faith taking into account the sale price and the method of distributing the proceeds of sale. The sale committee had not obtained an updated valuation of the development when the deal was signed in 2007. The valuation that was used dated from 2005. The sum meant to compensate subsidiary proprietors for financial loss was at the discretion of the sale committee and the STB found the sum to be unfairly distributed among them.

F. Financial loss

43 *Mohamed Amin bin Mohamed Taib v Lim Choon Thye*[80] ("*Regent Court*") is an instructive case on statutory interpretation and the meaning of financial loss. Under s 84A(7)(*a*) of the LTSA,[81] STB shall approve the application unless satisfied that any objector, being a subsidiary proprietor, will incur a financial loss. Read with s 84A(8)(*a*), a subsidiary proprietor shall be deemed to have incurred such loss if the "proceeds of sale for his lot", after such deduction as the STB may allow (including all or any of the deductions specified in the Fourth Schedule), are less than the price he paid for his lot. In *Regent Court*, financial loss was used by the ninth and tenth defendants (the defendants) as a ground for objecting to the collective sale as the proceeds of sale of their lot, after any deduction allowed by the STB, would be less than the price they paid for the lot. They claimed a loss of $93,935.75, being the difference between the proceeds of the *en bloc* sale and the purchase price of their unit together with the stamp fees and legal costs. This, the purchaser undertook to make good. They further undertook to pay such additional sums as may be allowed by the STB as deductions under s 84A(8)(*a*). By a supplemental agreement, the purchaser also agreed to pay the defendants on completion of the

77 [2008] 1 SLR 729.
78 The Court of Appeal's decision does not appear to have been reported.
79 *The Straits Times* (26 July 2008).
80 [2009] 3 SLR 193.
81 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

collective sale, the $93,935.75 and such additional deductions as the STB may allow. At the hearing, the STB was satisfied that the ground of financial loss had been made out and dismissed the application. The plaintiffs appealed to the High Court. Judith Prakash J upheld the appeal, set aside the STB's dismissal of the application and remitted the case back to the STB for continued hearing. The defendants asserted that they had incurred a "financial loss" within the meaning of s 84A(7)(*a*) read with s 84A(8) and that the STB was not required to take into consideration the undertaking and supplemental agreement provided by the purchaser. In short, the issue was the true meaning of "proceeds of sale for his lot" within s 84A(8)(*a*). Is it confined to the amount an individual subsidiary proprietor could expect to receive on the basis of the sale price or can a wider meaning be given to it? In answering this question, Judith Prakash J adopted a purposive approach to statutory interpretation, as required by s 9A(1) of the Interpretation Act,[82] as opposed to the literal rule which is considered to be out-dated. Thus, in construing s 84A(8)(*a*), the court has to ascertain the purpose of the collective sale provisions of the LTSA and is allowed to refer to extrinsic materials to assist in statutory interpretation: s 9A(2). These include speeches made in Parliament relating to the legislation in question. Thus, it is clear from the Second Reading speech of the Minister of State for Law[83] that the main purpose of the collective sale provisions in the LTSA is to facilitate *en bloc* sales in order to promote better utilisation of scarce land resources in Singapore and also urban redevelopment. Furthermore, it is plain from the same speech that Parliament was concerned that a subsidiary proprietor should not lose out financially by reason of the collective sale. This did not mean that only a literal approach to s 84A(7) would achieve that purpose. However, the STB adopted a literal approach in construing the "proceeds of sale for his lot" under s 84A(8) and confined it strictly to the sale price in the collective sale agreement. This would exclude any additional amount not mentioned in the sale and purchase agreement but which the purchaser had agreed to pay the objector. The High Court rejected this strict construction of "proceeds of sale" and saw no reason why this should be restricted to the purchase price set out in the sale and purchase agreement. Judith Prakash J was of the view that adopting the wider interpretation would further the legislative purpose of the LTSA by taking into account efforts to make good the financial loss of individual subsidiary proprietors and to ensure that no subsidiary proprietor would be prejudiced by the collective sale. If the objecting subsidiary proprietor would still suffer a financial loss despite the compensation offered, then the STB would have to dismiss the application. On the other hand, if the compensation would make good his loss, then there would be no basis for continuing to object to the sale.

82 Cap 1, 2002 Rev Ed.

83 *Singapore Parliamentary Debates, Official Report* (31 July 1998) vol 69 at cols 601–607.

The LTSA does not require that all subsidiary proprietors should make a financial gain, only that no one should make a financial loss. Applying a purposive approach, the STB should have considered not only the sale and purchase agreement but also the purchaser's undertaking and supplemental agreement in order to determine whether or not the defendants had suffered "financial loss" under the LTSA. In deciding that it could not look at these additional documents simply because they were extrinsic to the sale and purchase agreement, the STB had made an error of law.

G. Appeal on a point of law

44 The STB is empowered to make an order for collective sale on the basis of the facts of each case. Under s 98(1) of the Building Maintenance Strata Management Act,[84] no appeal against a decision of the STB lies to the High Court except on a "point of law".

45 The meaning of "point of law" is crucial. Guidance may be derived from *Halsbury's Laws of England*[85] and Lord Radcliffe's broader formulation of what constitutes an error of law in *Edwards v Bairstow*.[86] According to this proposition, a decision may be challenged on a point of law (in addition to an error of law *ex facie* that bears upon the ultimate determination) if the facts were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. V K Rajah JA in *Horizon Towers*[87] agreed with Andrew Ang J[88] on the wider meaning for the term "point of law" and had no doubt that the present appeals were on "points of law". For example, the statutory meaning of "good faith" was clearly an issue of law and a misinterpretation of the term would constitute an *ex facie* error of law. This clearly endorses what Judith Prakash J said earlier in *Regent Court*[89] that a question of statutory interpretation is always a question of law, referring in that case to the proper interpretation of

84 Cap 30C, 2008 Rev Ed.

85 *Halsbury's Laws of England* vol 1(1) (Butterworths, 4th Ed Reissue, 1989) at pp 121–122 para 70 referred to with approval by Selvam JC in *MC Strata Title No 958 v Tay Soo Seng* [1993] 1 SLR 870 at [22]. This volume of *Halsbury's* has since been replaced by the 2001 edition but the statement of law remains largely similar: see para 77 of the 2001 edition.

86 [1956] AC 14.

87 *Ng Eng Ghee v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener)* [2009] SGCA 14 at [102].

88 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR 522 ("*Phoenix Court*"); *Dynamic Investments Pte Ltd v Lee Chee Kian Silas* [2008] 1 SLR 729 ("*Holland Hill Mansions*"). However, the High Court could find no error of law that would vitiate the STB's order for sale. Andrew Ang J's construction of the term "point of law" was endorsed by Woo Bih Li J in *Liu Chee Ming v Loo-Lim Shirley* [2008] 2 SLR 764 ("*Futura Condominium*").

89 [2009] 3 SLR 193.

s 84A of the LTSA. Again, the formulation of the duties of a sale committee by the STB for the purpose of considering whether it had discharged its legal duties to the subsidiary proprietors raises a point of law that falls within the scope of s 98(1) above.

H. Subsidiary proprietor

46 In *Tan Siew Tian v Lee Khek Ern Ken*[90] ("*Airview Towers*"), the meaning of "subsidiary proprietor" in the context of s 84A(1) of the LTSA[91] was considered. The LTSA requires the subsidiary proprietors to sign the collective sale agreement within the period of one year from the date the agreement was first signed by a subsidiary proprietor (the permitted period). In this case, the Tans and the Nios had signed the collective sale agreement and then transferred ownership of their respective units so that they were no longer the subsidiary proprietors when the application was made to the STB. The High Court judge took the relevant date as the date of application to the STB. As a result, the signatures in question had become invalid or void by virtue of the transfer of ownership. The Court of Appeal held that this was a misconstruction of the term "subsidiary proprietor". The correct answer is provided in s 84A(1) itself. It is clear that the subsidiary proprietors are those "who have agreed in writing to sell all the lots and common property in the strata title plan to a purchaser under a sale and purchase agreement". On this construction, the Tans and the Nios who had signed the collective sale agreement would be considered subsidiary proprietors for the purpose of s 84A(1). Based on this interpretation, whether Stream Peak or the Sharmas ("successors in title" by virtue of the definition of "subsidiary proprietor" in s 84A(15)) had also signed the collective sale agreement would be irrelevant. It is unnecessary for a successor in title to sign the collective sale agreement if his predecessor in title had signed it. This does not preclude a subsidiary proprietor from selling his unit but his successor in title will be bound by the collective sale agreement. If the judge's construction were correct, it would mean that an existing subsidiary proprietor could get out of his commitment by selling or making a gift of his unit to another person. In the Court of Appeal's opinion, this would make the whole statutory scheme uncertain, unworkable and extremely burdensome to implement. However, the collective sale agreement might require a subsidiary proprietor who has signed the collective sale agreement not to dispose of his unit unless he gets the other party to sign the collective sale agreement as well, failing which he has to indemnify all the other subsidiary proprietors who have signed the collective sale agreement in the event of any loss suffered. This clause is inserted out of caution and

90 [2008] 3 SLR 941.

91 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

is not inconsistent with the statutory scheme of *en bloc* sales. The decisions of the STB and the High Court to the contrary were set aside and the matter remitted to the STB for further consideration. It is likely that applying this construction, the STB will grant the sale order, provided it is satisfied as to the statutory requirements.

II. Statutory non-compliance

47 If the provisions of the LTSA[92] governing collective sales are not complied with, what is the effect of such non-compliance on the validity of the application to the STB or on the order made by it?

48 In *Ng Swee Lang v Sassoon Samuel Bernard*[93] ("*Phoenix Court*"), the sale and purchase agreement failed to state the distribution method under s 84A(1) of the LTSA.[94] The minority owners argued, *inter alia*, that (a) the majority owners had no *locus standi* to make the application to the STB and that (b) the STB had no jurisdiction to hear the application. Under the section, an application *may* be made to the STB pursuant to a sale and purchase agreement which states the distribution method. It was argued that if the sale and purchase agreement does not state the distribution method, then no application may be made because the requirement in the section was not complied with. It was further argued that the section is akin to compulsory acquisition of the minority owners' property and, therefore, all the statutory conditions must be strictly adhered to, failing which, the right to sell cannot be exercised. Since the majority owners *may* not make the application, the STB has no jurisdiction to hear the application.

49 Dealing with argument (a) above, the Court of Appeal observed that surely the reference to *locus standi* could not have been intended in the administrative law sense as the majority owners obviously had an interest in the subject matter of the application. The true contention should have been that the majority owners had no statutory right or capacity to make the application. It would then turn on whether or not the respondents were the authorised representatives of the majority owners. The respondents' right or capacity to make the application had nothing to do with the failure to state the distribution method in the sale and purchase agreement.

50 The approach to the two arguments above involves the construction of s 84A of the LTSA[95] and the consequences that flow from

92 Land Titles (Strata) Act (Cap 158, 2009 Rev Ed).
93 [2008] 1 SLR 522.
94 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
95 Land Titles (Strata) Act (Cap 158, 2009 Rev Ed).

statutory non-compliance. Chan Sek Keong CJ observed that "although the collective sale scheme is relatively straightforward, the legislation giving effect to it (Part VA) is not free from difficulty, and has given rise to much litigation between minority and majority SPs and between majority SPs themselves".[96]

A. Modern approach to statutory non-compliance

51 The traditional approach to ascertaining the consequences of non-compliance is to ask whether the statutory requirement was mandatory or directory. Non-compliance of a mandatory requirement would invalidate an authority's decision whereas non-compliance of a directory requirement will not be fatal.

52 The modern approach was restated by Andrew Ang J:[97]

> … is to treat the question as one of statutory construction to be answered by looking at the whole scheme and purpose of the Act and by weighing the importance of the particular requirement in the context of that purpose and asking whether the legislature would have intended the consequences of a strict construction, having regard to the prejudice to private rights and the claims of the public interest (if any).

53 This is a more flexible approach and focuses on the consequences of non-compliance and whether, taking into account those consequences, Parliament intended total invalidity.

54 Chan Sek Keong CJ approved the above restatement and reiterated that:[98]

> … the modern approach is to consider whether it is the intention of Parliament to invalidate any act done in breach of a statutory provision. *Applying this approach [to the present appeal] we should ask whether Parliament intended the non-stipulation of the distribution method in the S&P Agreement to deprive the [majority owners] of the capacity to make the Application.* [emphasis added]

55 The modern approach has been adopted in England, Australia and Canada.[99]

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96 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [9] ("*Phoenix Court*").
97 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR 522 at [43] ("*Phoenix Court*").
98 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [23] ("*Phoenix Court*").
99 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [21] ("*Phoenix Court*").

56 In Australia, the High Court suggested that a better test was to ask whether it was the purpose of the legislation that an act done in breach of a legislative provision should be invalid.[100] It dismissed the mandatory/directory classification as having outlived its usefulness because it deflects attention from the real issue, which is whether an act done in breach of the legislative provision is valid.

57 In England, Simon Brown LJ reiterated the modern approach in the Court of Appeal case of *Ahmed v Kennedy*[101] as follows:

> … does this legislation on its true construction give the court a discretion to waive these petitioners' timeous non-compliance or must it be regarded as fatal to their proceedings?

58 The modern approach to ascertaining Parliament's intent is evident in *Phoenix Court*.[102] The appellants had used the jurisdictional/non-jurisdictional distinction to argue that s 84A(1) of the LTSA[103] is a jurisdictional provision and if the requirements are not complied with, the STB has no jurisdiction to hear the application. The Court of Appeal pointed out that in fact, the STB's power to approve or disapprove a collective sale is governed by ss 84A(6) and 84A(7) and not by s 84A(1). The court found it strange to say that the STB's jurisdiction is based on the majority owners' compliance with s 84A(1) so that if the sale and purchase agreement failed to state the distribution method, then the STB lacked jurisdiction or power to hear the application. The Court of Appeal also pointed out that s 84A(1) does not vest the STB with any jurisdiction or powers at all but prescribes the circumstances in which an application *may*[104] be made. It does not imply the converse proposition that an application may not be made in any other circumstances, as when the sale and purchase agreement omits to set out the distribution method. It would defy logic for the STB to say that in this situation, it cannot hear the application for lack of jurisdiction.

59 On the above analysis, s 84A(1) is not a jurisdictional condition. Non-compliance with it will be merely a procedural irregularity which a court or tribunal may take into consideration in deciding whether or not to grant the order. In other words, the irregularity may be waived. On the other hand, non-compliance with a jurisdictional condition will affect the jurisdiction of a court or tribunal.[105]

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100 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390.

101 [2003] 1 WLR 1820.

102 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 ("*Phoenix Court*").

103 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

104 The Court of Appeal interpreted the word "may" in s 84A(1) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) to mean "at liberty to".

105 The distinction and effects of non-compliance were discussed in *R v Ashton* [2007] 1 WLR 181 (CA).

60 However, Chan Sek Keong CJ said that the modern approach is to refrain from "affixing a label to a condition, fact or requirement as jurisdictional or non-jurisdictional and from ascribing the opposite (*ie*, a lack of jurisdiction) by reason of an omission or failure to comply with such a condition, fact or requirement".[106] Paraphrasing Woolf MR,[107] he asked whether s 84A(1) on its true construction gave the court a discretion to waive the respondents' omission to specify the distribution method in the sale and purchase agreement.

61 Chan Sek Keong CJ said further that this approach requires a close examination of s 84A(1). It prescribes certain requirements before an application can be made. They are the age of the development, share values and the total area of the lots held by the majority owners. If these requirements are not satisfied, the STB will reject the application. The court stated that the reference to the distribution method is redundant and unnecessary as it is already provided for in s 84A(3) read with the First, Second and Third Schedules to the LTSA. If, therefore, all the requirements of s 84A(3) are complied with, the court could find no good reason why Parliament should deprive majority owners of the right to make an application under s 84A(1), merely because the sale and purchase agreement failed to set out the distribution method.

62 Can Parliament's intent with regard to the effects of statutory non-compliance be ascertained from parliamentary speeches? Referring to the speech of the Minister of State for Law in the Second Reading of the Land Titles (Strata) (Amendment) Bill 1998, Chan Sek Keong CJ took the view that it was not necessarily an expression of legislative intent nor did it state the legal effect of the failure to specify the distribution method in the sale and purchase agreement. He stated that of greater assistance in ascertaining Parliament's intent are the policy objectives of the LTSA, which are to facilitate and not to obstruct *en bloc* sales. This is evident from ss 84A(7) and 84A(9) which restrict the grounds on which the STB may reject an application. Having regard to the policy objectives, the Court of Appeal could find no basis for setting aside the collective sale order made by the STB. On the other hand, there was a very strong basis for upholding it in order to affirm the general principle that the courts should not allow a truly technical objection to frustrate the wishes of the majority owners when the minority owners have suffered no prejudice whatsoever from the omission in question.[108]

106 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [31] ("*Phoenix Court*").

107 In *R v Secretary of State for the Home Department ex parte Jeyeanthan* [2000] 1 WLR 354 at 362.

108 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [35] ("*Phoenix Court*").

63 The Court of Appeal agreed entirely with Andrew Ang J's opinion that:[109]

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

64 The purpose of providing detailed procedures in the LTSA is to provide sufficient information to all relevant parties so as to enable them to decide whether or not to lodge objections with the STB. Andrew Ang J stated that "the procedures were not built as absolute obstacles to be surmounted on pain of the Board [STB] being precluded from exercising jurisdiction if any of the procedural requirements were not met regardless of whether or not or to what extent the interest of the minority were affected".[110] The Court of Appeal agreed that, on a proper construction of s 84A(1) in the light of the overall structure and scheme of the LTSA, the particular omission to state the distribution method in the sale and purchase agreement did not affect the validity of the application nor the jurisdiction of the STB to hear the application.[111]

B. Implications of the modern approach

65 It is clear from the foregoing that whenever a statutory non-compliance or procedural irregularity occurs, the STB or the court is to be guided by the policy objectives of the LSTA and must consider whether waiver of the statutory non-compliance will prejudice minority owners. In *Phoenix Court*,[112] the minority owners were found to have suffered no prejudice from the procedural irregularity relating to the distribution method.

66 The principles set out by the Court of Appeal in *Phoenix Court* in deciding whether or not statutory non-compliance of a requirement in the LTSA is fatal to the application were adopted in the following cases.

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109 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR 522 at [55] ("*Phoenix Court*").

110 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR 522 at [51] ("*Phoenix Court*").

111 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [52] ("*Phoenix Court*").

112 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 ("*Phoenix Court*").

67 In *Thurairatnam Kirupakaran v Wong Juan Tiang/Lee Lai Kew*[113] ("*Spottiswoode Apartment*"), the STB disallowed technical objections to frustrate the wishes of the majority owners when the minority had suffered no prejudice whatsoever from the technical omission. The STB bore in mind the policy objectives of the collective sale scheme which is to facilitate and not to unnecessarily obstruct collective sales. In the present case, the 80% requirement was not achieved before the call of the tender but was achieved when the decision to award the tender was made and also at the time of application to the STB which was the requirement under s 84A of the LTSA.[114] The discrepancy was considered not to be fatal to the *en bloc* sale application.

68 In *Goh Kok Hwa Richard v Lim Choo Suan Elizabeth*[115] ("*Rainbow Gardens*"), the STB concluded that if the failure was a procedural irregularity and not a jurisdictional condition, it could waive the irregularity. In exercising its discretion, the STB is also guided by whether or not prejudice has been caused to the minority owners. This guiding principle was adopted in *Sardool Singh v Lam Kong Choong*[116] ("*Flamingo Valley*"). The STB in *Rainbow Gardens* also adopted Andrew Ang J's statement that the onus of proof that the transaction is not in good faith rests with the objecting minority owners. In approving the sale in *Rainbow Gardens*, the STB was much influenced by the policy objectives of the *en bloc* sale legislation, which is to facilitate and not to obstruct the sale, and also by the consideration that none of the objectors had suffered any prejudice.

III. Nature of *en bloc* sales/sale and purchase agreement

69 Collective sales are akin to compulsory acquisition except that the purchaser is not the State but the private sector. Majority owners may sell the strata development, subject to the STB's approval, against the wishes of minority owners. Collective sales are forced sales. Chan Sek Keong CJ described[117] them as a new kind of legal arrangement to facilitate the sale of strata developments *en bloc* for urban renewal and to enable majority owners to maximise the economic value of their properties. It is a form of statutory sale and not a contractual sale, and takes effect by virtue of the STB's order and not by virtue of the sale and purchase agreement between the majority owners and the purchaser. Although this appears straightforward, the legal nature of the sale and purchase agreement has been a contentious issue because of the implications on the enforceability of the agreement, the validity of the

113 [2008] SGSTB 1.
114 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
115 [2008] SGSTB 2.
116 [2008] SGSTB 5.
117 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 ("*Phoenix Court*").

STB's order, the stamp duty payable on the sale transfer and compliance with s 6(*d*) of the Civil Law Act[118] with regard to the form of agreement.

70 If the sale and purchase agreement does not specify the proposed method of distributing the sale proceeds (distribution method), two questions arise: (a) is it valid and enforceable and (b) is this a statutory non-compliance with the LTSA that will render the STB's order invalid? Question (b) will be dealt with below. In *Phoenix Court*,[119] (a) and (b) were among the grounds of appeal raised by the minority owners against the STB's order for sale. They contended that the sale and purchase agreement was an aggregation of separate contracts between each subsidiary proprietor and the purchaser so that failure to specify the distribution method meant that it omitted to state the price payable to each subsidiary proprietor. The High Court rejected this argument. Andrew Ang J said that the LTSA[120] envisaged the collective sale as one single transaction between the majority owners and the purchaser. A cursory reading of s 84A(1) of the LTSA will show that the *en bloc* sale is one transaction: the majority having "agreed in writing to sell all the lots and common property … subject to an order being made" by the STB. Clearly, the majority did not own all the lots but contracted to sell all. Andrew Ang J continued to state that if the agreement was an aggregation of separate sale and purchase agreement, all the subsidiary proprietors would have to contract to sell their respective lots. This would be contrary to the legislative intent that minority owners need not sign the sale and purchase agreement for the obvious reason that they object to the sale. The implication is that minority owners do not have any direct contractual recourse against the purchaser for any breach of the sale and purchase agreement. Neither can they be sued for any breach of contract. Their eventual participation in the collective sale, if approved by the STB, would be by legal compulsion. It is the STB's order for sale that binds minority owners and not the sale and purchase agreement nor the collective sale agreement. Another implication of the sale being one single sale and purchase transaction is that no individual owner can compel the sale against the purchaser nor the latter choose to purchase some but not all the units in the development. The Court of Appeal concurred with Andrew Ang J's reasoning on this issue.[121]

71 The Court of Appeal also clarified in *Phoenix Court* that the non-specification of the distribution method in the sale and purchase agreement was not a relevant term of the agreement. As far as the

118 Cap 43, 1999 Rev Ed.

119 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR 522 ("*Phoenix Court*").

120 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

121 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [42] and [43] ("*Phoenix Court*").

purchaser is concerned, he is only obliged to pay all the subsidiary proprietors a collective price for the entire development in order to complete the purchase.[122]

72 A separate issue arising from the failure to state the distribution method is whether the sale and purchase agreement is unenforceable by virtue of s 6(*d*) of the Civil Law Act[123] or at common law as the price to be paid for the minority owners' units or any formula for working out the price is not stated. The Court of Appeal in *Phoenix Court* summarily dismissed this argument as having no merit since collective sales are governed by the LTSA and not by the Civil Law Act.[124]

73 It is submitted, with respect, that s 6(*d*) covers any "contract for the sale or other disposition of immovable property" and must be in writing or evidenced in writing. English case law has established that it must contain all the material terms, including the consideration. Section 6(*d*) does not expressly exclude the sale and purchase agreement in the context of collective sales. The requirement of writing under the English Statute of Frauds 1677, the spirit of which has been re-enacted in s 6 of the Civil Law Act, is to prevent fraud. This is not the main concern of the LTSA whose policy objective is to facilitate *en bloc* sales. Contrary to the argument that the agreement is unenforceable for want of a price stated, it is submitted that this argument will not prevail as English case law allows a joinder of documents so that the collective sale agreement containing the price or the means of ascertaining it can be read together with the sale and purchase agreement.

74 The argument that the collective sale is not one single transaction was used to minimise the stamp duty payable on the contract of transfer. If it is an aggregation of separate contracts between each subsidiary proprietor and the purchaser, then each transfer, as was argued in *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties*,[125] was entitled to enjoy the lower *ad valorem* stamp duty on the first $360,000 of the consideration, resulting in a saving of $5,400 *per* transfer. Tan Lee Meng J rejected the argument and held that the *en bloc* sale was one transaction. Andrew Ang J concurred with this reasoning in *Phoenix Court*.[126]

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122 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [34] ("*Phoenix Court*").

123 Cap 43, 1999 Rev Ed.

124 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [45] ("*Phoenix Court*").

125 [2008] 1 SLR 126.

126 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR 522 at [123] ("*Phoenix Court*").

IV. Role of the STB

75 The most significant pronouncements on the role of the STB were made by the Court of Appeal in *Horizon Towers*,[127] in particular the duties of the STB in reviewing a collective sale. The STB is not a court of law but a statutory tribunal whose main function is to determine whether the transaction is in good faith, irrespective of whether or not there is any objection to the collective sale application, and ultimately to decide whether or not to make the order approving the collective sale. Whenever objections are filed, the Court of Appeal expects the STB to play a more proactive, inquisitorial role rather than simply listening to the evidence and arguments. It must seek out the facts whenever there is evidence that the sale committee has not disclosed everything about the transaction to the STB. Under s 84A(5)(*b*) of the LTSA,[128] the STB has power to call for a valuation or other report at the expense of the majority subsidiary proprietors, and under s 96(1) of the Building Maintenance Strata Management Act,[129] it has the power to summon any relevant witnesses and to call for evidence. Ultimately, the applicants must adduce sufficient evidence to convince the STB that the transaction was in good faith. With regard to proceedings before the STB, the Court of Appeal reiterated that being a tribunal, it was inappropriate and incorrect for the STB to carry out hearings as if they were adversarial proceedings in the ordinary courts. Furthermore, the objectors to an application for collective sale cannot be regarded as "plaintiffs" in the conventional sense, nor the applicants as "defendants". The objectors are not seeking recompense for violation of their personal rights but objecting to the collective sale because the sale is in breach of statute in that the transaction is not in good faith.

76 With regard to the STB's "jurisdiction", the Court of Appeal's clarification in *Phoenix Court*[130] is useful. When the term is used in the context of a court or tribunal having the power to determine particular disputes, it means the authority vested in that body over the subject matter. In the case of collective sales, the LTSA does not expressly confer jurisdiction on the STB to hear collective sale applications but the existence of statutory power to do so implies that the STB has jurisdiction over the subject matter. This is to be contrasted with the use of the word "jurisdiction" in its narrower sense of power, for example, that the STB does not have jurisdiction to award damages. This means that the STB does not have power to award damages.

127 [2009] SGCA 14.
128 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).
129 Cap 30C, 2008 Rev Ed.
130 *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 ("*Phoenix Court*").

V. Role of the sale committee

77 Significant pronouncements were made in *Horizon Towers*[131] with regard to the nature of the relationship between a sale committee and the subsidiary proprietors, and the duties a sale committee owes to the subsidiary proprietors. V K Rajah JA stated that by virtue of s 84(1)(*a*) of the LTSA,[132] a sale committee is an agent for all subsidiary proprietors collectively or for the purpose of effecting a collective sale for the benefit of all subsidiary proprietors. Once the requisite majority consent is obtained, the sale committee becomes an impartial agent acting for both consenting and objecting subsidiary proprietors. Being an agent, the sale committee has a more onerous duty than a mortgagee in relation to the power of sale: and being in a fiduciary relationship with the subsidiary proprietors, it has obligations akin to those of a trustee with a power of sale. Its fiduciary obligations arise independently of any contract, in this case, the collective sale agreement. However, the collective sale agreement in *Horizon Towers* provided that the sale committee was to be the agent of the consenting subsidiary proprietors for the purpose of negotiating and finalising the collective sale. Whether such a provision is repugnant to the duty of the sale committee to act in the interests of all the subsidiary proprietors was not raised and the Court of Appeal left it open for future decision.

78 Having analysed the relevant authorities, the Court of Appeal restated the duties of a sale committee to include the following: (a) the duty of loyalty or fidelity, (b) the duty of impartiality, (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. Since under s 84A(9)(*a*)(i) of the LTSA,[133] the price of the collective sale is an ingredient of "good faith" in the transaction, the sale committee must act with the conscientiousness which a prudent owner would to obtain the best price reasonably obtainable for the property.

79 Further to the long list of duties a sale committee is required to carry out in the discharge of the duty to secure the best sale price obtainable in the prevailing circumstances, the Court of Appeal in *Horizon Towers*[134] added the following duties in relation to the application process: (a) to act in a transparent manner and provide all relevant information to all subsidiary proprietors, including the objecting minority, (b) to assist the STB by making full disclosure of all

131 *Ng Eng Ghee v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener)* [2009] SGCA 14 ("*Horizon Towers*").

132 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

133 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

134 *Ng Eng Ghee v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener)* [2009] SGCA 14 ("*Horizon Towers*").

relevant facts and circumstances that would explain how the decision to sell was reached and (c) to refrain from acting in an adversarial role against the objecting subsidiary proprietors.

80 It is submitted that the duties so meticulously laid down by the Court of Appeal will not only protect the interests of majority subsidiary proprietors but also supplement the statutory scheme of allowing minority views to be adequately ventilated and objections independently appraised. They will go a long way in circumventing, in the words of V K Rajah JA, "bullying and underhand tactics as well as any potentially collusive or improper conduct on the part of any of the majority owners"[135] and assuaging any grievance or injustice felt by objecting subsidiary proprietors in a contentious collective sale. On the other hand, these duties are so onerous that sale committees might think of engaging relevant professionals to discharge them. The question remains: can these duties be delegated?

VI. The Singapore Constitution

81 Two interesting constitutional issues were raised in *Horizon Towers*:[136] whether the LTSA[137] deprives minority owners of (a) their liberty to contract and (b) their entitlement to equality before the law and equal protection of the law.

82 Issue (a) involves s 9(1) of the Constitution of the Republic of Singapore[138] which provides that no person shall be deprived of his life or personal liberty except in accordance with law. The minority owners submitted that ss 84A(1) and 84B(1)[139] had the effect of depriving them

135 *Ng Eng Ghee v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener)* [2009] SGCA 14 at [3] ("*Horizon Towers*").

136 *Lo Pui Sang v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener)* [2008] 4 SLR 754 ("*Horizon Towers*").

137 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).

138 1985 Rev Ed, 1999 Reprint.

139 Section 84B(1) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) provides that:

> (1) Where a Board [STB] has made an order under section 84A(6), (7) or (11)–
>
> (*a*) the order shall bind all the subsidiary proprietors of the lots in the strata title plan, their successors in title and assigns and any mortgagee, chargee or other person with an estate or interest in land;
>
> (*b*) the subsidiary proprietors of the lots shall sell the lots and common property in accordance with the sale and purchase agreement; and
>
> (*c*) a lease affecting any of the lots in the strata title plan (other than a lease held by a subsidiary proprietor) shall, if there is no earlier agreed date, determine on the date on which vacant

(*cont'd on the next page*)

of their personal liberty to contract. Choo Han Teck J gave short shrift to the argument saying that personal liberty is always understood to refer to liberty against unlawful incarceration or detention. If any fundamental right is violated here, it is not the liberty to contract but the right to property, which is not a fundamental right entrenched in the Constitution. Choo Han Teck J said further that the Constitution allows deprivation of liberty "in accordance with law". In this context, the LTSA which is law passed by Parliament may deprive a minority owner of his right to own property upon a collective sale order being made by the STB.

83 Issue (b) involves Art 12(1) of the Constitution which provides for equality before the law and entitlement to equal protection of the law. It was argued that ss 84A and 84B(1)(*b*)[140] were in breach of Art 12(1). Choo Han Teck J dismissed this argument on the following grounds: first, the opportunity to sell a development *en bloc* is open to all subsidiary proprietors. They are legally entitled to vote or not to vote in favour of the sale. The law does not determine who the majority or minority subsidiary proprietors are until the subsidiary proprietors themselves vote. Second, such majority vote is consistent with the democratic way of condominium living. Third, the omission in the Constitution to provide for a fundament right to own property is deliberate, given the scarcity of land in Singapore. In fact, the Land Acquisition Act[141] allows the Government to acquire any land for specific purposes provided due compensation is paid. It was also argued that the LTSA discriminated against the minority and therefore infringed Art 12(2), which provides protection against discrimination. This argument was dismissed. The STB could not be said to discriminate against the minority when it approved the sale in accordance with the LTSA upon satisfying itself that all the rules were complied with.

84 These judgements have settled once and for all the above constitutional issues which are unlikely to resurface before the STB or the courts.

VII. Conclusion

85 The judgments above have clarified concepts and laid down general principles crucial to the determination of future applications to the STB and the outcome of appeals to the Supreme Court. It appears

possession is to be given to the purchaser of the lots and common property.

140 Section 84B(1)(*b*) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) states that the subsidiary proprietors of the lots shall sell the lots and common property in accordance with the sale and purchase agreement.

141 Cap 152, 1985 Rev Ed.

that the court will construe the collective sale provisions of the LTSA[142] in such a way that promotes the objectives of the Act and that is to facilitate collective sales. Furthermore, as long as something is within the contemplation of the LTSA, the court will embark on a gap-filling exercise if the relevant provision is found wanting and it is necessary to do so in order to promote the overall objectives of the Act. The Court of Appeal has said that the correction of drafting omissions and errors is allowed via purposive interpretation. It will be interesting to see how far the court will go short of judicial legislation. Judicial attempts to draw the line are anticipated.

86 With regard to recent attempts by the Court of Appeal to clarify and lay down detailed duties that the sale committee owes to subsidiary proprietors, they will no doubt give better protection to subsidiary proprietors and create greater certainty, but these duties may be regarded as being so onerous and burdensome that ordinary subsidiary proprietors might think twice, if not more, before joining a sale committee and incurring the risk of legal liability. They are after all mere volunteers.

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142 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed).