

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2009] SGCA 14

Civil Appeal No 119 of 2008/Y

Between

- (1) **NG ENG GHEE**
(NRIC No S1073538F)
- (2) **HENDRA GUNAWAN**
(NRIC No S2698509I)
- (3) **SULISTIOWATI KUSUMO**
(NRIC No S2698510B)
- (4) **ONG SIOE HONG**
(NRIC No S0925560E)

... Appellants

And

- (1) **MAMATA KAPILDEV DAVE**
(NRIC No S6970609F)
- (2) **NAZEEM JUMABHOY**
(NRIC No S0115421D)
- (3) **KAZI MAKSUD UMAR**
(NRIC No S2702818G)

... Respondents

And

- (1) **HORIZON PARTNERS PTE LTD**
(RC No 200701117D)

... Intervener

In the Matter of Originating
Summons No 10 of 2008/K

In the matter of Section 98 of the Building Maintenance and Strata
Management Act 2004 and Order 55 of The Rules of Court, Supreme Court of
Judicature Act (Cap 322)

And

In the Matter of An Order by A Strata Titles Board dated 7 December 2007 in
STB No 43 of 2007 from an Application under Section 84A of the Land Titles
(Strata) Act in respect of the Development known as Horizon Towers (Strata
Title Plan No 993) comprised in Land Lot Nos TS21-729W

Between

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(NRIC No S2702818G)

... Defendants

And

**HORIZON PARTNERS
PTE LTD**
(RC No 200701117D)

... Intervener

Civil Appeal No 120 of 2008/P

Between

- (1) **RUDY DARMAWAN**
(NRIC No S7479746F)
- (2) **WIDIA SETEONO**
(NRIC No S7275831E)
- (3) **MARYANI SADELI**
(NRIC No S2223192H)

... Appellants

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(NRIC No S6970609F)
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(NRIC NO S2223192H)
- (4) **THEN KHEK KOON**
(NRIC NO S0091782F)
- (5) **JASMINE TAN KIM LIAN**
(NRIC NO S7410528I)
- (6) **KUAH KIM CHOO**
(NRIC NO S0005726F)

... *Plaintiffs*

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DAVE
(NRIC No S6970609F)
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... *Intervener*

JUDGMENT

[Agency]

[Civil Procedure] – [Appeals]

[Equity] – [Fiduciary relationships]

[Land] – [Strata titles]

**This judgment is subject to final editorial corrections approved by the
Judge for publication in the Singapore Law Reports.**

Ng Eng Ghee and others
v
Mamata Kapildev Dave and others
(Horizon Partners Pte Ltd, intervener)
and another appeal

[2009] SGCA 14

Court of Appeal — Civil Appeals Nos 119 and 120 of 2008 (Originating
Summons No 10 of 2008)
Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA
3 February 2009

2 April 2009

Judgment reserved.

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

Introduction

1 *En bloc* sales have often aroused heated debate and controversy ever since enabling legislation was first introduced in 1999. The ground-breaking legislation was intended to and has facilitated the collective sale of qualifying estates even in the absence of unanimous consent by all the subsidiary proprietors. Parliament's primary objective in enacting the collective sale scheme was to promote the rejuvenation of older estates as well as the optimal use of prime land to build more quality housing in land-scarce Singapore. To achieve this salutary objective, the scheme, *inter alia*, permits a majority of not less than 80% of consenting subsidiary proprietors to effect the collective sale of the entire qualifying estate inclusive of the units of objecting subsidiary proprietors.

2 In the last decade, however, periodic price surges in the property market have prompted some housing estates to carry out collective sales even in the absence of an immediate or urgent need for rejuvenation or upgrading. 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. The unedifying drama and intrigue that an *en bloc* sale can precipitate has been captured in vivid and unflattering detail in the press and even in a recent television soap opera.

3 Nevertheless, it cannot be gainsaid that, in establishing the statutory scheme, Parliament had carefully considered both the rights and financial interests of the objecting subsidiary proprietors. As a class, they have to be adequately protected from bullying and underhand tactics as well as any potentially collusive or improper conduct on the part of any of the majority owners. Thus, detailed modalities were put in place to ensure that the views of objecting owners are adequately ventilated and their objections independently appraised. In particular, a Strata Titles Board (“STB”) is expressly empowered to review the entire sale process and to ensure that it has been carried out in good faith (the provision currently governing the constitution of STBs is s 89 of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed)). In assessing whether a sale transaction has been carried out in good faith, the STB must take into account, *inter alia*, the sale price for the lots and the common property in the qualifying estate (see s 84A(9)(a)(i)(A) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) (“LTSA”)).

4 In the present appeals, a number of critical issues in relation to the collective sale process arise for scrutiny. One issue is the nature of the duties owed by a sale committee (“SC”) to the subsidiary proprietors. Are these duties analogous to those of an ordinary property agent, a mortgagee exercising its power of sale or a trustee selling trust property? What is the extent of these duties: for example, does the SC have to obtain the best price for the property and what steps must it take to do so? Another issue is the meaning of “good faith” in s 84A(9)(a)(i) of the LTSA and what that obligation entails in relation to the sale transaction. In determining whether a transaction is in good faith, is a breach of duties by the SC relevant?

5 As this is a lengthy judgment, we set out the schematic layout of the judgment for ease of reference, which is as follows:

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The background

6 Two appeals have been brought before us (“the present appeals”). Civil Appeal No 119 of 2008 (“CA 119/2008”) was filed by the subsidiary proprietors of three units in the condominium development known as “Horizon Towers” (“the Property”) who had objected to the application to an STB (“the Horizon Board”) for the collective sale of the Property. Civil Appeal No 120 of 2008 (“CA 120/2008”) was filed by the subsidiary

proprietors of another two units in the Property, who had also objected to the collective sale. The present appeals are brought against the decision of the High Court judge (“the Judge”) (see *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 (“the Judgment”)) upholding the decision of the Horizon Board on 7 December 2007 (see *Mamata Kapildev Dave v Lo Pui Sang/Kuah Kim Choo* [2008] SGSTB 7 (“the HB decision”)) to grant an order for the collective sale of the Property, which consists of two plots of land, 15 Leonie Hill Road Singapore 239194 and 29 Leonie Hill Singapore 239228.

7 The Property is a 99-year leasehold condominium with a total of 210 units. As will shortly become apparent, the history of the collective sale process for the Property is complex and convoluted. The main *dramatis personae* in the saga were: First Tree Properties Ltd (“First Tree”), the marketing agent for the sale of the Property; the SC which was appointed at an extraordinary general meeting (“EGM”) on 23 April 2006 (see [11] below) to carry out the collective sale (“the original SC”); the original SC’s solicitors advising on the process of the collective sale; and Hotel Properties Ltd (“HPL”), which made an informal offer to purchase the Property. This offer eventually led to the sale of the Property to Horizon Partners Pte Ltd (“HPPL”), the intervener in the present appeals. The names of a few key individuals recur in the various accounts of the collective sale process and we should perhaps state who they are, namely:

- (a) Arjun Samtani, who was the chairman of the original SC;
- (b) Wee Hian Siew, the secretary of the original SC;
- (c) Tan Kah Gee, a member of the original SC;

- (d) Henry Lim, a member of the original SC who claimed to have liaised with several potential buyers for the Property (see [27] and [205] below);
- (e) Bharat Mandloi, the only member of the original SC who openly expressed serious reservations at an SC meeting (see [30]–[33] below) about the propriety of immediately entering into the sale of the Property to HPL; and
- (f) Alvin Er, the managing director of First Tree.

8 We should point out here that certain aspects of this labyrinthine narrative cannot be delineated clearly because the Horizon Board had ruled in the course of the proceedings before it that plainly relevant and admissible evidence (*viz.*, pertaining to the legal advice the original SC had received from its solicitors) was privileged. As will be seen below, the ruling of the Horizon Board was wrong in law and contrary to its statutory functions and duties. Furthermore, Wee Hian Siew and Henry Lim were the only members of the original SC who testified on behalf of the respondents, the consenting subsidiary proprietors, during the proceedings before the Horizon Board. The objecting subsidiary proprietors' application dated 25 October 2007 to subpoena Arjun Samtani as a witness of fact was rejected on the overly legalistic basis that insufficient particulars of the proposed testimony were provided. We shall return to these points below (at [199], [191] and [56] respectively).

The preliminary steps

9 The chain of relevant events can be traced back to October 2005, when a collective sale of the Property was first mooted by Wee Hian Siew and

Henry Lim. Arjun Samtani was the chairman of the management council (“MC”) of the Property at the time. It appears that Arjun Samtani was heavily involved in the informal preparatory work for the collective sale. Wee Hian Siew testified before the Horizon Board that it was Arjun Samtani and two other members of the MC of the Property – Tan Kah Gee and Wee Hian Siew himself – who started the ball rolling in October 2005.¹ It was clear to him well before the formation of the original SC that Arjun Samtani would seek to participate in its work.² Subsequently, First Tree was invited to make presentations on the feasibility of a potential collective sale, beginning in February 2006. First Tree is a housing agent with a paid-up capital of \$50,000. It has two shareholders, Alvin Er and his wife. Neither of them is a licensed valuer. The registered address of First Tree at the time of the Horizon Board’s proceedings was Alvin Er’s house although the actual business address was at the CPF Building in Bishan. Wee Hian Siew acknowledged in his testimony at the hearing before the Horizon Board that, as secretary to the original SC, he did not personally check on First Tree’s track record.³ Neither was he aware of whether any of the other original SC members had done so.⁴ The first presentation was made on 4 February 2006 to Henry Lim and Wee Hian Siew; the second took place on 11 March 2006 to about 20 subsidiary proprietors of the Property; and the third on 25 March 2006 with some 40 to 50 subsidiary proprietors present. When the presentations were made, the only other successful *en bloc* sale that First Tree appeared to have had an involvement in was St Michael’s Lodge, a development of less than 12 units.⁵ It is worth

¹ Merrill Legal Solutions Transcript of STB hearing on 7 November 2007 at p 60.

² Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at p 28.

³ Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at p 22.

⁴ *Ibid.*

⁵ Merrill Legal Solutions Transcript of STB hearing on 30 July 2007 at p 25 and para 7 of Alvin Er’s affidavit dated 18 July 2007.

noting that, at the first presentation, First Tree proposed a reserve price of \$450m. Alvin Er testified that this was revised to \$500m at the third presentation, because property prices were then rising. In the course of the third presentation, on 25 March 2006, First Tree informed the subsidiary proprietors that high-end collective sale prices had already shot up by 40% in the previous six months. Pertinently, First Tree justified the revision of the reserve price as follows:⁶

Because we firmly believe that base[d] on the following factors, we simply cannot ask for less!

- ✓ Recent Successful Collective Sales Comparison
- ✓ Excellent Prime Location
- ✓ Big Rare Land Site
- ✓ Right Timing
- ✓ Liquidity Are [*sic*] flooding in
- ✓ More Good News Are [*sic*] Coming

10 In March 2006, Arjun Samtani and Tan Kah Gee, unknown to the other original SC members and consenting subsidiary proprietors, took steps to purchase additional units in the Property. Tan Kah Gee moved first by signing an option dated 21 March 2006 for the purchase of an additional unit at the price of \$1.2m. A loan was taken to purchase the unit. The sale and purchase was completed on 26 June 2006. As at 2 January 2009, the outstanding amount of the loan was \$900,500.53. Shortly before First Tree's third presentation on 25 March 2006 (see [9] above), Arjun Samtani entered into an option dated 24 March 2006 to purchase an additional unit at the price of \$1.35m. The option was exercised on 7 April 2006. He and his daughter also

⁶ Affidavit of Alvin Er dated 18 July 2007, in Tan Rajah & Cheah's bundle of documents vol R2, at paras 10–11 and Exhibit 3.

took a substantial loan of \$1m to finance the purchase. The current outstanding sum has not been disclosed.

The launch of the formal collective sale process and the terms of the collective sale agreement

11 The formal collective sale process was launched at an EGM on 23 April 2006 (“the 23 April 2006 EGM”), when a resolution was passed appointing the SC for the purposes of the collective sale of the Property. The subsidiary proprietors of 133 units and 706 share values (65.67% of the total share values) in the Property were represented at the EGM. Alvin Er has testified that, after the third presentation on 25 March 2006 and prior to the 23 April 2006 EGM, Arjun Samtani had contacted him and told him to attend the EGM and make a presentation. At Arjun Samtani’s request, a copy of the proposed presentation was sent to him alone and he gave the go-ahead (Alvin Er did not explain why Arjun Samtani had asked for a copy of the proposed presentation).⁷ At the 23 April 2006 EGM, First Tree informed the subsidiary proprietors that, based on the latest transaction prices at that time, the sale of the Property at a reserve price of \$500m was estimated to result in an average premium of about 80% for each unit.

12 First Tree was formally appointed as the sole marketing agent for the Property by a letter of appointment dated 26 April 2006. The letter of appointment provided that First Tree’s marketing fee for the collective sale of the Property, which should not in any event exceed 1% of the sale price, would be payable solely by the eventual purchaser. The relevant clause reads:⁸

⁷ Merrill Legal Solutions Transcript of STB hearing on 30 July 2007 at pp 66, 67.

⁸ See Exhibit 5 of Affidavit of Wee Hian Siew and Henry Lim Meng Loke dated 18 July 2007 at p 166.

Our fees for the Collective Sale of the property shall be payable solely by the successful Bidder, which shall in any event ... not exceed 1% of the sale price, if any. No fees or disbursements of any kind shall be payable by you.

We pause to observe that this was an unusual arrangement (see [192] below). The appointment was to be valid until six months after the date when the owners having an aggregate of at least 80% of the share values of the Property had signed a collective sale agreement, or 31 March 2007, whichever was earlier, subject to renewal at the discretion of the SC. A collective sale agreement dated 11 May 2006 (“the CSA”)⁹ was circulated for signing by the subsidiary proprietors. By 20 July 2006, the subsidiary proprietors representing 80.65% of the share values of the Property had signed the CSA and thus First Tree’s mandate was due to expire on 20 January 2007.

13 Under cl 3.1 of the CSA, those subsidiary proprietors who signed the CSA (“the consenting subsidiary proprietors”) acknowledged and ratified the appointment of the following individuals to the original SC:

	<u>Name</u>	<u>Unit</u>	<u>Appointment</u>
(a)	Mr Arjun Samtani	#12-03, West Tower	Chairman
(b)	Mr Wee Hian Siew	#14-03, West Tower	Secretary
(c)	Mr Claude Reghenzani	#15-02, West Tower	Member
(d)	Dr Chan Siew Chee	#07-04, East Tower	Member
(e)	Mr Tan Kah Gee	#16-03, East Tower	Member
(f)	Mr Bharat Mandloi	#12-04, East Tower	Member
(g)	Mr Shahrukh Marfatia	#14-05, East Tower	Member

⁹ Record of Appeal vol 4C in CA119/2008 at p 1693.

- (h) Mr Henry Lim #12-06, West Tower Member
- (i) Mr George Eapen #15-03, West Tower Member

14 The ambit of the original SC's authority and discretionary powers under the CSA was conspicuously broad. Presumably, this was to facilitate the management of the collective sale process by the original SC and to avoid its having to convene an EGM for each and every decision that had to be made in the course of the process. Clauses 4.1 and 5 of the CSA, *inter alia*, provided that:

4.1 The Consenting Subsidiary Proprietors hereby agree that the [SC] shall have *full discretion and authority* with respect to the following matters:-

(a) to determine the selling price of the individual units/ the Property subject to the provisions as stated in Clause 5 (Collective Agreement to Sell);

(b) to carry on negotiations with all intended purchasers in conjunction with the Agents and to determine the terms of the sale by tender or private treaty in accordance with the terms herein, for and on behalf of the Consenting Subsidiary Proprietors;

...

(f) to carry out through the Agents the sale of the Property by way of a tender or such other usual method(s) employed in the sale of properties;

(g) to authorise and instruct the Solicitors and the Agents to accept any bids or offers that may be received from prospective purchasers in accordance with the terms therein;

...

(i) to approve the Contract and to enter into the Contract with the Purchaser and for this purpose, to sign the Contract on behalf of each of the Consenting Subsidiary Proprietors;

...

(t) to do all acts, deeds, matters and things whatsoever in connection with the Collective Sale and the Contract upon the advice of the Agents and/or the Solicitors.

5 COLLECTIVE AGREEMENT TO SELL

The Consenting Subsidiary Proprietors shall collectively sell their individual units together with all their rights, title and interest in the same ***to such purchaser as shall be determined by the [SC] at such price and on such terms and conditions as the [SC] deems fit*** PROVIDED THAT the selling price for the Property (net of payment, if any, for differential premium or development charge) shall not be less than Singapore Dollars Five Hundred Million (S\$500,000,000) (hereinafter referred to as the *Reserve Price*).

[emphasis added in bold italics]

15 Clause 4.2 of the CSA provided that “[t]he [SC] shall notify the Consenting Subsidiary Proprietors from time to time as regards the progress of the Collective Sale”. Interestingly, at the 23 April 2006 EGM, Arjun Samtani had informed the subsidiary proprietors that they would be given constant updates via notices or circulars, “preferably every 2 weeks”.¹⁰ But, as will be seen below (at [23]), the original SC failed to provide updates to the subsidiary proprietors on the collective sale during the period from October 2006 to January 2007 when the sale was actually entered into.

16 Clause 6.1(c) of the CSA provided that, in the event that unanimous consent to the CSA was not obtained, the consenting subsidiary proprietors agreed as between themselves to:

appoint the following persons as their authorised representatives in connection with the aforesaid application to the Strata Titles Board:-

- (i) Mr Arjun Samtani;
- (ii) Mr Wee Hian Siew; and

¹⁰ Paragraph 3.3, Minutes of 23 April 2006 EGM, in Tan Rajah & Cheah’s Bundle of Documents vol R28 at p 102.

(iii) Dr Chan Siew Chee,

(hereinafter collectively referred to as *Representatives*). The [SC] may by a majority in its discretion replace and/or substitute any one of the *Representatives* with any other person drawn from the [SC].

[emphasis in original]

17 Clause 6.2 provided that:

The *Representatives* shall have full discretion and authority to:-

(a) appoint valuers to carry out a valuation of the Property on the basis of a collective sale and to instruct such valuers to prepare report(s) on the distribution of the sale proceeds or on such other matters as may be necessary for the purpose of the Application or as may be required by the Strata Titles Board;

(b) do all things necessary and to instruct the Agents and the Solicitors to do all things necessary:-

(i) to comply with the requirements of the Act and in particular the Schedule thereto in respect of the Application; and

(ii) to obtain the Strata Title[s] Board's approval to the Application.

18 Significantly, Arjun Samtani and Tan Kah Gee did not disclose that they had purchased additional units in the Property (see [10] above) to the other subsidiary proprietors or the other members of the original SC, either during the 23 April 2006 EGM or next to their names in cl 3.1 of the CSA (see [13] above) or indeed at any other material point of time prior to the issue of the option to purchase the Property on 22 January 2007 (see [42] below). The other subsidiary proprietors found out about the additional units in May 2007 only after the application to the Horizon Board for the collective sale of the Property had been filed, and Arjun Samtani's and Tan Kah Gee's e-mails dated 30 April 2007 and 2 May 2007 respectively to the original SC's

solicitors disclosing their interests in additional units were unearthed in the course of the discovery process.

19 Arjun Samtani's involvement in the collective sale process continued with undiminished vigour. Indeed, it was he who chaired the 23 April 2006 EGM. At the same EGM, he also proposed (seconded by Tan Kah Gee) that the number of members of the original SC be fixed at nine. The other members of the original SC who testified before the Horizon Board agreed that, as their chairman, he acted in a leadership role for the collective sale process (see, *eg*, transcript of Wee Hian Siew's testimony before the Horizon Board on 6 November 2007 at pp 59–60). It was Arjun Samtani who called for and set the agenda for the SC meetings, as evidenced by e-mail correspondence between the original SC members (see *eg*, [26] below). On many occasions, directions and instructions were solely given by him on the conduct of the sale. Communications to the consenting subsidiary proprietors were signed off by him (see *eg*, [23] below). All important communications were channelled through or to him *qua* chairman of the SC. It would not be overstating the position to say that he played a crucial, if not dominant, role in initiating, implementing and finalising the collective sale.

The efforts to sell the Property between May 2006 and December 2006

20 The marketing efforts for the sale of the Property began in earnest in May 2006, when First Tree sent marketing information to some 44 local developers. A public tender for the Property was launched on 21 July 2006. It closed on 15 August 2006 with no bids. The original SC members and First Tree tried to follow up on expressions of interest from a handful of developers, but to no avail. Alvin Er informed the original SC at a meeting on 17 August 2006 that most of the developers had sought to quote below the reserve price.

In particular, on that day itself, Wing Tai Holdings Limited had informed him that it was willing to meet but only if the original SC would allow negotiations for a price below \$500m.

21 Faced with this situation, First Tree indicated at the 17 August 2006 meeting that it would be willing to be a co-broker with other property agents in the hope of obtaining an acceptable offer. Thus, some members of the original SC also approached other marketing agents such as DTZ Debenham Tie Leung (“DTZ”) and Knight Frank to market the Property.

22 On 13 and 14 September 2006, First Tree contacted 22 local developers to inform them that the Property was available through private treaty. Efforts at contacting potential buyers continued but no firm offers ensued. Between September 2006 and December 2006, Tang Wei Leng from DTZ approached and sounded out numerous potential buyers, including Far East Organization, Lippo Realty, Frasers Centrepoint Homes and Capitaland. A site visit was arranged for Capitaland but it subsequently informed DTZ that it was not prepared to pay \$500m for the Property.

23 The original SC initially provided regular updates to the subsidiary proprietors on the progress of the sale, *eg*, on 16 August 2006, 21 August 2006 and 21 September 2006.¹¹ The last such communication signed by Arjun Samtani was dated 23 October 2006. Significantly, it acknowledged that the property market was rising and promised to keep the subsidiary proprietors updated:¹²

¹¹ Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at p 55.

¹² Affidavit of evidence-in-chief of Hendra Gunawan filed in the STB hearings, at p 393.

From a legal point of view, the CSA remains valid up until May 10th 2007. *The property market continues to be on the upswing.* In view of this, the SC feels that we should stay firm with our reserve price instead of seeking a lower mandate from the owners. ...

As done in the past, we will continue to keep you updated with developments, if any.

[emphasis added]

Between November 2006 and early January 2007, the original SC did not meet as a committee. No updates were provided to the subsidiary proprietors. The next notification on 23 January 2007 announced that an option had been issued for the Property.

Changing market conditions and the SC meeting on 6 January 2007

24 Beginning in late December 2006, however, interest in purchasing the Property at or above the reserve price had begun to mount visibly, attesting to a corresponding price surge in the property market (see [38] below). On 23 December 2006, Alvin Er met with the top management of HPL. He informed HPL that the reserve price could not be revised below \$500m. He was then informed that HPL was considering purchasing the Property, possibly in a joint venture with other parties, and that he would be informed once a decision had been made. According to Alvin Er, he immediately informed Arjun Samtani of what had transpired during this meeting with HPL.¹³ He did not inform any of the other original SC members.

25 On 3 January 2007, Henry Lim (an SC member, see [13] above) received through a contact, Keith Yeo, a letter of offer from a Malaysian law firm, M/s Shan & Su, which stated:¹⁴

¹³ Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 60.

¹⁴ Appellants' Core Bundle vol 2 in CA 119/2008, at p CB-23.

The Chairman of Horizon Towers
Sales Committee
No. 15 Leonie Hill Road,
Horizon Towers East,
Singapore 239194

Dear Sirs,

RE: PROPOSED PURCHASE OF HORIZON TOWERS

We act for Vineyard Holdings (H.K.) Ltd with respect to the above matter, wherein our client instructs us that it is desirous of purchasing Horizon Towers ("the Property") for the sum of S\$510 million only, free of all liens and encumbrances, subject to terms and conditions to be agreed between the parties.

Kindly let us have the principle [*sic*] terms and conditions of the above sale for our clients['] due consideration.

We look forward to hearing from you the soonest.

Thank you.

Henry Lim forwarded this letter to the other original SC members and the original SC's solicitors for the collective sale process, on or around 4 January 2007.

26 On 4 January 2007, Alvin Er received a call from HPL. Its management wanted to meet up with the original SC to discuss the collective sale. Alvin Er contacted Arjun Samtani, who arranged for the meeting to take place later that day at 6.00pm.¹⁵ Some of the SC members, including Arjun Samtani, met with HPL's representatives at the SC's solicitor's office. HPL verbally indicated that it was willing to purchase the Property for \$500m. No minutes of this meeting were taken.¹⁶ After this meeting, Arjun Samtani sent out an e-mail dated 5 January 2007 to the SC members, stating:¹⁷

¹⁵ Merrill Legal Solutions Transcript of STB hearing on 31 July 2007 at p 11.

¹⁶ Affidavit of Alvin Er dated 18 July 2007 filed in the STB, at para 32.

¹⁷ Record of Appeal vol 4C in CA 119/2008, at 1758.

Friends,

To bring everyone up to speed, particularly George, Laurence and Dr Chan who could not attend. The “offer” was personally presented by the Ex Director of HPL. It consists of a net price of 500 million. They want 30 days time to work out with a mid east party (a jv?) and will give us a D/D of 5 million. If they do not take up the offer within 30 days we can [keep] the interest on the 5 m (1%).

Message given to them is a NO.

Next Steps.

FOR SC To work asap on the couple of interested parties (Henry, Alvin). We have time till Mon eve.

For HPL, To come back with better terms by Tue am.

Let us all meet in my place on Sat [6 January 2007] at 6 45 pm after the MC meeting.

27 On the same day, Henry Lim informed Keith Yeo about the HPL offer and informed him that if Vineyard was serious about its offer, it should immediately place a \$50m deposit as proof of its intent. HPL was, on the other hand, not similarly requested to affirm its commitment. In the proceedings before the Horizon Board (see [46] and [48] below), Henry Lim testified that he contacted Keith Yeo a few more times up till 16 January 2007, but received no response from Keith Yeo or any other person on behalf of Vineyard.

28 On 6 January 2007, a crucial SC meeting (“the 6 January 2007 SC meeting”) took place. The original SC discussed the issue of whether it should raise the sale price for the Property and reviewed HPL’s offer as well as other potential offers. We now set out the minutes of the 6 January 2007 SC meeting as recorded by a solicitor of the original SC in full:¹⁸

¹⁸ Appellant’s Core Bundle vol 2 in CA119/2008 at p CB-60.

1. SALE PRICE/RESERVE PRICE

On the question of whether the SC should raise the sale price, D&N advised that the SC has the duty to get the best price, taking all facts into consideration.

In doing so, the decision must be supported by logic and proper advice from the property experts, if the SC does not have the expertise.

SC members have to exercise due care skill and honesty in arriving at its decision.

D&N further advised that where the reserve price has been met, (i) it would be more difficult for the subsidiary proprietors to challenge the sale unless it is clear from the circumstances that the SC could have gotten a better price but did not do so, and (ii) whether the circumstances are such that the SC could have obtained a better price is a matter for the SC to decide.

2. HPL'S POTENTIAL OFFER

Alvin updated the SC that on 23.12.06, he met Ong Beng Seng, who told him that HPL cannot go in alone because project would cost almost S\$1 billion.

Terms subsequently discussed between the parties were as follows:-

- (a) Right of first refusal for 21 calendar days.
- (b) SC can talk to other parties but cannot sign contract with such other parties unless HPL decides not to proceed (ie after 21 days).
- (c) If after 21 calendar days, HPL does not decide to proceed, \$0.5m to be forfeited.
- (d) [Purchase price] still \$500m – Alvin confirmed no room to negotiate.

HPL wants letter from SC setting out the main terms before they will make offer.

3. REVIEW OF OTHER POTENTIAL OFFERS

(a) HK buyer through Morgan Stanley – Morgan Stanley wants commission from deal, but does not want buyer to be informed. SC decided against pursuing this potential offer at this stage as:

- (1) it appears messy;

- (2) not likely to get confirmation by Monday;
- (3) sale price also at \$500m only.
- (b) Henry updated the SC on the following:-
 - (1) DTZ's clients – will try to get above \$500m. But no indication of offer price and no suggestion that an offer will ever be made. On top of the aforesaid, they want cap on [differential premium].
 - (2) Mrs Phang's contacts – indication of price from \$490m to \$500m, but no offer despite Henry chasing on several occasions.
 - (3) KL party – a small time lawyer acting for a HK developer (whom none of the people at the table have heard of), indicating that they may be willing to pay \$510m gross, but nothing has happened to date.
 - (4) CBRE – developer needs time. No indication of who they are, how much time they need and no indication of what price might be.

4. In view of the fact that HPL seems most earnest and that there are no firm offers nor indication of timing as to when any firm offer (if at all) can be expected from the others, the SC decided that it should go with HPL (except Bharat, who abstained).

SC decided that [First Tree] (instead of the SC) will give letter to HPL on Tuesday morning, if no other bids materialise.

5. ACTION ITEMS

- (a) Notwithstanding that the SC has chosen to go with HPL on Tuesday, Henry is nonetheless to follow up on all potential offers to see if there can be anything better by Monday evening.
- (b) D&N to draft letter for [First Tree] to send out on Tuesday morning, if there are no other offers by Monday evening.

29 The brevity of the minutes is striking, given that the meeting itself took an hour and a half, and that several other important issues were apparently extensively discussed. It has now emerged that important concerns and reservations voiced by at least one of the original SC members, Bharat Mandloi, have been surprisingly papered over and not minuted. Bharat

Mandloi testified on 2 August 2007 before the Horizon Board about what was discussed at the 6 January 2007 SC meeting. The crux of his evidence (which has largely been corroborated) has given us cause for real concern.

30 It was recorded in the minutes of the 6 January 2007 SC meeting that Bharat Mandloi had abstained from voting on the sale to HPL. In truth, he had left the 6 January 2007 SC meeting before the voting took place.¹⁹ He explained that the circumstances prompting him to abruptly walk out of the meeting were as follows:²⁰

On 4th January, I was told by the chairman of the sales committee that we have an offer and the buyer is backed by a Middle Eastern partner and we should meet on the 4th evening at Drew & Napier [the SC's solicitors] office and the buyer or the developer prefers to discuss all the terms and conditions in person. We met on the 4th. The discussion went on. On the 5th, I sent out an email to all the SC members expressing my concern on two fundamental issues. ...

...

... I basically raised two points. One was that the en bloc premium which we were indicated has disappeared almost, if not fully. And the second obviously was the point that the whole purpose of en bloc when it is given as a concept to people is that when you sell the property en bloc, you get enough money to buy an equal in replacement; at the same time you have a surplus cash gain.

...

I abstained [from voting at the 6 January 2007 SC meeting] because after all the discussion went around on should we proceed with HPL discussion at this price or not. I was of the strong opinion that we should not primarily because if the premium is gone, the mandate which has been given to us to sell at this price is kind of morally nullified because we are not getting the premium ...

¹⁹ Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 18.

²⁰ Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at pp 14–16.

31 The most troubling aspect of his testimony is as follows:²¹

A ... [T]he chairman of the SC proposed that “Look, we have had enough discussion, we do not have any other solution” and at that point also, of course, there was an option available to go back to the CSPs [consenting subsidiary proprietors] because one of the points was that HPL had asked for 30 days which they brought down to 21 days for getting the approval. If the buyer could ask for 21 or 30 days of timeframe to get their management approval or internal approval while we could not go to the CSPs and call them on a week’s notice or 10 days’ notice and seek ratification of the mandate especially when---

Chairman [of the Horizon Board]: Did you ask this question?

A *I think this was discussed all along and everybody in the room was clear that if we go back to the CSPs, we are not going to get the mandate. In fact, I still remember somebody said if we go back to CSPs, this en bloc process is as good as dead.*

[emphasis added]

32 He added on cross-examination:²²

A No. I think that was not at one time, a couple of times it was discussed and it was 100 per cent clear to everybody that if you ever go back to CSP, to take a fresh mandate as on that date.

Chairman: No. When you say “clear to everybody”, it was actually orally said.

A It was discussed. Yes, yes, yes, Yes, sir.

Chairman: Okay. It is not---

A Because that option was ruled out, that is where I think--- –

Chairman: No, no. We just want to know whether it was your perception or whether it was actually---

²¹ Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at pp 16–17.

²² Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 20.

A No, it was clearly discussed and in my opinion everybody had the same conclusion.

33 Subsequently, Bharat Mandloi reaffirmed his evidence.²³

Q Now, you said that everyone in the sales committee were of the view that if they went back to the subsidiary proprietors for approval of this sale at 500 million, none of them would approve it, correct?

A They would not get the mandate.

34 Wee Hian Siew, in his testimony, initially limply asserted that he could not recollect what Bharat Mandloi had asserted at the meeting but, when pressed, reluctantly conceded that he did not dispute Bharat Mandloi's evidence.²⁴

Q. ... And [Bharat] suggested to the committee that the committee should go back to the owners to get a fresh mandate from the owners.

A. Possible, yes.

Q. *Right. And Arjun and other people, in response to him, said that if the committee is to go back to the owners, you will not get 80 per cent majority anymore. [emphasis added]*

A. 80 per cent majority.

Q. You will not get a mandate in that sense.

A. Sure.

Q. That is what the response to Mr Bharat was.

A. Yes.

Q. That is the case?

A. I -- okay, I am quite sure this can happen. This can be said, yes.

Q. You are quite sure that this can be said?

²³ Merrill Legal Solutions Transcript of STB hearing on 2 August 2007 at p 25.

²⁴ Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at pp 106-07.

A. Yes.

Q. So you do not dispute in that sense what Bharat is saying?

A. Right.

Subsequently Wee Hian Siew reverted to his stance that he could not recall what Bharat Mandloi had said at the 6 January 2007 SC meeting, but acknowledged that he therefore was in no position to challenge Bharat Mandloi's testimony that he had raised the issue of the eroded premium and the option of going back to the consenting subsidiary proprietors (see [30]–[33] above).²⁵

35 Henry Lim also agreed during cross-examination that the option of going back to the consenting subsidiary proprietors had been raised at the 6 January 2007 SC meeting. He testified:²⁶

Q. ... You are now saying that you had raised with Drew & Napier the option of going back to the CSPs for a fresh mandate. Is that what you are saying?

A. No, it is not a fresh mandate. We are saying that --

Q. Or to ask for their views?

A. Yes. To go back to the CSPs.

Q. So you raised this issue with Drew & Napier?

A. I cannot remember who but I know it has been raised, you know.

Q. Raised with whom? With the lawyers or amongst yourselves?

A. *Raised with the lawyers because on the 6th of January, the lawyers are present.*

Q. *And we do not see this question being addressed in the minutes, anywhere in the discussion in the minutes. Right?*

²⁵ Merrill Legal Solutions Transcript for STB hearing on 6 November 2007 at p 229.

²⁶ Merrill Legal Solutions Transcript for STB hearing on 9 November 2007 at p 240–245.

- A. *Yes, it was not there.*
- Q. *So the [SC] was concerned as to whether the CSPs would approve of the deal. Is that your testimony? ...*
- A. *Yes.*
- Q. *Concerned enough to raise that issue with the solicitors. Is that your testimony?*
- A. *Yes.*
- Q. *Right. And you were concerned -- the sales committee was concerned because there was a serious doubt in your mind as to whether the CSPs would endorse the deal? Right? What else can the concern be?*
- A. *Yes.*
- Q. *Right. And that concern was because of the erosion of premium. Would you agree?*
- A. *Yes.*
- Q. *And that concern was also because the prognosis for the market was healthy. Would you agree?*
- A. *Yes.*
- ...
- [Counsel]: ...
- And is this not exactly what Mr Mandloi has raised that one should go back to the CSPs for a decision on whether to proceed with the HPL offer?
- A. *Yes.*
- Q. *Thank you. Thank you very much. And was it not the response from Mr Samtani, Mr Reghenzani and Dr Chan that we should not do this because we would not get approval?*
- A. *No, not that I am aware of.*
- Q. *So you went ahead with the deal, right?*
- A. *Yes.*
- Q. *So how did you handle Mr Bharat's point about going back to the CSPs?*
- A. *We raised that point to our lawyer --*

Q. All right.

A. -- concerned.

Q. You see the difficulty with that Mr Er is that then everything gets --

THE CHAIRMAN: No, no, Mr Lim.

Q. I am sorry, Mr Lim. *Is that everything gets clothed by privilege and we can never test that story.* And it becomes a very convenient way to camouflage the truth from your perspective. And I would suggest to you -- in fact I will put to you since evidence is on record that Mr Mandloi's -- well, you have agreed on that, *the response to Mr Mandloi's proposal was that we should not or we would [not] go back to the CSPs because the CSPs will disapprove of the deal.* You can agree or disagree? I will leave it to submissions.

A. *I have no comment.*

Q. *No, I want an answer. Do you agree or disagree?*

[Counsel]: Sir, I am wrapping up, Sir.

THE CHAIRMAN: *Mr Lim, can you answer the question or not? If you cannot then counsel will make a submission on that.*

A. *I cannot answer that.*

THE CHAIRMAN: Okay. You just make a submission on that.

[Counsel]: *Yes, Sir.*

And in fact this was the position taken by Mr Samtani, Mr Reghenzani and Dr Chan who were the people pushing for the deal. Agree or disagree?

A. *I have no comment.*

Q. *No comment. And in fact, one of the three said that if they went back to the CSPs, this deal is as good as dead. Agree or disagree?*

A. *I have no comment.*

[emphasis added]

36 Bharat Mandloi's evidence certainly had the grudging support of both Wee Hian Siew and Henry Lim. Henry Lim's tired refrain of "no comment",

when repeatedly pressed for a direct answer, speaks for itself. We find it puzzling that the Horizon Board chose not to deal with Bharat Mandloi's account of the 6 January 2007 SC meeting in its decision at all, not even to dismiss it as irrelevant. In our view, Bharat Mandloi's account of what transpired ought to be accepted as credible. Furthermore, it is certainly relevant and highly significant for it incontrovertibly shows that, by the time of the 6 January 2007 SC meeting, the original SC was fully apprised of the dramatic changes in the property market. Nevertheless, the original SC brusquely decided against going back to the consenting subsidiary proprietors for reaffirmation of their mandate to sell at \$500m or to ascertain their wishes on how the SC ought to proceed.

The decision of the original SC to sell the Property to HPL

37 As 6 January 2007 was a Saturday, Henry Lim effectively had one working day to follow up with the other potential offers. He was apparently unsuccessful as, on 8 January 2007, First Tree promptly sent a letter to HPL ("the 8 January 2007 letter"), stating:²⁷

Subject to the terms of the contract to be agreed on between the parties, we are instructed by the [SC] for the collective sale of the Property to set out the following main terms:-

1. The purchase price shall be S\$500,000,000/-;
2. Agent's commission (being 0.5% of the purchase price), development charge and differential premium to be borne by you;
3. Option fee at 1% of the purchase price, S\$500,000/- to be forfeited if the Option is not exercised on or before the expiry of 21 days from the date of the Option ("Option exercise period"); and

²⁷ Record of Appeal vol 4E in CA 119/2008, at 2337.

4. During the Option exercise period, the [SC] will not be prohibited from soliciting offers from other interested parties, save that a contract can only be signed with any such interested party if you do not exercise the Option on or before the expiry of the Option exercise period.

If you are prepared to make an offer, kindly let us have your letter of offer and your cheque for 1% of the Purchase price (ie S\$5,000,000/-) in favour of "Drew & Napier LLC", which will be held by Drew & Napier LLC in escrow pending the finalization of the terms of the Option.

38 There can be little doubt that the move towards quickly wrapping up the deal with HPL took place against the background of a pronounced, widely-known and well-publicised price surge in the property market. Kalpana Rashlwala, "Developers revive interest in unsold collective sale sites", *The Business Times* (11 January 2007) ("the 11 January 2007 BT article") reported that a neighbouring condominium, Grangeford Apartments ("Grangeford"), was raising its reserve price by 25% to \$350m. The report stated:²⁸

The *continuing surge* in the high-end residential sector and record prices for prime housing sites are reviving developers' interest in collective sales sites that were not sold last year, players say.

...

A case in point is leasehold Horizon Towers in the Leonie Hill area. Its owners are asking \$500 million, which works out to about \$820 psf per plot ratio including a payment the successful bidder will have to make to the state to upgrade the lease to 99 years.

This looked expensive for a leasehold site when the tender closed in August last year. 'But now it's like just half the unit land price for Parisian,' said a consultant. 'All of a sudden, Horizon Towers doesn't look that expensive for bidders with deep pockets.'

Industry sources say a joint venture, involving a local developer and a fund, recently placed an offer that meets the \$500 million asking price. Lawyers representing Horizon Towers' owners are said to be evaluating the terms and conditions set by the potential buyer and if these can be agreed on, the site is likely to be awarded.

²⁸ Record of Appeal vol 4C at p 1893.

In the meantime, though, other developers may be considering whether it is worth making a fresh offer for the sprawling 204,742 sq ft site, which has a remaining lease of about 71 years.

Apparently, the owners of Grangeford – another 99-year leasehold property in the vicinity – are said to be raising their reserve price about 25 per cent to \$350 million from \$280 million last year. And as a result of this, many more owners are now coming forward to sign the collective sale agreement.

‘It is much more difficult to get the minimum 80 per cent approval level from owners these days, and it may be necessary perhaps to revise upwards the reserve price during the signing process to persuade at least 80 per cent of owners to join in – because of all the positive media coverage on the property market recovery,’ says CB Richard Ellis executive director Jeremy Lake, whose firm is marketing Grangeford. Property consultants told BT it is not just collective sales sites in the Orchard Road area that are seeing a revival in interest.

[emphasis added]

Alvin Er prevaricated as to whether he had drawn this article to the attention of the original SC but nevertheless unequivocally conceded that the original SC was aware of its contents.²⁹ Wee Hian Siew acknowledged having come across the article when he read *The Business Times*.³⁰ Henry Lim claimed that Alvin Er had not forwarded the article, at least, to him.³¹ The momentum of this surge in property prices is also dramatically attested to by a letter dated 2 March 2007 (barely two months later), in which the marketing agent of Grangeford, CB Richard Ellis, informed Grangeford’s subsidiary proprietors that it had decided to raise the reserve price to \$470m (*ie*, by \$120m) in response to an expression of keen interest by HPL to purchase Grangeford.³²

²⁹ Merrill Legal Solutions Transcript of STB hearing on 31 July 2007 at pp 102–104.

³⁰ Merrill Legal Solutions Transcript of STB hearing on 6 November 2007 at pp 84, 201.

³¹ Merrill Legal Solutions Transcript of STB hearing on 9 November 2007 at p 206.

³² See CB Richard Ellis’s letter annexed to the Appellants’ Case in CA 120/2008.

39 As a court of law, we should not, however, rely in this matter on subsequent events to ascertain or divine the knowledge and beliefs of the original SC members at the material period of time in January 2007. It is therefore crucial for us to examine what was known to them and expressed by them on record. We have already concluded above that Bharat Mandloi's evidence (which was not challenged by either Wee Hian Siew or Henry Lim) showed that the original SC was aware of the surge in prices in the property market at the latest by the time of the 6 January 2007 SC meeting (see [36] above). It is also highly pertinent that soon after the 6 January 2007 SC meeting, Tan Kah Gee e-mailed Arjun Samtani and the other SC members on 12 January 2007, stating:³³

Hi Arjun

Hope you're having a good time in London.

I suppose you're aware that we have neither received HPL's firm bid (which they promised to deliver 3 days ago Tuesday) nor any bid from any other developers (*although more developers have expressed interest*), to date.

As per our Saturday meeting, it is clear that there's a division in opinion among the SC members. I for one feel that the terms from HPL is not attractive (I was subsequently told that there were 3 cases in the market that developers ended up not exercising their options, so there's a real risk, and the option money forfeited were 1% each, not 0.1%). I also feel that we should fetch more than \$500MM given the current market condition, although that has not yet been supported by another firm bid from another developer. I had voted with the SC on Saturday to maintain unanimity and due to the strong advice put forward by David Ang [the solicitor from D&N], despite my discomfort.

If we're still going ahead to give the option to HPL (upon them reverting to us), I strongly suggest that we do the following *for the protection of the SC*:

³³ Record of Appeal vol 4C in CA 119/2008 at 1755.

- (1) Receive in writing from David, in a letter or in the meeting minute, that he had advised that we accept the HPL bid as it meets our CSA mandate and that we are opened to challenges on our skills, expertise, judgement, vested interest if we hold out for a better bid which does not come. He also advised that we can not be challenged by any party (including non consenting SP) that we have sold it too cheap at \$500MM [because] it meets the reserve price and there's no other bidder (*although I still have a concern as to whether we should handle all expression[s] of interest properly*).
- (2) Receive from [First Tree] that there's no other bid and in their opinion HPL makes the best deal and they recommend that SC accepts it.
- (3) To ask Henry to write (or email) to all parties which he has corresponded with to keep in writing that [none] of them has yet to give us a firm bid.

I think that the above due diligence, *in writing*, is the minimum we have to have before we give any options to HPL.

[emphasis added]

This e-mail is significant for a number of reasons. First, the reference to the division of opinion among the original SC members and Tan Kah Gee's own discomfort with the decision to sell to HPL at the 6 January 2007 SC meeting is further evidence that the original SC was apprised of the upswing in the property market at the latest by 6 January 2007. Secondly, the reference to expressions of interest from more developers suggested that, if the SC had waited a bit longer, it might have been able to obtain a better price (see also [179] below). Thirdly, why was Tan Kah Gee voicing concerns as to "whether we *should* handle all expression[s] of interest *properly*" [emphasis added]? A reasonable inference from this is that he did not believe that the original SC had, despite the "unanimity" of the decision taken earlier on 6 January 2007, acted "*properly*" as he was of the view that the Property "*should fetch more than \$500MM given the current market condition*" [emphasis added]. Fourthly, it seems that, as far as Tan Kah Gee was concerned, he voted in

favour of the sale to maintain “unanimity” and because of the “strong advice” received from the SC’s solicitors. It is not clear if the “division in opinion” he referred to is confined to Bharat Mandloi’s objection to the sale to HPL (see [30]–[33] above) as no individuals are identified. Regrettably, the minutes of the 6 January 2007 SC meeting are bereft of details. We have not seen any response to this e-mail but there is on record an e-mail from Arjun Samtani to Alvin Er sent soon after, on 13 January 2007, asking him to *carefully maintain records* (see [41] and [43] below).

40 It bears emphasis that there was no concluded deal with HPL at this point of time when the original SC, or at least the active members of the SC, were fully aware of a fast rising property market. HPL’s response to the 8 January 2007 letter from First Tree only came on 15 January 2007 (“the 15 January 2007 offer”), in the form of an offer by a member of the HPL group (Alkaff Mansion Pte Ltd) to purchase the Property at \$500m, the minimum reserve price that had been set some eight months ago at the 23 April 2006 EGM.

41 On 16 January 2007, First Tree sent a letter to the original SC, stating that as at 5.30pm on that day, “there are no other offers and no firm indication of any other offer in the near future except from Alkaff Mansion Pte Ltd”, and recommending that the SC accept the 15 January 2007 offer.³⁴ This the SC did on 16 January 2007 itself. It is also worth noting that, apart from the 4 January 2007 meeting between HPL and some of the original SC members (see [26] above), the original SC members apparently left it entirely up to Alvin Er to deal directly with the representatives from HPL and with Arjun Samtani. We should also point out that the SC members must have been aware that First

³⁴ Appellants’ Core Bundle vol 2 in CA 119/2008, at CB-75.

Tree's mandate was due to end on 20 January 2007. If no sale was concluded by then, no commission would be due to it. The mandate was eventually extended on 20 January 2007 until 28 February 2007 for the purpose of seeing through the HPL sale. We shall revisit this point again later, at [192] below.

42 Subsequently, on 22 January 2007, the original SC issued an option to purchase to HPPL, exercisable by 4.00pm on 12 February 2007. HPPL exercised the option to purchase on 11 February 2007, thus converting the option to purchase into a sale and purchase agreement between HPPL and the subsidiary proprietors of the Property ("the S&P"). By cl 4 of the option to purchase, the sale of the Property was made conditional upon an order of the STB for the collective sale of the Property (under s 84A of the LTSA) in accordance with the provisions of the S&P.

43 It should be noted that, before HPPL exercised the option to purchase on 11 February 2007, Henry Lim sent an e-mail dated 2 February 2007 to the original SC members and Alvin Er, entitled "Developers/contacts in touch with me on Horizon Towers".³⁵ The list contained some 26 names (including HPL) but not Vineyard, Shan & Su or Keith Yeo (see [39] above).

44 It is also noteworthy that the original SC did not seek an independent valuation of the property prior to the sale even though it was expressly authorised by the CSA to do so (see cl 6.2(a) of the CSA, at [17] above). It is pertinent that the solicitors had advised the SC during the 6 January 2007 meeting that the "*decision [to sell] must be supported by logic and proper advice from the property experts if the SC does not have the expertise*" [emphasis added] (see [28] above). This caution was apparently forgotten by

³⁵ Appellants' Core Bundle vol 2 in CA 119/2008, at CB-80.

all concerned. Indeed, it was only much later that the original SC obtained a valuation dated 16 March 2007 from Chesterton International Property Consultants Ltd which purported to value the Property (as at 16 March 2007) at \$485m. Subsequently, a valuation report dated 7 May 2007 was obtained from Jones Lang LaSalle, which valued the Property (as at 22 January 2007) at \$496m. Finally, a third valuation report dated 1 November 2007 from CB Richard Ellis purported to value the Property at \$485.5m (as at 22 January 2007) and \$492.6m (as at 12 February 2007). For the sake of completeness, we should mention that the appellants had also obtained valuation reports for the Property: a report dated 18 July 2007 from SC Lim Pte Ltd which valued the Property (as at 22 January 2007) at \$582m (relying on comparable sales) and \$613m (considering a rising market); a report dated 18 July 2007 from HBA Group Property Consultants Pte Ltd which valued the Property (as at 22 January 2007) at \$650m; and a report dated 20 July 2007 from Steven Loh Consulting Pte Ltd which valued the Property (as at 22 January 2007) at \$645m. It can be readily seen that the parties appear to have had little difficulty in locating “independent” valuers, after the sale had taken place, to support their irreconcilable stances on the appropriateness of the sale price. We need say no more.

45 On 25 March 2007, an EGM (“the 25 March 2007 EGM”) was held to consider the collective sale of the Property under the CSA, the option to purchase and the S&P. At this EGM, several subsidiary proprietors who had signed the CSA voiced their deep unhappiness about the sale to HPPL at the reserve price of \$500m. In particular, vociferous complaints were made and vigorous objections raised about the lack of communication and updates from the original SC on the progress of the sale process ever since the 23 October 2006 notification (see [23] above), the absence of a proper valuation report

prior to the sale and the failure to seek a fresh mandate given that the property market had risen sharply and that the earlier anticipated premium had all but evaporated.

The application to the Horizon Board

46 On 20 April 2007, the three authorised SC members (Arjun Samtani, Wee Hian Siew and Chan Siew Chee) filed an application to the Horizon Board for the collective sale of the Property. The application to the Horizon Board was dismissed on 3 August 2007 (“the Horizon Board’s 3 August 2007 decision”) on the technical ground that it did not contain documents required under a Schedule to the LTSA. On 11 August 2007, the S&P expired without any extension being granted by the consenting subsidiary proprietors. It appears, at this stage, given the changes in market conditions, many of the consenting subsidiary proprietors were not at all keen in proceeding with the sale. HPPL, on the other hand, insisted that they exercise their best endeavours to complete the sale.

47 By the first week of September 2007, the composition of the original SC had been entirely transformed with the resignation of all its members (see [13] above) between 27 June 2007 and 7 September 2007. On 23 August 2007, HPPL commenced legal proceedings by way of Originating Summons No 1238 of 2007 against the then members of the SC in their own capacity as well as on behalf of and as representing all the other consenting subsidiary proprietors, as well as the original SC members. It sought a declaration that these defendants were in breach of the option to purchase, *inter alia*, by failing to do everything in their power to obtain a collective sale order from the STB. HPPL sought an order that the defendants do everything in their power to obtain that order and, further or alternatively, for substantial damages for

breach of contract. (That action is still pending.) In response to this unexpected development, subsequently, three consenting subsidiary proprietors filed an appeal to the High Court by way of Originating Summons No 1269 of 2007 against the Horizon Board's 3 August 2007 decision not to order the collective sale. At an EGM on 20 September 2007, a wholly new SC was appointed and the S&P was extended for the purpose of obtaining a collective sale order. The new SC revealed that it agreed to this extension out of "goodwill", in the hope that HPPL would reciprocate by dropping Originating Summons No 1238 of 2007 so long as the new SC acted in good faith to try and obtain a collective sale order.³⁶ HPPL, however, was not agreeable to this but instead requested the Registry to adjourn those proceedings *sine die* to await the outcome of the present appeal.

48 On 11 October 2007, after hearing the appeal in Originating Summons No 1269 of 2007, the High Court set aside the Horizon Board's 3 August 2007 decision and remitted the matter to the Horizon Board. The second tranche of hearings before the Horizon Board commenced on 16 October 2007.

The parties' submissions

49 Essentially, the application for collective sale was challenged by objecting subsidiary proprietors on the basis that the transaction was not in good faith after taking into account the sale price (s 84A(9)(a)(i)(A) of the LTSA). Counsel for a number of the objectors submitted that the original SC, when exercising the power under the CSA of selling all the units in the Property, was acting as agent for all the subsidiary proprietors and that it was in the position of a mortgagee exercising its power of sale. One of the

³⁶ See the 18 October 2007 letter from Lim Seng Hoo, chairman of the new SC, to HPPL, annexed to the Appellants' Case in CA 120/2008.

objectors said that, unlike a mortgagee, the original SC had no interest in the other subsidiary proprietors' property and, thus, he would place the duty of the SC as higher than that of a mortgagee.

50 The objectors criticised the original SC's handling of the offer from Vineyard (see [25] and [27] above). They argued that the original SC had acted with undue haste in selling the Property to HPPL in the circumstances that it did.

51 It was also submitted that the ownership of additional units by two original SC members (see [10] above) placed them in a position of conflict. A third person who bought an additional unit during the collective sale process was William Kwok. He was not a member of the original SC and only became an SC member on 25 February 2007. It was alleged that the conflicting personal interests of these three SC members had brought about the hurried sale of the Property.

52 The objectors also tendered expert valuation reports to show that the Property had been sold at too low a price (see [44] above).

53 The other objections (*viz*, on constitutional and jurisdictional points, ss 84A(1) and 84A(3) of the LTSA, as well as bad faith after taking into account the method of distribution of the sale proceeds) are not relevant for the purposes of the present appeals.

54 The objectors applied on 25 October 2007 for Arjun Samtani to be subpoenaed as a witness of fact. As we have mentioned earlier (at [8]), the Horizon Board did not accede to this request.

55 The applicants for collective sale essentially submitted that the original SC had acted in good faith in accepting HPL's offer, given the history of the unsuccessful marketing of the Property up until December 2006. They said that the original SC had relied on its solicitors' advice in deciding not to pursue the Vineyard offer and to sell the Property to HPL instead. However, the applicants insisted that the details of the original SC's solicitors' advice should not be disclosed as they were protected by legal privilege. It was also argued that Henry Lim had asked Vineyard through Keith Yeo for further information and to give a deposit of \$50m if it was serious about purchasing the Property. Since this was not forthcoming, the original SC decided to give HPPL the option to purchase instead.

The Horizon Board's decision

56 As mentioned (at [6] above), the Horizon Board's order directing the collective sale of the Property was granted on 7 December 2007. We have already pointed out that the Horizon Board rejected the objectors' application to subpoena Arjun Samtani on the technical basis that they had failed to provide sufficient particulars of the proposed testimony that the applicants for the collective sale were entitled to (see [8] above). Having regard to our views on the duties and functions of an STB (see [170]–[175] below), we pause to observe at this juncture that it is regrettable that the Horizon Board took an overly legalistic approach to the issue of subpoenaing Arjun Samtani to testify. An STB is not a court of law. Its key duty is to ensure that there is good faith in a given collective sale. Its findings of fact are critical. Yet, by refusing to subpoena Arjun Samtani, the Horizon Board effectively deprived itself of key information, for example, pertaining to Arjun Samtani's involvement in the preliminary steps prior to the commencement of the collective sale, his reasons for the purchase of the additional unit at a significant point immediately

preceding the sale process and, vitally, his precise role as well as influence on the other SC members in the sale decision. Instead, as an unhappy compromise, the Horizon Board irresolutely indicated that the objectors could file another application with the necessary details. No such application was eventually filed given the constraints of time.

57 In the HB decision ([6] *supra*), the Horizon Board classified the issues which it had to address under five headings as follows (at [7] of the HB decision):

1. Constitutional Point;
2. Jurisdictional Point;
3. Section 84A(1) Point: which would generally include your 80% requirement and the content of the S&P;
4. Section 84A(3) Point: which is basically concerning matters that are not in compliance with the Schedule [to the LTSA] ...;
5. Section 84A(9) [Point] which basically involved the transaction not [being] in good faith:
 - (a) Sale Price
 - (b) Method of distribution
 - (c) The relationship between the Purchaser and the Vendor

Of these issues, only the last issue (the s 84A(9) point) is relevant for the purpose of the present appeals.

58 On the last issue, the Horizon Board began by stating that, while it was possible that the original SC was an agent owing certain fiduciary duties to the rest of the consenting subsidiary proprietors, the Horizon Board was concerned only with the issue of good faith *vis-à-vis* the sale transaction and any breach of fiduciary duties had to be assessed in the light of this

requirement (see the HB decision at [54]). The Horizon Board did not even begin to address the issue of whether the original SC owed fiduciary duties to the objecting subsidiary owners.

59 The Horizon Board noted the comparison of an SC's duties to those of a mortgagee exercising its power of sale, *viz*, to act in good faith and to take reasonable steps to obtain the best price available at the time of the sale (or, *per* Salmon LJ in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 ("*Cuckmere*") at 966, "the true market value"). However, it rejected this comparison, stating that "there is no express statutory duty on the SC other than this: they need only ensure that the sale transaction is in good faith", since the SC members' "interest as owners would mean that they would be inclined to try to obtain the best price available" (at [58] of the HB decision). The logic of this reasoning of the Horizon Board is debatable. To "incline to try" is not the same as actually trying. In fact, as will be seen later (at [188] below), the evidence shows that far from trying to obtain the best price, certain members of the original SC were not even inclined to try. Furthermore, it should be emphasised that, since s 84A(9)(a)(i)(A) requires the STB to take into account the sale price for the lots and the common property in the development as a factor in determining good faith, it is difficult to understand why a duty to obtain the best price is not part of the duties of an SC.

60 The Horizon Board viewed "good faith" as involving "notions of honesty, fairness and absence of unconscionable and perhaps even reckless behaviour" (at [60] of the HB decision). The Horizon Board then considered two areas in determining whether the transaction was in good faith – *first, the*

steps taken in relation to the sale; and second, the comparison between the sale price and the true value of the property (at [61] of the HB decision).

61 In relation to the first area, the Horizon Board noted that Vineyard had not responded to Henry Lim's request, through Keith Yeo, for further information and the deposit of \$50m (see [27] above) as proof of Vineyard's seriousness about purchasing the Property (see the HB decision at [64]). Furthermore, the original SC had taken the advice of its solicitors as to the appropriateness of accepting HPL's offer to pay \$500m for the Property. Thus, the Horizon Board concluded (at [65] of the HB decision):

While [the SC's] attitude towards Vineyard's interest at \$510 million might be said to be robust and cavalier, in the circumstances, the Board is of the view that it was a judgment call of the SC and not a decision made 'not in good faith'.

62 The Horizon Board added that, at the time of HPL's offer in early January 2007, the sale price of \$500m was a *fair price*. The property market was then relatively less bullish than it became later. By selling at \$500m, the original SC had fulfilled its mandate to sell at a price not below the reserve price (see cl 5 of the CSA, at [14] above and the HB decision at [68]).

63 The Horizon Board was aware that altogether three members of the SC had at different times purchased units in the Property after the collective sale process had commenced (see [10] and [51] above). However, it was of the view that *no conflict of interest had been proved*, relying once again on the reasoning that, as owners of units in the Property, the original SC members would be interested in getting the best price available. The Horizon Board said (at [73] of the HB decision):

The Board does not accept that the respondents have proved that the three SC members who had purchased more units when they did

were *ipso facto* in a conflict position. When they bought the extra units, they may well have been motivated by the prospect of a collective sale yielding good profits, a money-making venture. They may have used 'insider' knowledge and took a risk in purchasing the extra units at that time. This motive would lead them to seek the best price that could be had at that time rather than accepting a price that was not reflective of the true market value. But this in itself does not mean that they were in a position of conflict with the other CSPs. Whether they were living in the units, and they were indeed living in their original units, or renting them out they were owners who had agreed to sell in a collective sale and would be interested in getting the best price available. *The conflict if any has to be proved and the Board is of the view that the respondents so alleging have not done this.* [emphasis added]

64 Finally, given the history of attempts to advertise and promote the sale, the Horizon Board found that the sale to HPPL was not hurried (see the HB decision at [69] and [74]).

65 In respect of the second area of inquiry (*viz*, the comparison between the sale price and the true value of the Property), the Horizon Board considered the expert valuation reports tendered by the objectors to the collective sale, which gave market values of the Property as at 22 January 2007 which were higher than \$500m (see [44] above). The Horizon Board rejected these valuation reports on the basis that they referred to sale transactions after 22 January 2007 in establishing the open market value of the Property as at 22 January 2007, and that they did not give due consideration to the exceptionally large land area of the Property that had made the Property out of the reach of most developers in Singapore in January 2007 (see the HB decision at [81]–[101]).

66 The Horizon Board pointed out that the fact that there were no offers for the Property despite the efforts to market it showed that, up till November 2006, the reserve price was above the market value of the Property (see the

HB decision at [102]). Although it accepted that the market had begun to move when interest was shown at the price of \$500m, it found that the sale price to HPPL was “not too low” in the light of the likely price range of the Property in December 2006 as indicated by the only other expression of interest of \$510m from Vineyard (at [103] of the HB decision).

67 The Horizon Board also considered the question of whether the transaction was not in good faith having regard to the adopted method of distribution of the sale proceeds which was to divide 50% of the sale proceeds based on the strata area of the respective units and the other 50% in proportion to their respective share value (see s 84A(9)(a)(i)(B) of the LTSA which requires an STB to take into account the method of distributing the proceeds of sale). It noted that this method of distribution was an acceptable compromise which helped to even out the difference in strata areas and share values where there were big discrepancies in both among the various units. Therefore, it found that the transaction was in good faith in so far as the method of distribution of the sale proceeds was concerned (see the HB decision at [110]–[112]). This point is no longer relevant.

68 Finally, the Horizon Board considered whether the transaction was not in good faith having regard to the relationship between the purchaser and any subsidiary proprietor (see s 84A(9)(a)(i)(C) of the LTSA). This issue is irrelevant for the purpose of the present appeals.

The appeal to the High Court

69 Several of the objecting subsidiary proprietors filed appeals to the High Court against the Horizon Board’s decision. There were three appeals, by way

of Originating Summonses Nos 5, 10 and 11 of 2008 (respectively “OS 5/2008”, “OS 10/2008” and “OS 11/2008”).

The appellants’ submissions

70 In OS 10/2008 Mr KS Rajah SC, on behalf of the objectors, made submissions pertaining to constitutional and jurisdictional issues which are no longer live in the present appeals. Accordingly, we shall not consider them. The main issue in the High Court which concerns us today is that of good faith in relation to the transaction. Mr Harry Elias SC (“Mr Elias”), counsel for the same objectors, submitted that the sale of the Property to HPPL was not in good faith, firstly because the SC had deliberately concealed from the consenting subsidiary proprietors the higher offer of \$510m from Vineyard, and secondly in the light of the method of distribution of the sale proceeds. Mr Rudy Darmawan, a minority owner who acted in person in OS 11/2008 and is one of the appellants in the present appeals (“Mr Darmawan”), submitted that First Tree had acted in conflict of interest. According to him, First Tree was not motivated to find the highest bidder or follow up on the offer from Vineyard because its preoccupation was with fixing its own commission (which was to be paid by the purchaser) rather than securing the highest bid for the Property. Miss Jasmine Tan (another minority owner who acted in person in OS 11/2008) made similar submissions to Mr Darmawan’s on First Tree’s conflict of interest. She also argued that the Horizon Board had erred in treating the SC’s solicitors’ legal advice as privileged and that it had attempted to avoid the airing and inclusion of relevant facts through a technicality in refusing to subpoena Arjun Samtani (see [8] and [56] above).

The Judge's decision

71 On Mr Elias's first submission, the Judge was of the view that the appellants had not discharged the burden of proving bad faith. He pointed out that the Horizon Board had made a finding of fact that the original SC had acted on its own initiative in deciding to pursue HPL's proposal after receiving and relying on legal advice. He also pointed out that the appellants' case in respect of the Vineyard offer was essentially concerned with the question of whether the purchase price was fair, upon which the Horizon Board had also made a finding of fact. The Judge concluded that the High Court would not interfere with these findings on questions of fact on which there was no right of appeal under the Building Maintenance and Strata Management Act 2004 (Act 47 of 2004) ("BMSMA") (see the Judgment ([6] *supra*) at [14]).

72 On the method of distribution of the sale proceeds, the Judge stated that it could not be said that there was a lack of good faith in the selection of the method of distribution or that the method was wrong just because it was the only method considered or the method resulted in some subsidiary proprietors getting more sale proceeds than others. He emphasised that, even if the Horizon Board was wrong in concluding that the chosen method was appropriate, that was an error of fact and not an error of law that could be taken on appeal (see the Judgment at [15]).

73 Significantly, the Judge was of the view that the legitimate scope of an STB's inquiry into whether a transaction was in good faith, after taking into account the sale price under s 84A(9)(a)(i)(A) of the LTSA (see [3] above), was a narrow one. He stated (at [16] of the Judgment):

It was the [Horizon Board's] duty to focus its attention on the question whether the purchase price was fair, and it was for the