

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2009] SGCA 14

SUMMARY OF CASE

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

And

- (1) **MAMATA KAPILDEV DAVE**
(NRIC No S6970609F)
- (2) **NAZEEM JUMABHOY**
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- (4) **THEN KHEK KOON**
(NRIC NO S0091782F)
- (5) **JASMINE TAN KIM LIAN**
(NRIC NO S7410528I)
- (6) **KUAH KIM CHOO**
(NRIC NO S0005726F)

... Plaintiffs

And

- (1) **MAMATA KAPILDEV**
DAVE
(NRIC No S6970609F)
- (2) **NAZEEM JUMABHOY**
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... Defendants

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PTE LTD
(RC No 200701117D)**

... Intervener

Ng Eng Ghee and others
v
Mamata Kapildev Dave and others

[2009] SGCA 14

Court of Appeal — Civil Appeal Nos 119 and 120 of 2008
Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA
3 February 2009; 2 April 2009

Facts

The collective sale of Horizon Towers (“the Property”) was first mooted in October 2005. The chairman of the management council at the time, Arjun Samtani, and one Tan Kah Gee purchased, with the assistance of substantial financing, additional units in the Property just prior to the two men’s appointment to the sale committee (“the original SC”) at an extraordinary general meeting that launched the formal collective sale process (“the 23 April 2006 EGM”). Arjun Samtani was appointed chairman of the original SC and Tan Kah Gee, a member. At Arjun Samtani’s request, a housing agent (“First Tree”) gave a sales presentation at the 23 April 2006 EGM, proposing a reserve price of \$500m for the Property which it informed the subsidiary proprietors would result in a premium of about 80% for each unit. The next day, Arjun Samtani sought the endorsement of other original SC members of the appointment of First Tree as the original SC’s marketing agent. First Tree was formally appointed as marketing agent on 26 April 2006. Under the terms of the letter of appointment, its marketing fee, of up to one per cent of the sale price, was to be paid solely by the eventual purchaser. This agency arrangement was to end on 20 January 2007.

The Property was marketed unsuccessfully from May 2006 to December 2006. On 3 January 2007, however, one of the original SC members received a letter of offer to purchase the Property for \$510m (“the Vineyard offer”). On 4 January 2007, Hotel Properties Ltd (“HPL”) verbally indicated that it was willing to purchase the Property for \$500m.

At an SC meeting on 6 January 2007, the original SC decided to sell the Property to HPL despite the suggestion from Bharat Mandloi, an original SC member, that the SC seek the consenting subsidiary proprietors’ approval because property prices had suddenly risen dramatically, leading to a

substantial erosion of the premium promised at the 23 April 2006 EGM when the reserve price was set. According to Bharat Mandloi, it was clear to the SC that if it went back to the subsidiary proprietors, it was not going to get the mandate to sell. This aspect of his testimony was not contradicted. Rejecting his suggestion, the original SC invited HPL to make an offer. The Vineyard offer was not seriously pursued. A letter was sent to HPL inviting it to make an offer to purchase the Property at the reserve price. On 15 January 2007, a member of the HPL group made a formal offer to purchase the Property at the reserve price. This offer was accepted by the original SC by issuing an option to purchase on 22 January 2007 to a subsidiary of HPL ("HPPL"). At that time, the SC must have been aware that a neighbouring property had just increased by 25% the reserve price for its collective sale. No disclosure of Arjun Samtani's and Tan Kah Gee's purchase of additional units was made by them prior to the decision to sell to HPL, nor was any independent valuation of the Property obtained.

An application for the collective sale of the Property to the Horizon Board was duly made by the original SC on behalf of the consenting subsidiary proprietors, the respondents in this appeal. In the course of the Horizon Board's proceedings, the appellants (the objecting subsidiary proprietors) applied to subpoena Arjun Samtani as a witness of fact and for the original SC's solicitors' legal advice to be disclosed. They maintained that Arjun Samtani and Tan Kah Gee were in a position of conflict; that the sale was at an undervalue; and that there was an absence of good faith on the part of the original SC. The Horizon Board rejected the application to subpoena Arjun Samtani on the basis that the appellants had failed to provide sufficient particulars of his proposed testimony. It also determined that the original SC's solicitors' legal advice need not be disclosed as it was privileged. The Horizon Board held that the sale to HPPL was made in good faith for the purposes of s 84A(9)(a)(i) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA"), taking into account the history of earlier unsuccessful attempts to sell the Property; that the appellants had not established a conflict of interest arising from the original SC members' purchase of additional units; and that the Property had been sold at a "fair" price. An order for the collective sale of the Property was made.

On appeal to the High Court, the judge held, *inter alia*, that the issue of whether the sale price was "fair" was a finding of fact by the Horizon Board on which there could be no appeal under s 98(1) of the Building Maintenance and Strata Management Act 2004 (Act 47 of 2004) ("BMSMA"). Although the judge acknowledged that there might have been "intrigue" in the course of the collective sale, he did not think that the Horizon Board was the appropriate

forum for considering the conduct of the original SC. The appellants filed the present appeals against the judge's decision.

Held, allowing the appeals:

(1) *Ex facie* errors of law entitled a party to an appeal under s 98(1) of the BMSMA. It was not necessary to rely on the test in *Edwards v Bairstow* [1956] AC 14 (*viz*, whether the determination under appeal was one that no person acting judicially and properly instructed as to the relevant law would have come to) to determine whether the present appeals were on points of law: at [101] and [102].

(2) An SC was the agent of all the subsidiary proprietors in relation to the collective sale of their strata units as a result of which a fiduciary relationship arose between the SC and the subsidiary proprietors. Since, under the statutory collective sale scheme, an SC had the power to sell the units of objecting subsidiary proprietors against their wishes, the need for the imposition of high standards of conduct upon an SC, not only in relation to the consenting but to the objecting subsidiary proprietors as well, was even more pressing than in the case of an ordinary common law agency relationship. Given that the SC owed fiduciary duties *qua* agent to the owners of the units in a strata development collectively, the SC had obligations akin to that of a trustee with a power of sale. The SC's duties included: (a) the duty of loyalty or fidelity; (b) the duty of even-handedness; (c) the duty to avoid any conflict of interest; (d) the duty to make full disclosure of relevant information; and (e) the duty to obtain the best price for the properties of the subsidiary proprietors: at [104], [108], [113], [124] and [134].

(3) In considering whether there was "good faith" in the transaction under s 84A(9)(a)(i)(A) of the LTSA, the Horizon Board should not have confined itself to determining whether the sale price was fair or not, but should have considered what was good faith at general law (common law and equity). The word "transaction" in s 84(A)(9)(a)(i) of the LTSA embraced the entire sale process, including the marketing, negotiations and finalisation of sale price (all of which steps ought to be evaluated in the context of the prevailing market conditions), culminating in the eventual sale of the property. The manner in which the final price was arrived at must affect the good faith of the transaction. The duty of good faith required the SC to comply with its duties as fiduciary agent of all the subsidiary proprietors: at [130], [131] and [133].

(4) A Strata Titles Board had to play a proactive inquisitorial role in determining applications for collective sale whenever objections had been filed. It was not confined to the evidence presented to it by the contending parties, but had to seek out the facts whenever there was reason to believe that

the SC had not disclosed everything about the transaction to the Board: at [173].

(5) In refusing to subpoena Arjun Samtani to testify and in allowing the original SC to assert legal privilege in respect of the advice given by its solicitors, the Horizon Board had erred in law. It had misconceived its statutory role and functions in failing to appreciate that its role was to ensure that all relevant evidence was placed before it, and had also applied the wrong legal test in assessing the relevance and admissibility of evidence: at [197], [199] and [210].

(6) In determining that the objecting subsidiary proprietors had not established that there was an actual conflict of interest arising from the purchase of additional units by the original SC members, and by implying that the failure of these members to disclose their additional purchases before or after their appointment to the original SC was not significant, the Horizon Board had applied the wrong legal test for conflict of interest. The correct question to ask was whether there was a *possible* conflict of interest. Furthermore, the Horizon Board had wrongly placed the burden of proof on the objectors: at [197], [200] and [210].

(7) In determining that the sale price of the Property was fair, the Horizon Board had applied the wrong legal test; the test of good faith was not whether the price was fair, but whether it was the best price reasonably obtainable in the prevailing circumstances: at [197], [201] and [210].

(8) In its ruling that the requirement of “good faith” in s 84A(9)(a)(i) of the LTSA meant “honesty, fairness and absence of unconscionable and perhaps even reckless behaviour”, the Horizon Board had erred in law by adopting a narrow interpretation of “good faith”: at [197], [202] and [210].

(9) In concluding that the original SC had acted in good faith in selling the Property to HPL as it had received and relied on legal advice when deciding whether to give the option to purchase to the purchasers, the Horizon Board had again erred. It was not the law that a fiduciary was entitled to rely on legal advice alone to exonerate itself from any breach of duty. While a trustee of a power of sale was entitled to obtain advice from experts on matters that were not within his competence or knowledge, ultimately the trustee had to make his own decision in good faith, responsibly and reasonably: at [197], [203] and [210].

(10) The judge had erred in law in taking a restricted view of the duties of a Strata Titles Board in dealing with applications for approval for collective sales. This led him into error in finding that the Horizon Board’s determination that there was good faith in the transaction was a question of fact: at [208].

(11) The original SC had breached its duties as fiduciary agent for all the subsidiary proprietors by failing to act with due diligence and transparency in the process of appointing a property agent; failing to proactively follow up on the Vineyard offer and other expressions of interest; failing to improve the chances of obtaining a better price for the Property by leveraging on the Vineyard offer in negotiations with HPL; failing to obtain advice from an independent property expert prior to the sale and disregarding First Tree's obviously conflicting motivation in pushing for the sale; acting with undue haste in finalising the sale to HPL when there was no legal or moral obligation to do so; deciding to sell the Property to HPL when there were undisclosed potential conflicts of interest on the part of two key SC members; and failing to consult (or even to update) the consenting subsidiary proprietors to seek further instructions despite the surge in the property market: at [177]–[195] and [210].

(12) The order of the Horizon Board for the collective sale of the Property was thus set aside: at [212].
